



**Kenya Union of Post Primary Education Teachers (KUPPET) & 3 others v  
Kamau & another; Teachers Service Commission (Interested Party) (Civil  
Application E153 of 2022) [2022] KECA 1313 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1313 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E153 OF 2022  
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
(KUPPET) ..... 1<sup>ST</sup> APPLICANT  
SECRETARY GENERAL, KUPPET ..... 2<sup>ND</sup> APPLICANT  
NATIONAL CHAIRMAN, KUPPET ..... 3<sup>RD</sup> APPLICANT  
NATIONAL TREASURER, KUPPET ..... 4<sup>TH</sup> APPLICANT**

**AND**

**PETER MWAURA KAMAU ..... 1<sup>ST</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TEACHERS SERVICE COMMISSION ..... INTERESTED PARTY**

*((Being an application for stay of execution against the ruling of the Employment  
and Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J.) delivered  
on 6th May 2022 in Employment and Labour Relations Court Case No. 980 of 2012))*

**RULING**

1. The applicants have approached this Court by way of a notice of motion dated May 11, 2022. The application is brought under Articles 50(1) and 159(2) (e) of the Constitution of Kenya, Order 42 Rule 6 of the Civil Procedure Rules, 2010 Rules 41, 42, 43, 45, 47 and 49 of the Court of Appeal Rules, Sections 3 & 3A of the Appellate Jurisdiction Act. The relevant prayers in the Motion are as follows:



- a. ....
- b. That pending *inter partes* hearing and determination of this application, the court be pleased to issue an interim order staying execution of the orders dated May 10, 2022 granted in furtherance of the ruling of Hon Lady Justice Maureen Onyango issued on May 6, 2022.
- c. That pending the lodging, hearing and determination of the Appeal, the court be pleased to issue an interim order staying execution of the orders dated May 1, 2022 granted in furtherance of the ruling of Hon Lady Justice Maureen Onyango issued on May 6, 2022.
2. The application is supported by the affidavit of Akelo M T Misori (the applicant's Secretary General) sworn on May 11, 2022. The main grounds raised by the applicants are that:
- i. The applicant had filed two applications dated October 21, 2021 and January 12, 2022 in the Employment and Labour Relations Court.
- ii. The crux of the two applications was a determination of the correct decretal sum payable, and an order for interim stay of execution.
- iii. The learned Judge summarily dismissed the two applications on the basis that the advocates for the applicants were not properly on record.
- iv. Subsequent to the order of the court, a proclamation was served on them on December 17, 2021 and, therefore, they face imminent risk of execution.
3. On June 9, 2022, the applicant filed an amended notice of motion brought under Rules 4, 5(2)(b), 16, 41, 42, 43, 45, 46, 47 and 49 of the *Court of Appeal Rules, 2022* section 3, 3A and 3B of the *Appellate Jurisdiction Act*, Order 51 Rule 1 of the *Civil Procedure Rules, 2010* Articles 50(1) and 159(2) (d) and (e) of *the Constitution* seeking the following prayers:
- a. ....
- b. That the court be pleased to issue interim orders for stay of execution of the decree dated May 31, 2021, and an injunction against the ruling of September 27, 2021 together with all consequential orders flowing therefrom having been issued by Hon Lady Justice Maureen Onyango of the Employment and Labour Relations Court in ELRC NO 980 OF 2012.
- c. That pending the lodging, hearing and determination of the appeal, the court be pleased to issue interim orders for stay of execution of the decree dated May 31, 2021, and an injunction against the ruling of September 27, 2021 together with all consequential orders flowing therefrom having been issued by Hon. Lady Justice Maureen Onyango of the Employment and Labour Relations Court in ELRC No 980 OF 2012.
- d. That this honourable court be pleased to extend and/or enlarge time for filing/regularization of a notice of appeal against the ruling delivered by Hon Lady Justice Maureen Onyango on May 6, 2022 in Employment and Labour Relations Court Cause No 980 of 2012
- e. That the Applicants/Appellants be granted leave to serve the letter requesting typed proceedings and the court's Ruling dated May 6, 2022.
4. These are the two applications that are now before us. In order to navigate through this legal maze of applications and orders, it is necessary to set out the background to the suit and to the subsequent applications.



5. The 1<sup>st</sup> respondent filed ELRC Cause No 980 of 2020 against the respondents, seeking what he claimed were his withheld or unpaid salaries from the year 2011 to 2013. After the hearing, judgment was entered in favor of the 1<sup>st</sup> respondent as follows:

..... “The claimant sought orders compelling the 1<sup>st</sup> to 4<sup>th</sup> respondents to release his salaries and allowances for the period of June 2011 to June 2018 unlawfully withheld and amounting to Kshs 51,054,533.00 together with accrued interests with effect from June 1, 2011 until payment is made in full. In the alternative, the 1<sup>st</sup> to 4<sup>th</sup> respondents to release to the claimant salaries and allowances for the period of June 2011 to June 2018 unlawfully withheld and amounting to Kshs 27,747,783.00 together with accrued interest with effect of June 1, 2011 until payment is made in full.

