



Osanjo v Managing Director, Kenya Ports Authority & 3 others (Civil Application E048 of 2022) [2022] KECA 1380 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1380 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E048 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 16, 2022**

BETWEEN

NANCY AKEYO OSANJO APPLICANT

AND

MANAGING DIRECTOR, KENYA PORTS AUTHORITY 1ST RESPONDENT

**GENERAL MANAGER HUMAN RESOURCE AND ADMINISTRATION,
KENYA PORTS AUTHORITY 2ND RESPONDENT**

**HEAD OF HUMAN RESOURCE, KENYA PORTS AUTHORITY 3RD
RESPONDENT**

KENYA PORTS AUTHORITY 4TH RESPONDENT

(An application for prohibitory orders restraining the respondents either by themselves, their agents, servants and/or assigns from evicting the applicant/appellant from the 4th respondent's servant quarters, being High Level Block JD-Door 5 pending lodging, hearing and determination of an intended appeal from the aforesaid judgment of the Employment & Labour Relations Court Judicial Review Cause No. E004 of 2021)

RULING

1. Until her dismissal from employment on June 4, 2021, the applicant Nancy Akeyo Osanjo worked as a receptionist by Kenya Ports Authority (KPA), the 4th respondent. Her employment was terminated on grounds of having submitted a fake academic certificate. By dint of her employment, she was housed by KPA in what she refers as servant quarters, high level block JD-Door 5 (the house).
2. On June 29, 2021, the applicant filed an application for judicial review before the Employment and Labour Relations Court (ELRC) seeking, among other reliefs, an order of certiorari to quash the decision of the Managing Director of KPA from either interdicting her or terminating her



employment. During the currency of those proceedings, the ELRC granted her orders stopping KPA from evicting her from the house. However, in a judgment delivered by the ELRC (Byram Ongaya, J.) on July 1, 2022, the applicant's judicial review application was dismissed. The court found that the procedure leading to her interdiction and summary dismissal was not unfair and that the applicant had failed to demonstrate that her constitutional rights and fundamental freedoms, which she had claimed were violated, were not breached as she alleged. Aggrieved by that judgment, the applicant filed a notice of appeal dated July 12, 2022.

3. Before us now is her application hinged, not on the provisions of the *Court of Appeal Rules*, but on the *Civil Procedure Act* and the *Civil Procedure Rules* seeking a prohibitory order to restrain the respondents from evicting her from the house pending the hearing and determination of her appeal.
4. Learned counsel Mr Onduso appeared before us virtually on August 17, 2022 and referred to the grounds on the face of the application; the supporting and further supporting affidavit sworn by the applicant. He orally highlighted his written submissions in which he cited the well-known case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 and urged that the conditions enunciated therein for grant of interlocutory injunctions have been met; that in this case the applicant has a *prima facie* case with a probability of success; that section 31 of the *Employment Act* postulates that an employer is obligated to provide reasonable housing accommodation; that damages would not provide an adequate remedy; that the eviction would render her and her children homeless and destitute.
5. Opposing the application, learned counsel for the respondents Miss Kamau also orally highlighted her written submissions and submitted that the intended appeal is frivolous. Counsel cited the decision of this court in *Eric V J Makokha & 4 others vs Lawrence Sagini & 2 others* [1994] eKLR in arguing that the contract of the applicant's employment having been terminated, the benefit of housing also came to an end; that section 31 of the *Employment Act*, the right to housing is only available if the employment relationship exists. Reference was also made to the decision of the ELRC in *Fadhil Juma Kisua & another vs Kenya Ports Authority* [2015] eKLR.
6. We have considered the application, the affidavits, and the submissions. Although counsel for the applicant anchored the application on provisions of the *Civil Procedure Act* and the *Civil Procedure Rules* and prosecuted it based on the principles in *Giella vs Cassman Brown*, (above) we take it, and have considered it as though it is made under the relevant rule 5(2)(b) of the *Court of Appeal Rules*. The applicant is required to demonstrate that her intended appeal is arguable and that the appeal will be rendered nugatory if the orders she seeks are declined, and the intended appeal ultimately succeeds. See *Stanley Kangethe Kinyanjui vs. Tony Ketter and 5 others* [2013] eKLR.
7. In the memorandum of appeal attached to the record of the application, the applicant asserts, among other things, that the learned Judge in dismissing her judicial review application failed to appreciate that she was not accorded an opportunity to be heard and wrongly accepted the respondent's version of events as gospel truth without giving a basis for doing so. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are satisfied that the intended appeal is not frivolous. It is arguable.
8. As to whether the appeal will be rendered nugatory if the orders sought are not granted, the applicant's suit before the ELRC was a judicial review application. The reliefs that would ordinarily be available to the applicant under the *Employment Act*, where, as here, reinstatement is not in issue, are mainly compensatory. Indeed, one of the reliefs the applicant sought before the ELRC was an award of damages. As urged by counsel for the respondents on the strength of the decision of this Court in *Eric V J Makokha & 4 other vs Lawrence Sagini & 2 others* [1994] (above) the benefit of housing runs with the employment.



We are therefore not persuaded that the appeal will be rendered nugatory if we decline the orders sought.

9. The application fails. It is dismissed. We make no orders as to costs.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

