



**Ngore (Chairperson NSC) & 3 others v Okoiti & 11 others (Civil Appeal  
(Application) E385 of 2022) [2022] KECA 1186 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1186 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E385 OF 2022  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**BERNARD M NGORE (CHAIRPERSON NSC) ..... 1<sup>ST</sup> APPLICANT  
ROGERS OCHAKO ABISAT (INDEPENDENT MEMBER NSC) .... 2<sup>ND</sup>  
APPLICANT  
BERNARD NJIU NJIRAINI (MANAGING DIRECTOR (KEBS) .... 3<sup>RD</sup>  
APPLICANT  
KENYA BUREAU OF STANDARDS (KEBS) ..... 4<sup>TH</sup> APPLICANT**

**AND**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY, INDUSTRY TRADE AND CO-  
OPERATIVES ..... 3<sup>RD</sup> RESPONDENT  
STATE CORPORATIONS ADVISORY COMMITTEE ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT  
HELLEN KABETI NANGITHIA (INDEPENDENT MEMBER  
NSC) ..... 6<sup>TH</sup> RESPONDENT  
MARY WANJA MATU (INDEPENDENT MEMBER NSC) ..... 7<sup>TH</sup> RESPONDENT  
FOUZIA A ABDIRAHMAN (INDEPENDENT MEMBER NSC) .... 8<sup>TH</sup>  
RESPONDENT  
PATRICK M MUSILA (INDEPENDENT MEMBER NSC) ..... 9<sup>TH</sup> RESPONDENT  
EDWARD NJOROGE (INDEPENDENT MEMBER NSC) ..... 10<sup>TH</sup> RESPONDENT**



ERIC MUNGAI (INDEPENDENT MEMBER NSC) ..... 11<sup>TH</sup> RESPONDENT

GILBERT LANGAT (INDEPENDENT MEMBER NSC) ..... 12<sup>TH</sup> RESPONDENT

*(An Application for Stay of Execution of the entire Judgment and Decree of the Employment and Labour Relations Court (M. Onyango, J.) dated 25th May, 2022 in Nairobi ELRC Cause No. 19 of 2020)*

## RULING

1. Before us is a notice of motion dated 4<sup>th</sup> July, 2022 in which the applicants pray for stay of execution of the judgment and decree of the Employment and Labour Relations Court (“ELRC”) Petition No. 19 of 2020 (M. Onyango, J.) dated May 25, 2022 pending the hearing and determination of the intended appeal.
2. The application is brought under Rule 5(2) (b) of the *Court of Appeal Rules*. It is premised on the grounds that: by the said judgment and decree, the trial court declared as irregular, null and void and quashed the appointments of the following officers of the National Standards Council (NSC): Bernard M. Ngore, the Chairperson of the NSC and the 1<sup>st</sup> applicant; Rogers Ochako Abisai, Independent Member NSC and the 2<sup>nd</sup> applicant; Bernard Njiinu Njiraini, Managing Director of the Kenya Bureau of Standards (KEBS) and the 3<sup>rd</sup> applicant; and all other seven independent members of the NSC who are the 6<sup>th</sup> to 12<sup>th</sup> respondents who had been appointed under the *Standards Act*; the applicants have preferred an appeal against the said judgment and decree by filing a notice of appeal; the Board of Directors of KEBS referred to under the Act as the National Standards Council (NSC) is statutorily mandated to set standards, approve, certify and permit all manufactured, imported goods and local produce to ensure that the products consumed in the Country meet set standards which is a daily duty and obligations carried out by the NSC. That with the judgment and decree, the 4<sup>th</sup> applicant has been left without a functioning Board of Directors or a Chief Executive Officer and as a consequence there is no institution to undertake the vital statutory roles of the 4<sup>th</sup> applicant which if allowed to continue will affect production, manufacturing and at large the business community.
3. Further, that lack of the board and the managing director to oversee standardization and regulation of quality and standards of the products exposes the citizens at large to the consumption of sub-standard goods and which is a greater risk as the decision did not consider public interest. That they had annexed the memorandum of appeal, which shows that they have an arguable appeal with a high chance of success in view of the important legal issues raised with regard to the right to fair hearing and access to justice. That the applicants had made an application before the trial court for stay of execution of the judgment and decree on May 31, 2022 which application was dismissed on July 25, 2022.
4. The motion is further supported by the affidavit of the 1<sup>st</sup> applicant which merely reiterates and expounds on the above grounds and there is no need to rehash them; suffice to state, that this Court in Civil Application No. E184 of 2021 stayed a similar declaration in respect of the appointment of Directors and Chairmen of similar parastatals like the 4<sup>th</sup> applicant. The issues, facts, circumstances and the law in that case and the instant application are similar, hence the application ought to be allowed to maintain uniformity, predictability and equal treatment before the law.
5. There is equally a supporting affidavit sworn by one, Betty Maina, the Cabinet Secretary, Ministry of Industry, Trade and Co-operatives dated July 29, 2022 on behalf of the respondents. The affidavit