The formula used by the claimant in his alternative prayer was the latest communication from the 1<sup>st</sup> respondent to the branches regarding payment of allowances to full time executive secretaries vide its circular KPT/EX/SEC/ALL/011 of September 8, 2011 following the National Governing Council meeting held on August 26, 2011. Further, the respondents have not refuted or controverted the claimant’s evidence that it had more than 700 members hence the claimant’s alternative prayer is granted but only from 1<sup>st</sup> June 2011 to March 13, 2013 which was the date that his posting to Tinganga Secondary School took effect. This is calculated using the formula  $[Kshs\ 84,500 + 52(x-700)]$  where x is the number of branch members.

However, I note that the list of the branch members from the interested party as annexed by the claimant (at page 83 and 84 of the documents annexed to the amended claim) is from May 2011 to January 2012. Since it is not possible to tabulate the claimant’s entitlement up to March 13, 2013 without the lists, the interested party is directed to issue to the claimant and 1<sup>st</sup> respondent and to file a copy of an updated list of the 1<sup>st</sup> respondent’s Kiambu Branch members from May 2011 to April 2013 within 30 days for computation of the claimant’s dues.

Bearing in mind the history behind this matter, and the 1<sup>st</sup> respondent’s conduct in the past, this Court directs that the judgment amount be paid into the claimant’s Equity Bank Account No. 0640192873117 Kiambu Branch upon the same being ascertained.

This Court declines to direct the 1<sup>st</sup> to 4<sup>th</sup> respondents to be paying salaries and allowances to the claimant at the end of every month when such payments are due and at the rate of Kshs 559,137.00 per month with effect from July 1, 2018 into his designated Equity Bank Account No 0640192873117 Kiambu Branch, having found that his employment was terminated pursuant to the elections held on January 19, 2013 and his posting letter of March 12, 2013.

The claimant’s prayer to have the changes made by the 5<sup>th</sup> respondent in the register of Kiambu County Branch on January 19, 2013 and communicated vide the extract dated 22<sup>nd</sup> January 2013 declared unlawful and the 5<sup>th</sup> respondent directed to revoke them, fails having been overtaken by events. It is common ground that elected officials serve for 5 years hence the said officials served until 2016. As such, granting such an order will be futile.

This court declines to grant the order directing the 1<sup>st</sup> to 4<sup>th</sup> respondents to pay the claimant compensation at an amount (Kshs 982,000.00) equal to defray accrued loan interest occasioned by the withholding claimant’s salaries and allowances and any other subsequent penalties at the rate of Kshs 20,965.00 with effect from June 30, 2018 until the



time of delivery of judgment. This being the claimant's contractual responsibility arising under his loan agreement.

The 1<sup>st</sup> to 4<sup>th</sup> respondents will bear the claimant's costs of this suit.

Interest shall accrue at Court rates from March 13, 2013 when the claimant ceased being an employee of the 1<sup>st</sup> respondent to date of payment in full."

6. After the judgment, the applicant filed two applications, which were primarily on the tabulation of the correct amount that was payable to the 1<sup>st</sup> respondent. An issue arose as to whether the advocates who filed the two applications were properly on record.
7. After hearing the parties on the question of whether the advocates were properly on record, the learned judge ruled as follows:

" 16. I have considered the prayers in the two applications and the submissions made before the Court orally on November 29, 2021 in respect of the application dated October 21, 2021.

17. The application dated October 21, 2021 is filed by Triple A Advocates on behalf of the 1<sup>st</sup> to 4<sup>th</sup> respondents. The record does not show that the application was served upon Ashitiva Advocates who were on record for the said respondents at the time of judgment.

18. Among the prayers for consideration by the Court in the application is for leave for Triple A Advocates to come on record for the 1<sup>st</sup> to 4<sup>th</sup> respondents in place of Ashitiva Advocates LLP. There is no consent by the said firm authorizing Triple A Advocates to come on record for the said respondents.

19. On November 29, 2021 when arguing the application dated October 21, 2021, Ms Akello for the applicants did not mention the issue of admission of the firm of Triple A Advocates to come on record. She only dwelt on the wrong tabulations of the decretal sum.

20. Even though the Court has wide powers to grant prayers in matters pleaded even when the parties have not argued the same if the issue is not contested, in cases of change of advocates after judgment, the Civil Procedure Act is clear that such authority must be given by the Court.

24. The two applications before me are thus filed by a stranger and are incurably defective.

26. The applications dated October 21, 2021 and January 12, 2022 are hereby struck out with costs for failure to comply with Order 9 Rule 9 on change of advocates after judgment."

