



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, ASIKE-MAKHANDIA, MURGOR, JJ.A.)

CIVIL APPLICATION NO. NYR. 32 OF 2020

BETWEEN

EPHRAIM MWANGI GACHIGUA.....APPLICANT/APPELLANT

AND

TEACHERS SERVICE COMMISSION1ST RESPONDENT

THE B.O.M. THOGOTO TTC..... 2ND RESPONDENT

THE MINISTRY OF EDUCATION.....3RD RESPONDENT

MR. IMANYARA KINOTI.....4TH RESPONDENT

MR. JASON KABERIA..... 5TH RESPONDENT

MR. FRANCIS WAINAINA.....6TH RESPONDENT

MRS. NANCY MACHARIA.....7TH RESPONDENT

MRS. MARY ROTICH.....8TH RESPONDENT

MR. KIHUMBA KIMOTHO.....9TH RESPONDENT

MR. JAMES MUGUNA.....10TH RESPONDENT

CATHERINE K. LENAIIROSHI.....11TH RESPONDENT

ABDIRIZAK H. FARAH.....12TH RESPONDENT

LOISE NYASEDA.....13TH RESPONDENT

(Being an application for stay of execution from the Ruling of the Employment and Labour Relations Court of Kenya at Nyeri (Nzioki wa Makau, J.) dated 30th March 2020 in Petition No. 14 of 2019)

RULING OF THE COURT

1. Ephraim Mwangi Gachigua, (the applicant) filed before the **Employment and Labour Relations court, (ELRC) Petition No. 14 of 2019** alleging violations of his constitutional rights. In response thereof, the 1st, 4th, 7th, 8th, 9th, 10th, 12th and 13th respondents filed a preliminary objection stating that the court lacked jurisdiction as the matters raised in the petition were *res judicata* having been dealt with to finality in **ELRC Case No. 215 of 2017**. On 30th March, 2020 the learned Judge delivered a ruling which is the subject of the applicant's

intended appeal dismissing the petition on the ground that it was res judicata. The learned Judge stated as follows in a pertinent paragraph: -

“It is clear the Petition is a thinly disguised suit for the same reliefs the Petitioner had sought as claimant in Cause No. 215 of 2017 Ephraim Maina Gachigua v Teachers Service Commission which was litigated to conclusion by dint of the Ruling of the court delivered on 10th April 201... It was determined by a court with jurisdiction that the suit he had preferred as Cause No. 215 of 2017 was time barred and therefore improperly before court. The Petition is simply an effort to circumvent the limitation period which the Petitioner is well aware set in 2016 when he ought to have moved against his former employer.”

2. Aggrieved by the said outcome, the applicant filed a Notice of Appeal evincing his intention to file an appeal. Pending the hearing and determination of the intended appeal, he filed the motion on notice dated 27th April, 2020 brought under the provisions of **Rule 5, (2) (b)** of the **Court of Appeal Rules** primarily seeking an order that: -

“THAT pending the hearing of the intended appeal, this court be pleased to order a stay of execution of the Ruling and subsequent orders arising from the ruling of the honourable Justice Nzioki wa Makau J. delivered on 30th March 2020.”

3. The motion is supported by the grounds stated in the body thereof which are further elaborated by the matters deposed to in the applicant’s affidavit sworn on 27th April, 2020. He states that upon perusal of the impugned ruling, he believes that the learned Judge erred in law and has preferred an appeal against the said decision and that there is real danger that while the appeal is pending, prejudicial actions may take place rendering the appeal a mere academic exercise and nugatory.

4. The application was opposed by the 1st respondent vide the replying affidavit sworn by **Evaleen Mitei** on 3rd March, 2021, pointing out that the learned Judge did not order the respondents to do or refrain from doing anything that is capable of being stayed or being restrained by an order of injunction. That this Court has held in various rulings, that a dismissal order, being a negative order, is incapable of execution and thus cannot be stayed. Secondly, that where a cause of action is dismissed by the High court, granting either an order of injunction or stay has an undesired effect of reviving an already dismissed cause of action at an interim stage and without hearing merits of the appeal. That the relationship between the applicant and the 1st respondent was premised on ascertainable terms of engagement which may be remedied by way of payment in the unlikely event favourable orders are subsequently granted. Lastly, that the applicant will not suffer irreparable loss since there is no evidence adduced to show that the respondents intend to execute the Ruling by way of Bill of costs.

5. This application was canvassed by way of written submissions without appearance by counsel or parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global pandemic. We have considered the motion and the submissions. This application invokes the jurisdiction of this Court as provided under **Rules 5(2) (b)** of the **Court of Appeal Rules**, that:-

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may— in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

6. We have considered this application while bearing in mind the guiding principles when exercising this kind of jurisdiction as set out in a long line of case law. In the case of; **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai 157 of 2006** (unreported), it was held that;

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

7. We now wish to consider this application within the above set out principles to respond to the twin issues of whether the applicants have an arguable appeal and secondly whether the appeal if successful will be rendered nugatory if an order of stay is not granted. The order issued by the trial court, was a negative order as the court dismissed the petition and did not order any party to do anything or refrain from doing anything. It has been stated in numerous decisions of this Court that when a court has issued a negative order, there is nothing that can be stayed. See the case of; **Kaushik Panchamatia & 3 others vs. Prime Bank Limited & another [2020] eKLR**. The Court of Appeal had this to say regarding a similar matter where the applicant was seeking stay of a negative order:-

“... We are guided by the decision in the case of Western College of arts and Applied Sciences vs. Oranga & Others [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated *inter alia* as follows:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by

injunction.”

See also Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR:-

Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in Executive Estates Limited v Kenya Posts & Anor. [2005] 1 E.A. 53 where it was stated:

“..... The order which dismissed the suit was a *negative order which is not capable of execution*”

8. In light of the above decisions and the fact that the applicant has not demonstrated how the appeal can be rendered nugatory considering that he is still employed by Teachers Service Commission if the appeal will be successful, his claim regarding flawed procedures including his demotion lies in damages. We therefore find this application lacking in merit.

9. In the event this application therefore fails and it is dismissed with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR