



**Governor, Kericho County & another v Ngeno (Civil Application
E047 of 2021) [2022] KECA 1427 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1427 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E047 OF 2021
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA
DECEMBER 16, 2022**

BETWEEN

GOVERNOR, KERICHO COUNTY 1ST APPLICANT

COUNTY GOVERNMENT OF KERICHO 2ND APPLICANT

AND

ARCH NICHOLAS NGENO RESPONDENT

*((Being an application for stay of execution of the judgment and decree of the Employment
and Labor Relations Court (Wasilwa, J.) dated 7th July, 2021 in Kericho ELRC No.2 OF 2020))*

RULING

1. Before us is a notice of motion dated August 12, 2021 filed pursuant to rules 1(2), 5(2)(b), 43, 43b, and 47 of the *Court of Appeal Rules*. Substantively, it seeks an order of stay of execution of the judgment and decree issued by Wasilwa, J on July 7, 2021 in Kericho ELRC Petition No 2 of 2020 pending the hearing and determination of the appeal together with an attendant order for costs.
2. The motion is supported by grounds in its body and a supporting affidavit of Paul Kiprono Chepkwony, the Governor, Kericho County sworn on August 12, 2021. It is opposed by a replying affidavit sworn on October 22, 2021. It was canvassed through written submissions and legal authorities relied upon by advocates for the respective parties in support of and in opposition to the application.
3. The background to the application, albeit in summary, is that the respondent, was on June 24, 2013 appointed as the County Executive Committee Member in charge of Lands, Housing and Physical Planning for the 2nd respondent. That after being gazetted, he continued discharging his duties as required of his office diligently until October 12, 2016 when he was arrested and charged in Criminal Case No 5 of 2016, *Republic v Nicholas Ngeno & 4 others*, for offences of abuse of office contrary to section 46 as read with section 48(1) of the Anti- Corruption and Economic Crimes Act, failure



- to comply with the law applicable, procedure and guidelines relating to the management of public funds and incurring expenses contrary to section 45(2)(b) as read with section 48(1)(a) of the [Anti-Corruption and Economic Crimes Act](#) and conspiracy to commit an offence of corruption contrary to section 45(a)(3) as read with section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#). The charges did not however arise in the course of the respondent's engagement with the 2nd applicant but out of a previous employment with the defunct Municipal Council of Eldoret. On January 16, 2017 while the said criminal case was ongoing he was removed from office by the 1st respondent on claims of being absent from office for over one year, which absence had affected service delivery in his docket.
4. The respondent then approached the Employment and Labour Relations Court (ELRC) for various remedies anchored on the alleged infringements of his constitutional rights under articles 10, 41, 47 and 236 of the [Constitution, 2010](#) in the termination of his employment by the applicants. The applicants opposed the petition but in the end, the trial court found in favour of the respondent and awarded him damages as follows; "1 month salary *in lieu* of notice = 350,000/=, 12 months' salary as compensation for the unfair and unjustified termination = 12 x 350,000 = 4,200,000/= , Gratuity at 31% of the annual basic salary for the remainder of the contract period = 17 months= 350,000 x 17 x 31 = 1,844,500/=, General damages of Kshs. 2 Million for breach of the petitioner's rights under the constitution all making a grand total of Kshs.8,394,500/=Less statutory deductions and costs plus interest."
 5. Aggrieved by the said judgment and decree, the applicants filed a notice of appeal on July 8, 2021 and thereafter followed it up with the instant application. The applicants' position is that they have an arguable appeal on the grounds that the trial court erred in finding that: there was violation of the respondent's rights; it was at fault for disregarding the principle of public interest when directing the applicants to compensate the respondent for unfair termination and that it also erred in failing to take note of the fact that the respondent had not been in the office for over a year which absence affected delivery of services to the citizens of the county.
 6. On the nugatory aspect, the applicants have stated that the execution of the judgment and decree will render the appeal nugatory on account of the substantial decretal amount involved. They are not sure if the decretal sum if paid and the appeal succeeds, the respondent will be in a position to refund the amount. Finally, it is stated that paying out the amount will negatively impact on the finances of the applicants.
 7. The application is opposed by the respondent on the grounds that the applicants have failed to demonstrate an arguable appeal as the finding by the trial court that the respondent was not subjected to fair administrative action is not disputed. Further, that the denial of the right to be heard of the respondent was not controverted. That public interest cannot do away with the fundamental rights to be heard and subjected to fair administrative action. That being a money decree, the applicants have to establish a reasonable apprehension that in the event the appeal succeeds restitution will be impossible. There was no assertion that he would be unable to refund the money in case the amount is paid to him and the appeal succeeds. In any event, he was capable of refunding the said monies being an Architect by profession.
 8. Though parties were required to file written submissions in furtherance of their diverse arguments, only the applicants did so. The applicants' submissions merely reiterate and expound on the grounds and the supporting affidavit of the applicants. They rely on the cases of [Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another](#) [2015] eKLR and [RWW v EKW](#) [2019] eKLR to buttress their position that they had made out a case for grant of the orders sought.
 9. The principles that guide this court in the discharge of its mandate in an application of this nature were crystallized by the Court in the case of [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013]



eKLR. They are that in order to succeed in such an application, an applicant has to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.

10. The applicants rely on various grounds they have raised in the application, in support of their contention that they have satisfied the first prerequisite. In law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and raises a bona fide issue that can be argued fully before the Court. See the case of *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
11. In light of the above threshold, we are satisfied that the grounds of appeal set out in the application are arguable, their ultimate success or otherwise notwithstanding.
12. On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (supra) this court stated that

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

13. The applicant’s argument with regard to satisfaction of this prerequisite is that there are fears of execution of the judgment which if carried out, the money will be paid and thus the appeal will be rendered nugatory. There is also the aspect of the respondent being unable to refund the amount and the run on the applicants’ finances. The respondent on the other hand has argued that this is a monetary

NKR Civil Application No E047 of 2021 ruling of the court page 6 of 8 decree and he is financially capable of refunding the decretal amount should the appeal succeed, and the appeal will therefore not be rendered nugatory. In *Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji & another* (supra) cited by the respondent, this Court stated as follows:

“with time it became necessary to put certain riders to the legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

14. Further, in *Kenya Hotel Properties Limited v Willesden Properties Limited*, Civil Application No 322 of 2006 (UR 178/2006), this court stated as follows:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree, so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”



15. The respondent has stated categorically that he is an Architect, a man of means, and therefore in a position to pay back the decretal amount in case the appeal is successful. The lack of rebuttal by the applicants on the respondent's above contention is sufficient basis for us to hold that the second prerequisite has not been satisfied. The allegation of a run on the applicants' finances if the decree is satisfied is purely speculative.
16. As we understand it, both prerequisites must be satisfied before a party can be granted relief under rule 5(2)(b) of the *Court of Appeal Rules*. Since only one prerequisite has been met, the application is unsustainable.
17. In the result and on the basis of the foregoing, we find no merit in the application.
It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