8. Aggrieved by the ruling, the applicant has now approached this court by way of the two applications. The applicant filed written submissions dated May 18, 2022 and a case digest dated May 18, 2022. On his part, the 1<sup>st</sup> respondent filed a replying affidavit sworn on May 24, 2022, written submissions and a case digest dated May 26, 2022. The applicant filed a further affidavit sworn on May 18, 2022.
9. The 1<sup>st</sup> respondent contends that the two applications are incurably defective on the grounds that: the firm of Triple A Advocates is not properly on record as it purported to file a consent dated November 1, 2021 which is irregular; that the purported consent, though signed by Triple A Advocates, is not



stamped or signed by the firm of Ashitiva & Co; that the applicant is seeking to stay a negative order of the Employment and Labour Relations Court; that the applicant has not filed a notice of appeal against the order of the learned Judge; and that the applicant has not served a copy of the letter requesting for proceedings.

10. At the outset, we wish to state that, though the parties have gone to great lengths in submitting on conflicting factual matters and the various applications that were argued before the learned judge, the only issue that is before us is whether the applicant has met the requirements for grant of the various orders that are sought in the two applications. We note that the applicant has relied on many irrelevant provisions of the law, including the *Civil Procedure Act*, which is not applicable to the matters before us. To compound the litany of errors that is the hallmark of this application, the application dated May 11, 2022 sought stay of negative orders. When this defect in the application was exposed by the respondents, the applicant filed an amended application without leave. That application is an omnibus application seeking all manner of prayers, including one for extension of time, which is an application that should be heard by a single Judge. It further sought an order for stay and an injunction in the same prayer.
11. It is clear on the face of the ruling that, the learned Judge struck out the two applications for failure to comply with order 9 of the *Civil Procedure Rules* and held that the advocates who filed the applications were not properly on record, as the consent of the previous advocates was not sought. This is the ruling which is the basis of the applications that are before us.
12. We note that, one of the issues raised by the 1<sup>st</sup> respondent is that the applicant has not filed a notice of appeal and has not served the respondents with a letter requesting for a certified copy of the proceedings. In reaction to this, the applicant filed an amended notice of motion praying for orders: extension of time /enlargement of time for filing/regularization of a notice of appeal against the order dated May 6, 2022; leave to serve the letter requesting for typed proceedings; and an order for stay of execution or injunction.
13. The applicant has expressly admitted that it has not filed a notice of appeal, and that is why it is now seeking for extension of time. A party can only invoke the jurisdiction of this Court by filing a notice of appeal in accordance with rule 77, which provides as follows:

- “ 1 A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against for which appeal is lodged.
  3. Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall—
    - a. specify the part complained of;
    - b. the address for service of the appellant; and
    - c. the names and addresses of the persons intended to be served with copies of the notice.

4 .....



5 Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging the notice of appeal.

6 .....

14. In *Phoenix EA Assurance Company Limited vs. SM Thiga t/a Nation Newspapers* [2009] eKLR, this Court had this to say on the matter: “A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”
15. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR had this to say on this matter: “A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is one that which requires leave or not. It is a jurisdictional prerequisite.”
16. The applicant has not filed a notice of appeal and is seeking extension of time to file the same in this omnibus application. Such an application is to be heard by a single Judge in accordance with Rule 55(1). This is the first step that the applicant should have taken, and such a misstep cannot be cured in the manner the applicant has approached the Court. It ought to file a proper application in accordance with the rules of this Court and address the reasons for delay before the single Judge. The knee jack reaction of purporting to amend its application in response to the challenge by the 1<sup>st</sup> respondent is certainly a misguided step that cannot remedy the defect. It amounts to nothing but a desperate attempt to hold on straw or on a wilted reed in quick sands.
17. By now, it is clear that this application can only suffer the fate of dismissal. We have an applicant who has not filed a notice of appeal. Further, the applicant is seeking to stay negative orders. In *Thika School of Medical and Health Sciences Limited (Under Administration) & another vs. Rao & 2 others* (Civil Application E004 of 2022) [2022] KECA 382 (KLR) (Civ) (4 March 2022) (Ruling) the Court at paragraph 24 stated as follows:

“...there is no jurisdiction to grant relief under Rule 5(2) (b) of this Court’s Rules where the High Court’s order either resulted in a dismissal or a striking out orders or, alternatively, where the court did not order either party to do or refrain from doing something capable of being restrained... that where the court is not being asked to issue an order of status quo, there is no jurisdiction to grant relief under the said Rules...”

18. It is clear that no attempt to breathe life in this application can save it, as the applicant has submitted on totally irrelevant principles. Even on the straightforward issues on the applicable principles under Rule 5(2) (b), there is nothing to demonstrate that the applicant has an arguable appeal, or that such an appeal will be rendered nugatory unless the stay is granted, as there is no memorandum of appeal annexed to the application or submissions on this issue. This is another fatal error and the lesser we say about this application the better.
19. In view of the foregoing, we dismiss this application with costs to the respondents.

**Dated and Delivered at Nairobi this 2<sup>nd</sup> day of December, 2022.**

**H A OMONDI**

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**JUDGE OF APPEAL DR K I LAIBUTA**

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**JUDGE OF APPEAL**

**M GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

