



**County Public Service Board of Narok v Kenya County Government Workers Union
(Civil Application E038 of 2022) [2022] KECA 1338 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1338 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E038 OF 2022
HM OKWENGU, MSA MAKHANDIA & HA OMONDI, JJA
DECEMBER 2, 2022**

BETWEEN

COUNTY PUBLIC SERVICE BOARD OF NAROK APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

(An application for stay of execution of Ruling and Order of the Employment and Labour Relations Court of Kenya (Wasilwa, J.) dated 5th July, 2022) stay of sentencing slated for 17th July, 2022 and stay of the decree and judgment of the same court dated 2nd December, 2021 in Nakuru ELRC Cause No. E457 of 2016)

RULING

1. Before us is a notice of motion dated July 12, 2022 in which the County Public Service Board of Narok (the applicants), seek three orders of stay of execution of the judgment and decree, ruling and order of Wasilwa, J. delivered on diverse dates as below that: -
 - a. the decree and judgment delivered by the honourable lady justice H Wasilwa on December 2, 2021 in ELRC Nakuru No 457 of 2016 be stayed pending the hearing and determination of the intended appeal.
 - b. the ruling and order of a contempt application delivered by honourable lady justice H Wasilwa on July 5, 2022 be stayed pending the hearing and determination of the intended appeal.
 - c. any and all further proceedings in ELRC Nakuru No 457 of 2016 be stayed including but not limited to the proceedings of July 19, 2022 when the applicant's members are set to appear in person in court for purposes of sentencing after been found to be in contempt of court
2. A brief background to the application is that the respondent who is a trade union sued the applicant for wrongful dismissal of one of its members one, Levin Kimeu (the member) who had been transferred



from Kitui Municipal Council to the applicant in 2012 as a Planner II and later was absorbed into County Government of Narok upon transition. On March 11, 2014, the member was directed to proceed on annual leave as he had failed to take annual leave from the year 2009. That on April 16, 2014 the member whilst still on leave was served with a letter alleging that he had violated the rules of governance in the performance of his duties in that he had made double allocation of plots, misused his office and sabotaged County Government plans and development agenda, and was therefore given 14 days to respond to the said allegations. When the member reported from leave, he found his office had been allocated to someone else.

3. Further, his salary was stopped on January 2016 and his name was thereafter removed from the payroll without giving him reasons for the same. The matter ended up in the Employment and Labour Relations Court where the court found in favour of the respondent by holding that the actions of the applicant were in contravention of the law and therefore the respondent was unlawfully and unfairly interdicted. Consequently, it directed the applicant to reinstate the member with full pay with effect from March 31, 2016 without loss of promotion and benefits with immediate effect and in any case not later than January 1, 2022 and proceeded to award the member 6-month salary as damages for unlawful interdiction.
4. When the applicant failed to comply with the terms of the judgment and decree the respondent took out contempt proceedings. The application was allowed prompting the applicant to approach this court by filing a notice of appeal on December 14, 2021, pursuant to which it filed the instant application.

The application is anchored on the grounds that: the applicant's only duty is to hear disciplinary proceedings of County employees and since this did not happen then the applicant's role was limited; it was not the one that interdicted the member hence it was untenable for it to comply with the judgment and decree; the respondent never followed the proper procedure for enforcement of a decree against a County Government which has resulted in a legal crisis that can only be remedied by the grant of orders sought.

5. The application is further supported by the affidavit of Zipporah Sintoyia Gad, the Board secretary of the applicant who depones that the appeal is arguable as can be discerned from the flow of events leading to this application. That if the orders sought are not granted, there will be unlawful sentencing of the members of the applicant and the county secretary to prison for six months in civil jail. That the execution of the decree ought to have been directed at County State officers who were not parties to the suit.

The motion was opposed by the respondent through a preliminary objection on the ground that the application had been lodged by a stranger and a firm of advocates who were not on record at the time when the ruling for contempt of court was delivered, and the judgment in the substantive suit. That, by virtue of Order 9 Rule 9 of the [Civil Procedure Rules 2010](#), the application as a whole was incompetent, bad in law and incurably defective.

6. The applicant filed written submissions but the respondent did not. On an arguable appeal, it was submitted that the trial court in exercising its powers misdirected itself and failed to take into consideration pertinent facts surrounding the case for instance failure to accord the board members the right to be heard thus did not hear the dispute on merit. That the court erred by failing to follow the laid down principles of law and constrained its wide discretion and failed to apply the same judiciously.

On the nugatory aspect, the applicant states that if stay is not granted and the payment is made to the member and the appeal is successful, the applicant will not be able to recover the monies so paid.



Further, that the trial court shall proceed to sentence the applicants board members and which action will not be reversible which render the appeal nugatory.

7. This being an application under rule 5(2)(b) of the rules of this Court, it is upon the applicant to satisfy us not only that the intended appeal is arguable, and is not frivolous but also that the same if successful, will be rendered nugatory if stay orders are not granted at this stage. This is now settled law and if any authority is required it is readily available in the case of *Kiran Chandubhai Patel v Transworld Safaris Limited* - Civil Application No Nai 197 of 2003 (unreported) where this Court stated: -

“It is trite law that in an application such as this for an applicant to succeed he is principally obliged to show, firstly, that his intended appeal is arguable and not frivolous. Secondly, that, unless he is granted an injunction, the intended appeal if successful will be rendered nugatory. In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously squarely falls on the applicant to place such evidence before the Court hearing his application.”

8. In its decision in *Bob Morgan Systems Ltd & Another v Jones [2004] 1 KLR 194* at p 196 this Court stated: -

“The powers of the Court under rule 5(2)(b) aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal if successful, will be rendered nugatory.”

9. On the issue of preliminary objection, we find the preliminary objection not tenable in law. The proceedings in this Court are totally different from those in the courts below. Rule 75(1) allows any person who desires to appeal to file a notice of appeal. The rules do not prohibit a person who was represented by an advocate in the court below from filing an appeal in person or through a different advocate. The only requirement as stipulated by rule 23(1), is that a party to an application or appeal, who changes advocate or having been represented by an advocate, decides to act in person, or having acted in person engages an advocate, should lodge and serve a notice of change. By rule 75(3), the person filing the notice of appeal is required to state the address of service of the appellant. However, by rule 18, a person who has given an address of service may at any time file a change of address of service without the leave of the court. Accordingly, the preliminary objection has no basis at all in law and is rejected.

10. On the first principle, the applicant has stated that the issues it intends to contest before this Court include that the trial court in exercising its powers misdirected itself and failed to take into consideration pertinent facts surrounding the case for instance failure to accord the board members the right to be heard and thus did not hear the dispute on merit. That the court erred by failing to follow the laid down principles of law and proceeding by constraining its wide discretion and failing to apply the same judiciously.

We are aware that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more, we are satisfied that the intended appeal is arguable.

On the nugatory aspect, 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.”
11. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and each case has to be considered on its merits. The fear of the applicant is that the 6 months’ salary will be paid to the respondent’s member and it may not be possible to recover the same from the member in case the appeal is successful. We are persuaded that the payment of the six-month salary if executed would render the appeal nugatory as the respondent may not be in a position to refund the amount. Indeed, the respondent did not at all controvert this fact. There is another issue as well. That unless the stay is granted, the applicant’s board members will probably be sentenced to serve six months’ imprisonment in civil jail for contempt of court. This threat is real and if it was to be executed, the action would be irreversible. All these satisfies the nugatory aspect.
12. The upshot is that the application dated July 12, 2022 is allowed in its entirety. Costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

HANNAH OKWENGU

.....
JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H A OMONDI

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