merely reiterates and expounds on the above grounds as well hence no need to repeat the same, suffice to state that the respondents support the motion except the 1<sup>st</sup> respondent.

6. The application is opposed by the 1<sup>st</sup> respondent through an affidavit dated July 29, 2022, in which he depones that the prayers sought cannot be granted as they are vague in the manner they are drafted. That the orders sought are discretionary and the applicants must satisfy three grounds; firstly, that they have an arguable appeal by setting out bona fide arguable grounds of appeal which are not frivolous; secondly, the applicants must demonstrate that the appeal or intended appeal will be rendered nugatory unless the orders of stay are granted and lastly, that it is in the interest of the public to grant the prayers sought. That the intended appeal is not arguable as the grounds of appeal set out in the draft memorandum of appeal are bare and do not specifically disclose which points of law or facts were wrongly decided by the trial court.
7. On the nugatory aspect, the 1<sup>st</sup> respondent depones that there are a set of factors demonstrating that the appeal will not be rendered nugatory which include; that the 1<sup>st</sup> and 2<sup>nd</sup> applicants' term of office shall expire on November 14, 2022; that the 3<sup>rd</sup> applicant's term of office was to expire on August 29, 2022; and had already been replaced by Ms. Esther Ngari. That the trial court quashed the appointments of the 1<sup>st</sup> to 3<sup>rd</sup> applicants, among others, and directed the 2<sup>nd</sup> to 5<sup>th</sup> respondents to ensure that the new chairperson and members of the NSC are appointed strictly in compliance with the Constitution and the statutory legislation. That it would be contrary to public interest for the 1<sup>st</sup> to 3<sup>rd</sup> applicants to remain in office after being found by a court of law to have been recruited in a manner that was unconstitutional, null and void and in any case, they can be compensated by damages absence stay. The 1<sup>st</sup> respondent further states that declaratory orders cannot be stayed but can only be set aside in the appeal itself since an order of certiorari takes effect immediately upon issuance by the court.
8. By a further affidavit, the 1<sup>st</sup> respondent deponed that *vide* Gazette Notice No. 8831 of July 28, 2022, the Cabinet Secretary for Industrialization, Trade and Enterprise Development had revoked the appointment of the 1<sup>st</sup> applicant, as the Chairperson of the NSC and appointed Kenneth Wathome Mwatu to replace him with effect from July 28, 2022 which in effect had done away with the argument that the judgment and decree of the ELRC will cause a vacuum in the management of the KEBS.
9. The application was canvassed by way of written submissions. Relying on the case of Attorney General vs. Katiba Institute & 2 others KECA 38, the applicants submit that this Court granted stay in a similar matter to the current one when the ELRC had quashed the appointment of the board members and chairmen of several parastatals. On arguability of the appeal, the applicants submit that the trial court erred in finding that the appointments were unconstitutional yet the relevant Act on which the appointments were premised had not been repealed. This issue alone presents an arguable appeal. Reliance is placed on the case of Co-operative Bank of Kenya Ltd vs. Banking Insurance of Finance Union (Kenya) [2015] eKLR for the proposition that one arguable point is sufficient to make an appeal or intended appeal deserving of hearing and need not to be one that will necessarily succeed.
10. On the nugatory aspect, the applicants submit that due to the judgment and decree, the 4<sup>th</sup> respondent cannot transact any business despite the huge expectations bestowed upon it by the citizenry who are equally at risk of consuming sub-standard products. As such, unless stayed, the decision of the trial court would create a monumental risk as to the safety of the products consumed locally and further, the decision did not consider public interest, bearing in mind that the 4<sup>th</sup> respondent serves the people of Kenya.
11. In support of the motion, the 2<sup>nd</sup> to 5<sup>th</sup> respondents submit that the intended appeal is arguable and not frivolous as clearly demonstrated from the annexed draft memorandum of appeal among them being that the court did not have jurisdiction to entertain the dispute. That this Court had issued stay orders



