



Nairobi City County Chief - Urban Planning & 2 others v Sunguti (Civil Application E006 of 2022) [2022] KECA 1184 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1184 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E006 OF 2022
W KARANJA, AK MURGOR & KI LAIBUTA, JJA
OCTOBER 21, 2022**

BETWEEN

NAIROBI CITY COUNTY CHIEF - URBAN PLANNING 1ST APPLICANT

**NAIROBI CITY CHIEF OFFICER INFORMATION COMMUNICATION
TECHNOLOGY (ICT) 2ND APPLICANT**

NAIROBI CITY COUNTY GOVERNMENT 3RD APPLICANT

AND

BERNARD BARASA SUNGUTI RESPONDENT

(Being an application for stay of execution of the Order and Ruling of the Employment and Labour Relations Court at Nairobi (Nzioki wa Makau, J.) delivered on 20th December 2021 in Employment and Labour Relations Court Case No. 108 Of 2020)

RULING

1. The Notice of Motion dated January 6, 2022 is made pursuant to, sections 3A and 3B and rules 5(2) (b) of the *Court of Appeal Rules, 2010*, the applicants, Nairobi County Chief Officer for Urban Planning, the Nairobi City Chief Officer Information Communication Technology and the Nairobi City County Government have sought the following orders;
 - a. a stay of execution of the Court Ruling and orders delivered by the Employment and Labour Relations Court on December 20, 2021 pending the hearing and determination of an intended appeal.
 - b. an injunction be issued against the execution of court orders the payment a fine of Kshs. 500,000 within 7 days failing to which the applicants should be arrested and confined for a period of one month from December 27, 2021 pending the hearing and determination of the intended appeal.



- c. together with costs.
2. In the applicants' motion that was brought on the grounds set out on its face and the supporting affidavit of Erick Obwao, sworn on January 6, 2022, as well as their written submissions, the applicants contend that the Employment and Labour Relations Court (ELRC) had found them guilty of contempt of court and had ordered them to pay Kshs. 500,000 within 7 days; and that they were dissatisfied with the decision and intend to appeal against it. They further contend that they had filed a Notice of appeal, and that, unless the orders sought were granted, they stand to suffer irreparable damage since they will be incarcerated and lose their liberty. Their grievance against the decision was that the trial court did not appreciate that implementation of the orders was made impossible by a Deed of Transfer of Functions that transferred the Urban Planning and Health sectors from the 3rd applicant to the Nairobi Metropolitan Services (NMS), so that the services were no longer under its control. It was further averred that the intended appeal would be rendered nugatory if they were to serve the sentence in civil jail before the appeal is heard and determined.

3. In a replying affidavit sworn on January 13, 2022 and in written submissions, the respondent opposed the motion and stated that it was incompetent, lacked merit, was an abuse of the Court's process and should be struck out in limine with costs; that he was not aware of any appeal and/or review filed by the applicants; that no prejudice will be suffered by the applicants if they comply with the court's orders and purge the contempt.

During the virtual hearing, though served, the applicants did not appear. They had nonetheless filed written submissions.

On his part, the respondent, who appeared in person submitted that it was the services of the 3rd applicant that were transferred and not the functions of that office; that the offices were not transferred to the NMS, and therefore the physical environment did not change; that he is still employed but has no office from which to work.

4. The brief facts of the dispute are that, the respondent worked as a Public Health Officer with the 3rd applicant for about 12 years when the 1st applicant removed him from his work station and denied him access to his office at City Hall which rendered him unable to perform his duties; that the 1st applicant refused to allocate him development applications for vetting, yet he distributed such applications to junior officers. In addition, he claimed that the 2nd applicant refused to open an online account to enable him approve building plan applications, but had opened accounts for junior staff. He complained that this had exposed him to unnecessary psychological trauma, economic hardship, fiscal embarrassment and insubordination by junior staff;

that he had suffered irreparable loss and damage from what amounted to unlawful constructive dismissal from his employment. He prayed for judgment and orders for: (i) permanent injunction restraining the applicants from removing him from his work station and from denying him access to his office; (ii) general damages for constructive dismissal and costs.

5. The applicants denied any wrongdoing and stated that there was a misjoinder of parties as they were not the respondent's employer since both the Urban Planning and Public Health sectors where he worked were no longer under the 3rd applicant's control since they had been taken over by NMS; that the respondent had also not exhausted all the internal mechanisms before filing the case in court.

After the trial court found in favour of the respondent, he filed a Notice of motion dated September 22, 2021 seeking contempt of court orders against the applicants' Dr. Jairus Musumba, Mr. Peter Mukenya and Mr. Dominic Mutege, which application the applicants opposed.



The trial court allowed the application and fined the applicants' Kshs. 500,000 to be paid within 7 days from the ruling, failing which they should be arrested and confined for a period of one month from December 27, 2021. It is this decision that prompted the applicants to bring this application.

In so far as applications filed under rule 5 (2) (b) of this Court 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”.

6. Concerning whether the intended appeal is arguable, the applicants' case is that in granting the orders of contempt of court, the trial court failed to take into account that they were not the respondent's employer since both the Urban Planning and Public Health sectors were no longer within the 3rd applicant's control, pursuant to a Deed of Transfer of Functions that transferred the sectors from the 3rd applicant to NMS; and further that the contemnors Dr. Jairus Musumba, Mr. Peter Mukenya and Mr. Dominic Mutegi were not given an opportunity to be heard before being sentenced to one month incarceration.

If indeed this was the situation prevailing, and yet the trial court went ahead to grant the contempt orders without taking into account the constraints the applicants faced, and without providing the contemnors an opportunity to be heard, then we consider these to be arguable matters.

On the question of whether the intended appeal would be rendered nugatory, we agree that the applicants will suffer irreparable damage if they were to be incarcerated and lose their liberty before the intended appeal is heard and determined. Courts have stated time without number that loss of liberty is not a matter to be taken lightly. It would therefore be important to safeguard the applicants' interest by staying the orders until the appeal is heard and determined.

7. Accordingly, the applicants having satisfied the twin requirements specified under rule 5(2) (b) of this Courts' rules, the motion dated January 6, 2022 is merited and is allowed. Costs in the appeal.

It is so ordered.

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

W. KARANJA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

Dr. K.I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

