



Aura v Cabinet Secretary Ministry of Environment and Forestry & 2 others (Civil Application E304 of 2022) [2022] KECA 1151 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1151 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E304 OF 2022
DK MUSINGA, F SICHALE & HA OMONDI, JJA
OCTOBER 21, 2022**

BETWEEN

STELLA MARRIS ODERO AURA APPLICANT

AND

THE CABINET SECRETARY MINISTRY OF ENVIRONMENT AND FORESTRY 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

(An application for stay of execution and/or stay of further proceedings pending the hearing and determination of an intended appeal from the ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (Lady Justice M. Mbaru) dated 12th May, 2022; in ELRC PETITION E1064 of 2021)

RULING

1. The application before this court dated May 22, 2022, brought pursuant to rules 5(2) (b), 42, 4 and 47(1) and (2) of the *Court of Appeal Rules* and supported by an affidavit of even date seeks that; pending the hearing and determination of this application there be a stay of execution of the orders made on May 12, 2022 and a stay of further proceedings in Employment and Labour Relations Court (ELRC) PET. E1064 of 2021 in the first instance, and also pending hearing and determination of the appeal; a conservatory order restraining the 1st and 2nd respondents from deploying, employing or advertising the position of the director of meteorological services pending the hearing and determination of this application and appeal; an order do issue for the applicant to continue working in her position as director of meteorological services with no alteration of employment terms and conditions without any loss of benefits, salary and seniority; and costs be in the cause.
2. The application is opposed by a replying affidavit sworn by the 1st respondent dated May 31, 2022.



3. The applicant filed ELRC No E1064 of 2021 and judgment was delivered on May 12, 2022, dismissing the applicant's petition. According to the applicant, the upshot of the impugned judgment was that, the applicant was ordered to hand over her duties; and her position as the director meteorological services would be filled and deployed to someone else. The applicant is apprehensive that the respondents shall execute the order arising from the impugned judgment, and this will render the appeal nugatory; she will suffer irreparable and irreversible harm yet she has an arguable appeal with high chances of success.
4. The respondent argues that the applicant was issued with a notice of retirement on February 12, 2021, to which notice she neither responded to nor raised an objection; that the applicant together with 8 other officers were further reminded on June 7, 2021, to submit their documents to enable the forwarding of their claims to the director of pensions for processing, however, the applicant only forwarded her colleagues' documents but failed to submit hers.
5. The applicant was then instructed to prepare a comprehensive handing over report which she accepted to do, but she never submitted the medical reports, KRA exemption certificate and national council for persons with disabilities card as required by law, as such the respondents were not aware of her disability; and that in any event, the applicant had not complied with regulation 70 of the PSC which requires that for an officer's service to be extended to 65 years on grounds of disability, one needs to have been registered with the council, and needed to have been registered in the council's database at least 3 years prior to retirement.
6. It is further contended that the applicant's promotion and appointments had nothing to do with her disability but rather were based on merit; that it is only the 2nd respondent which has the mandate to review the application and extend the retirement age or otherwise; the judgment of the Employment and Labour Relations Court has been implemented as the 1st respondent has already appointed Dr. Gikungu to take charge of the office of the director, meteorological services; the respondent will indeed suffer irreparable harm if the impugned judgment is stayed, and in any case, should the appeal be successful the applicant can be adequately compensated for in damages.
7. This court has severally stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in rule 5(2) (b) the applicant has to establish that;
 - i. The appeal is arguable.
 - ii. The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.
8. This Court held in the case of *Wasike v Swala* [1984] 591, that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. Also in the case of *Attorney General v Okiya Omtata & Anor* [2019] eKLR this court stated that;

“the principles for our consideration in exercise of our unfettered discretion under rule 5 (2) (b) to grant an order of stay are well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
9. In *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR this court stated that; ‘it is sufficient that the



issues raised are arguable' and at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.

10. The gist of the applicant's application is that she is a person with disability, and that she has been retired from her position as director, meteorological services at age 60 whereas as a person with disability she ought to retire at age 65. The applicant argues that she is duly registered as a person with disability registration number NCPWD/P/549299, and the respondents' refusal to extend her retirement age violates her right to fair labour practices; and in making the new appointment the respondents were biased.
11. On the other hand, the respondents contend that the applicant failed to submit her documents for forwarding to the Public Service Commission as well as failing to register in the public body's human resource data base as a person with disabilities at least 3 years prior to retirement as set out under regulation 70 of the Public Service Commission Regulations and contends that the applicant rose through the ranks to her current position of director of meteorological services, the promotion was as a result of merit, her disability notwithstanding.
12. The 1st respondent further argues that the applicant was asked to undergo a second medical assessment, but she did not do so, the Public Service Commission (PSC) declined to extend her retirement age and duly retired her from service at the age of 60; that the new appointee has already been appointed to take over as director of meteorological services and that the applicant has been paid all her dues upto May, 2022, and has since been removed from the payroll.
13. The respondent submits that any harm or loss that the applicant may suffer can be compensated for by an award in damages. On the appeal being rendered nugatory, the respondents submit that this court has held in the case of Reliance Bank Limited v Norlake Investment Limited [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.
14. In the case of African Safari Club Limited v Safe Rentals Limited, Nai Civ App 53 of 2010 this court held;

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly... to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”
15. In short, the court is to decide which party's hardship is greater. With that in mind, if the applicant's prayer for stay of execution is denied and the appeal eventually succeeds, the applicant can be adequately compensated by an award for damages, if at all.
16. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.
17. The issue of whether or not the applicant was registered as a person with disability at least 3 years prior to her retirement, and whether she followed the proper procedures are issues that will be determined with finality at the hearing of the appeal and this court cannot delve into the merits or lack thereof at this interlocutory stage. The applicant has shown that indeed she has an arguable appeal.



18. As regards the nugatory aspect, this court notes that the appointment to replace the applicant has already been made, and is in agreement with the respondents that an attempt to reverse this would cause confusion and would not be in the public interest, and as such the application has been overtaken by events. The applicant contends that should her appeal succeed she would not be compensated for the lost years of employment. We note that the applicant's former position has been filled and there is nothing to stay; in any event, this is a monetary issue and as such this court is of the opinion that should the appeal be successful, the applicant shall be compensated by damages which will be calculated. We find that the applicant has failed to show how her appeal would be rendered nugatory should the application be disallowed.
19. Having failed to satisfy the second limb of the test as is the standard in a rule 5(2) (b) application, this application is dismissed with costs to the 1st respondent. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

D. K. MUSINGA (P)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

