



**Wajir County Government & another v Kenya County Government Workers Union
(Civil Appeal (Application) 291 of 2020) [2022] KECA 653 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 653 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 291 OF 2020
AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA
JULY 8, 2022**

BETWEEN

WAJIR COUNTY GOVERNMENT 1ST APPLICANT

WAJIR COUNTY ASSEMBLY SERVICE BOARD 2ND APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Employment
and Labour Relations Court at Nairobi (H. Wasilwa, J.) delivered
on 16th January 2020 in ELRC Petition No. 38 of 2019)*

RULING

1. By a Notice of Motion dated 3rd September 2020 brought pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rule 5(2) (b) of the *Court of Appeal Rules*, 2010, the applicants, Wajir County Government and Wajir County Assembly Service Board, seek a stay of execution of the judgment and decree of the Employment and Labour Relations Court delivered on 16th January 2020 pending the hearing and determination of the intended appeal; and that the costs of the application be in the appeal.
2. The Motion is brought on the grounds set out on its face and an affidavit in support sworn by Shalle Sheikh Mursal, the Clerk, County Assembly of Wajir, 3rd September 2020 wherein the applicants contend that judgment was delivered on 16th January, 2020 against them and, being aggrieved, filed a Notice of appeal on the 30th January, 2020; that on the 25th August, 2020, the respondent filed contempt proceedings against the Clerk, the Speaker and the Head of the Finance Department of the County Assembly of Wajir in execution of the High Court's decree where the applicant had been ordered to pay Kshs. 73,228,320 to the respondent's members, which amount is in dispute; that further, the Employment and Labour Relations Court ordered the applicants to reinstate the salaries



of the employees of the 2nd applicant and return the employees to the position they were in January 2015 when the salaries were varied, and to pay all the salaries arrears from January 2015 to June 2019 together with interest; that, soon thereafter, in seeking to execute the decree against the applicants, the respondent prematurely filed an application in the trial court seeking to commit the senior officers of the 2nd applicant to civil jail, and that the contempt application was fixed for hearing on 7th September, 2020.

3. The applicants deponed that the appeal is arguable, since one of the intended grounds of appeal is the failure by the learned judge to appreciate that the employees of the 2nd applicant were consulted and notified of the intended salary harmonisation and review that was carried out following an independent consultant's recommendations to align their job groups and salaries with those of their counterparts at similar levels of employment in the Wajir County Public Service, and in other county assemblies in Kenya, so that their salaries would conform with the Salaries and Remuneration Commission directives; that an order directing the 2nd applicant to pay its employees the salaries they earned before the impugned review and harmonization was not only impossible to implement, but cannot be paid out of the existing budgetary allocations for recurrent expenditure; that such payment would also be contrary to the Salaries and Remuneration Commission's directives.
4. It was further deponed that were the 2nd applicant to be compelled to pay the decree holders, they will not be capable of refunding the amounts paid in the event that the appeal were to succeed; that, furthermore, the 1st applicant is not an employer of any of the decree holders, and no specific claim was made against it in the petition; that it is the autonomous County Assembly Service Board, the 2nd applicant, that handles matters of recruitment, remuneration and termination, and not the 1st applicant who is now in danger of execution being made against it. It was finally deponed that the applicants were not provided an opportunity to ventilate their appeal and, if the respondent was allowed to execute the impugned decree against the applicants, the appeal will be rendered inconsequential, nugatory and an academic exercise.
5. In a replying affidavit sworn on 17th September 2020, Roba Duba the respondent's National Secretary, opposed the application for the reason that no legal justification had been tendered by the applicants for their disobedient conduct towards the lower court; that the contempt proceedings are yet to be determined; that save for filing of a Notice of appeal, no memorandum or record of appeal was filed, hence it would be practically impossible for this Court to ascertain whether there is an arguable appeal; that the applicants have not demonstrated or disclosed the substantive loss they would suffer if the stay was not granted, and neither had they offered a security for due performance of the decree; that the applicants' application is frivolous, vexatious, bad in law, and an abuse of the court process.
6. Both learned counsel, Messrs. Yunis, Osman & Mwiti Advocates for the applicants and Brian Otieno Advocates for the respondent filed written submissions on behalf of the parties.
7. In so far as applications filed under rule 5(2) (b) of this Court's Rules are concerned, the threshold requirement to be satisfied are amplified in the case of *Republic vs. Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.



8. On the arguability of the intended appeal, the applicants attached memorandum of appeal containing 14 grounds that, substantive amongst them, the applicants' grievances against the decision is that, the court failed to take into account that the respondent's members were consulted and notified of the review and harmonisation of their salaries following the recommendations of an independent consultant who had been commissioned to align the respondent's members job groups and salaries with those of their counterparts at similar levels of employment in the Wajir County Public Service, and in other county assemblies in Kenya, so as to conform with the Salaries and Remuneration Commission directives. If this was indeed a matter which the trial court overlooked or failed to take into account, we find this to be an arguable matter.
9. As pertains to whether the appeal would be rendered nugatory if the contempt of court application was to proceed, we would answer this question in the affirmative. This is because the applicants' case is that they are unable to pay the decretal sums ordered firstly, because the payments are in contravention of the Salaries and Commission's directives. Secondly, the amounts demanded have not been included in the existing budgetary allocations for recurrent expenditure, which has placed the applicants in dire risk of being found in contempt of court and committed to civil jail. And were this to happen, the appeal will be rendered nugatory. Furthermore, they point out that, if the entire amount of Kshs. 73,228,320, were to be paid as ordered, there is every chance that the respondent's members would be incapable of refunding the amounts paid to them.
10. In sum, we find that the applicants having satisfied the threshold requirements for the grant of stay of execution, the motion dated 3rd September, 2020 is allowed. A stay of execution of the judgment of the Employment and Labour Relations Court dated 16th January 2020 is hereby ordered. Costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K.I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

