



**Judicial Service Commission v Oyatsi (Civil Application
E097 of 2022) [2022] KECA 1062 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1062 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E097 OF 2022
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
OCTOBER 7, 2022**

BETWEEN

JUDICIAL SERVICE COMMISSION APPLICANT

AND

SUSAN KHAKASA OYATSI RESPONDENT

*(An application for stay of execution of the judgment and decree of the
Employment & Labour Relations Court of Kenya at Nairobi (Nduma Nderi, J.)
dated 10th March, 2022 in Nairobi Constitutional Petition No. E111 of 2020)*

RULING

1. Before us is a notice of motion dated March 24, 2022 filed by the Judicial Service Commission, (“the applicant”), pursuant to Rule 5 (2)(b) of the [Court of Appeal Rules](#). The applicant seeks inter alia: -

“That this honourable court be pleased to grant an order of stay of execution of the judgment and decree of the Employment and Labour Relations Court in Nairobi ELRC Petition No. E111 of 2021 Susan Khakasa Oyatsi vs. Judicial Service Commission delivered on 10th March, 2022 pending the hearing and determination of the intended appeal.”

2. The genesis of the application as can be gleaned from the record before us, is that the respondent had on February 19, 2015 been appointed as an Acting Director of Finance, a position that had fallen vacant in 2013 pending the filling of the position with a substantive office holder; that she had remained in that acting position for over 6 years as at the time of filing the petition in the High Court; the position had been advertised twice and she had applied, been invited, interviewed but had never been successful nor had the position ever been filled. Her efforts to have the reasons for her not being successful were never given to her. That two other offices within the applicant which had senior officers in acting capacities had been filled with those who were in acting capacities save for her case. She therefore petitioned the Court and sought judgment against the applicant for orders, inter alia, that her continued working



in an acting capacity of the respondent for over six years was unlawful and violated her rights to fair labour practices, that failure to be paid full remuneration for Director of Finance (Job group -JSG1) was in violation of her rights to equal remuneration for work and violation of her right to freedom from servitude and right to human dignity and self-worth.

3. The claim was defended by the applicant who conceded to the fact that the position of the Director of Finance had fallen vacant on November 12, 2013. It had advertised for the position and the respondent was among those shortlisted and interviewed but she was not successful due to internal factors and particularly conflicts in the department of finance on account of the respondent's failure to embrace teamwork which information was communicated to her. That at the end, the applicant concluded that the recruitment process was non-responsive for failure to generate a suitable candidate and the respondent was allowed to continue in the acting capacity pending another advertisement. That later, her appointment in acting capacity was revoked on December 2, 2016 and she resumed her duties as the Regional Assistant Director of Finance. The position was re-advertised on June 29, 2016 and interviews conducted on December 5, 2019 but did not again get a suitable candidate. The position was again re-advertised on July 13, 2021 but never proceeded as orders were obtained from court by the respondent restraining the applicant from completing the recruitment process.
4. The trial court eventually found in favour of the respondent, allowed the petition and awarded special damages of KShs.13.6 Million to the respondent. Dissatisfied with the judgment and decree, the applicant initiated the appellate process by filing in this Court a notice of appeal.
5. The grounds in support of the motion are that: the High Court made orders that the respondent was deemed lawfully appointed to the position of Director of Finance of the judiciary upon expiry of 18 months from the date of appointment in acting capacity without there being a competitive, fair and transparent recruitment exercise before substantive appointment as per the law; and, further condemned the applicant to pay special damages to the respondent in the form of underpayment to be calculated at KShs. 3,572,320.00 per year from 2nd May, 2018 until the date of the judgment amounting to KShs.13.6 Million; that the intended appeal raises substantial and arguable points of law as can be gleaned from the draft memorandum of appeal annexed to the application, among them being that the trial court erred; in declaring that the respondent be deemed as duly appointed to the position despite there being no competitive exercise for the recruitment which would be a gross violation of the law on employment; that further, the court erred in law when it refused to acknowledge that the respondent received her allowances during that period that she was in an acting capacity which was not factored in the award of damages.
6. On the nugatory aspect, the applicant states that the intended appeal will be rendered nugatory if the orders sought are not granted as the substantive appointment which has been done without proper procedure will impact on the ability of the applicant's accounting officer, the Chief Registrar of the Judiciary to discharge her mandate under Sections 66 and 68 of the *Public Finance Management Act* as read with the Judiciary Fund Regulations of 2019. That she will now be compelled to delegate her mandate to a person that has not met the criteria laid down for appointment as Director of Finance of the Judiciary. Secondly, the applicant will be forced to pay the colossal decretal sum to the tune of KShs.13.6 Million plus and there is no guarantee that the applicant will be able to recover the money from the respondent in the event that it succeeds in its appeal. That public interest favours the grant of the order of stay of execution as the public would lose confidence in the administrative process and recruitment mandate of the applicant as well as the amount involved will impact negatively on public coffers.