in a similar matter in the case of *Attorney General vs. Katiba Institute & 2 Others* [supra]. Finally, they submit that this was a matter where public interest should supersede private and individual interests. They rely on the case of *Gitarau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR for this proposition.

12. On his part the 1<sup>st</sup> respondent submits that the orders sought are discretionary and one must meet the threshold of an arguable appeal and the nugatory aspect as espoused in the case of *Multimedia University & Another vs. Professor Gitile N. Naituli* [2014] eKLR. That the grounds in the draft memorandum of appeal do not present an arguable appeal. On the nugatory aspect, it is submitted that the applicants are not entitled to the orders sought as the orders granted of certiorari cannot be stayed. Reliance is placed on the Nigerian case of *Chief R.A. Okoya & others vs. S. Santilli & Others* (SC 200 of 1989) [1990] NGSC 82 and the case of *Republic vs. Public Procurement Administrative Review Board & 3 others ex- parte Kenya Electricity Generating Company Ltd* [2010] eKLR. Therefore, the application was not merited and should be dismissed.
13. Having considered the application, the grounds in support thereof, the various affidavits, submissions by counsel and the law, we take cognizance of the fact that the principles applicable in the exercise of this Court's discretion under Rule 5(2) to grant an order of stay of execution pending appeal are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless the order of stay sought is granted, the appeal or intended appeal would be rendered nugatory if successful. In the case of *Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 others* [2013] eKLR this court succinctly set out the law as follows: -

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say, it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
14. Ideally, Rule 5(2) (b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed.
15. In determining whether the appeal is arguable or not, it is trite that by arguable, it does not mean the appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by this Court. On whether the applicants have established an arguable appeal, we have considered the applicants' memorandum of appeal. Among the issues raised by the applicants which we think merit consideration by this Court is the contention that the trial court erred in law and fact:- in finding that the appointments were unconstitutional yet the relevant Act on which the appointments were premised had not been repealed; in misinterpreting and misapplying Article 10 and 232 of *the Constitution* on competitive and merit-based recruitment and when it elevated the requirements of the Government Mwongozo Circular over and above the *Standards Act*. In our view, these and the other issues raised in the draft memorandum of appeal are not frivolous.
16. On whether the appeal will be rendered nugatory should the impugned judgment and decree not be stayed, we note that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. It is common ground that the 4<sup>th</sup> respondent has a greater responsibility as under Section 7, 9 and 10 of the *Standards Act*, the NSC is required by law to set standards, approve, certify



and permit all manufactured, imported goods and local produce to ensure that the products consumed in the Country meet set standards. These are daily duties and obligations carried out by the NSC. It therefore means that the impugned judgment and decree has rendered the 4<sup>th</sup> respondent to be without a functional Board of Directors and a Chief Executive Officer. We agree with the applicants that this will expose the Kenya populace to the danger of consuming substandard products. This is a clear case of public interest prevailing over individual or personal interest. See *Gitarau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [supra]. The appeal will further be rendered nugatory as the applicants will have to be replaced as the institution cannot run without substantive office bearers.

17. In the circumstances of the present case, we are persuaded that the applicants have demonstrated existence of an arguable appeal which will be rendered nugatory should stay not be granted. Accordingly, the application dated July 4, 2022 is allowed. Costs shall abide the outcome of the intended appeal.

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

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

Signed

**DEPUTY REGISTRAR**