7. The application is further supported by the affidavit of Anne Amadi, the Chief Registrar of the Judiciary and the Secretary of the applicant dated March 22, 2022 which affidavit reiterates and expounds on the grounds adumbrated above and we need not therefore rehash them.
8. The application is opposed by the respondent through her own affidavit dated July 4, 2022. The respondent deposes that three months from the date of the judgment, the applicant had refused to comply with the judgment and decree of the court for no apparent reason(s). She questions the decision of the applicant to appeal, there having been no authorization from the Human Resource Committee. That the applicant had continued receiving positive assessment of her work without any reservations. Further, the applicant will not suffer prejudice as she will remain an employee of the applicant even if this Court comes to a different finding on appeal from that of the trial court. That the applicant can easily recover the funds from her salary as she is still her employer, and that notwithstanding, she was still in a position to refund the amount that would have been paid to her in execution of the decree from her other means.
9. The application was canvassed by way of written submissions. Respective counsel for parties agreed to rely on them solely. The applicant submitted that the intended appeal raises serious issues of law and has high chances of success. Counsel referred to the draft memorandum of appeal annexed to the application. It was his submission that an arguable appeal is not one that should succeed but one that ought to be argued fully before the court. Counsel referred to the question of presumption of the office as well as the award of damages as arguable points that should be fully ventilated in this Court.
10. On the nugatory aspect, counsel submitted that the appeal will be rendered nugatory if the order of stay of execution is not granted for the reasons inter alia, that the applicant shall be forced to pay approximately KShs.13.6 Million to the respondent, while there is a pending arguable appeal thus rendering any and/or all orders that this Honourable Court may make nugatory should the intended appeal be successful. Further, should the intended appeal be successful there is no assurance that the applicant would be able to recover the substantial sum awarded to the respondent which will be extremely prejudicial.
11. On public interest, the applicant submits that the payment of a whopping Kshs.13.6 Million from the public coffers would ideally raise public concern. It relied on the Supreme Court case of *Lemankey Aramat vs. Harun Meitamei Lempanka & 2 Others* [2014] eKLR for the proposition that public funds should be utilized in a prudent and responsible way.
12. In response, the respondent submitted that the applicant had not made out a case for grant of the prayers sought. That the intended appeal has no chance of success considering that no authority was sought and obtained from the Human Resource Committee to pursue the appeal. Further, what the applicant seeks to stay is not irreversible thus the appeal cannot be rendered nugatory. That in any event, she was in a position to repay the decretal sum in the event that the appeal succeeded.
13. We have considered the application, the affidavits, the submissions by both counsel, the authorities cited and the law. The jurisdiction of this Court in applications such as this is donated by Rule 5 (2) (b) of this Court's *Rules*. The jurisdiction is original and discretionary and for an applicant to succeed he/she must demonstrate that the appeal or intended appeal is not idle or frivolous but arguable and secondly, that unless stay is granted and the appeal succeeds, it will be rendered nugatory. See: *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR.



14. In *Teachers Service Commission vs. Kenya National Union of Teachers*, Sup.Ct. Appl. No. 16 of 2015, the Supreme Court considered the nature and scope of the jurisdiction under this provision, and stated as follows: -

“It is clear to us that Rule 5 (2)(b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...

Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”

15. On the first limb, we have perused the draft memorandum of appeal and find that the applicant’s appeal is not frivolous as it raises arguable points, inter alia, that the trial court erred in law and fact in exercising appointment powers by declaring that the respondent be deemed as duly appointed without there being a competitive, fair and transparent recruitment exercise. That in making this kind of declaration the court failed to appreciate that presumption of appointment of the respondent would violate constitutional values and become a bad precedent to undermine the duties of state organs and independent commissions to do competitive and open recruitment of various office holders. Then there is the award of damages which the applicant claims that they were unwarranted. We cannot however go into the merits of those grounds at this stage but all we can say is that they are not frivolous. As stated in *Wasike vs. Swala* [1984] eKLR an arguable appeal is not one that must necessarily succeed but one which merits consideration by the Court. We are satisfied that the applicant has met the requirement of arguability of the appeal.
16. On the nugatory aspect, as this Court held in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227, the factors which 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. In the instant application, counsel for the applicant submitted that the judgment, if executed will see the respondent execute very crucial office duties of the particular office holder which may be irreversible and further see to the payment of Kshs. 13.6 Million which are public funds. Further that, should the appeal succeed, it will be difficult to recover the money from the respondent, and finally, is the question of public interest.
17. We agree with the applicant that the appeal will be rendered nugatory if the order of stay of execution is not granted for the above reasons. We may add that the decisions to be made by the respondent in that office may as well be of far-reaching consequences and irreversible in case the maker is said to have had no authority to make them in that capacity and as envisaged in the judgment of the trial court.
18. The applicant having demonstrated both limbs to our satisfaction, we allow the application and order stay of execution of the judgment and decree of Nduma Nderi, J. dated the March 10, 2022 pending the hearing and determination of the intended appeal. Costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE



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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

