



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI, MURGOR, J.J.A.)

CIVIL APPLICATION NO. 115 OF 2020

BETWEEN

JOSEPH MURIITHI NJERU.....APPLICANT

AND

COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

(Being an application for stay of execution from the Ruling of the Employment and Labour Relations Court

at Nyeri (Nzioki Wa Makau, J.) dated 15<sup>th</sup> day of October, 2020 in ELRC No. 4 of 2020)

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RULING OF THE COURT

1. Joseph Muriithi Njeru (the applicant) being an employee of the *Kirinyanga County Government* (the respondent) filed a multiplicity of suits. The applicant's claim in all the suits arose as a result of a letter dated 3<sup>rd</sup> March, 2018 which was addressed to him by the Secretary of the respondent. The letter conveyed to the applicant the decision by the respondent to have him deployed from Kirinyaga Central as a Sub-county Administrator to the County Ministry of Agriculture, Livestock, Veterinary and Fisheries.

2. The letter purporting to deploy the applicant seems to have irked him to an extent that he filed a suit against the respondent, **Nyeri Employment & Labour Relations Court (ELRC) No. 192 of 2018**, claiming that the deployment was unconstitutional. By a strange twist of fate, it appears this suit was dismissed for non-attendance. Apparently, instead of the applicant seeking to reinstate the dismissed suit he filed another suit being **ELRC No. 24 of 2019** which the learned trial Judge found was an abuse of process of court and ordered it dismissed principally because the matters in issue were directly and substantially in issue in **ELRC No. 192 of 2018**.

3. Unrelenting, the applicant filed yet another suit being **ELRC No. 4 of 2020** against the respondent similarly alleging that the re-deployment was unconstitutional. The respondent countered the third suit with a preliminary objection alluding to the matter being *res judicata* owing to the two other suits which were dismissed. In the impugned ruling, which is the subject matter of the intended appeal, the learned Judge stated as follows in a pertinent paragraph; -

**“The case is substantial (sic) *res judicata* as the Claimant is prohibited from bringing the suit as he ought to have either appealed the decision made or sought review of the determination of the Court instead of filing a fresh suit. As held in the case above there is prohibition to litigate again. The principle of *res judicata* applies even where a suit is dismissed.”**

4. Aggrieved by the said outcome, the applicant filed a Notice of Appeal showing his intention to file an appeal. Pending the hearing and determination of the intended appeal, he filed the instant motion on notice dated 3<sup>rd</sup> December, 2020 brought under the provisions of **Rule 5 (2) (b)** of the **Court of Appeal Rules**. The prayers sought by the applicant are rather convoluted and long winding, we reproduce them here below verbatim to demonstrate how difficult it was to decipher them. The applicant sought *inter alia*:-

**“2. That pending the hearing and determination of the intended appeal an order of injunction be issued restraining the Respondent either directly or through any of its officers, employees, agents or in any other manner whatsoever and howsoever from carrying on with the disciplinary proceedings commended vide letters dated 30.07.2019 ref no. 20140035801(38) and 26.08.2019 referenced 20140035801(38) against the claimant which was founded on the letter dated 27.06.2019 referenced CGK/CS/HRM/STD/003/Vol.6/19 re-designating the claimant from a Sub-County Administrator to an**

undefined portfolio in the Office of the County Secretary.

3. That pending the hearing and determination of the intended appeal, an order of injunction be issued restraining the Respondent either directly or through any of its officers, employees, agents or in any other manner whatsoever and howsoever from implementing the decisions contained in the letters dated 03.05.2018 referenced CGK/CS/HRM/STD/003/Vol.5/46 re-designating the claimant from a Sub-County Administrator to an undefined portfolio in the County Ministry of Agriculture, Livestock, Veterinary and Fisheries and 27.06.2019 referenced CGK/CS/HRM/STD/003/Vol.6/19 re-designating the claimant from a Sub-County Administrator to an undefined portfolio in the Office of the County Secretary.”

5. The motion is supported by an affidavit sworn on 3<sup>rd</sup> December, 2020. The applicant states that both **ELRC No. 192 of 2018** and **ELRC No. 24 of 2019** were dismissed before any determination was made on his grievances. Therefore, the issues raised therein were never determined on merit and he was entitled to have another bite of the cherry, as it were. Moreover, the applicant contended that the respondent subsequently instituted a disciplinary process against him and that is what compelled him to file **ELRC No. 4 of 2020** which was also dismissed. The applicant maintained that the intended appeal is arguable and that it has high chances of success and it is only fair and just that the orders sought be granted immediately to prevent the respondent from designating him to a non-existent position.

6. The respondents did not file any response to this application despite having been served via email with a hearing notice that directed them to file written submissions. However, that does not lessen the duty placed on us by law while exercising judicial discretion, which must always be based on cogent reasons to avoid injustice and abuse of the court process.

7. The hearing of this motion 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.”**

8. The guiding principles when exercising this jurisdiction have been set out in a long line of case law. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

**“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.)”**

9. We now turn to consider this application within the above set out principles to answer the twin issues of whether the applicant has an arguable appeal and secondly whether the appeal if successful, would be rendered nugatory without an order of stay. The order issued by the learned trial Judge was a negative order as the applicant’s petition was ordered to be struck out and no more. The court did not order any party to do anything or refrain from doing anything. The courts have on various occasions held that when a court has granted negative orders, there is nothing that can be stayed. See the case of; **Kaushik Panchamatia & 3 others vs. Prime Bank Limited & another [2020] eKLR:-**

**“This is a negative order. We are guided by the decision in the case of Western College Farts 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.”**

Also in **Co-operative Bank of Kenya Limited v 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 .....**”

10. We note that the applicant has also applied for an order of injunction to restrain the respondent from undertaking any disciplinary proceedings. We are not persuaded by the averments and documents produced by the applicant that there is evidence of any serious

wrongdoing on the part of the respondent who exercised their discretion as employers to deploy the respondent, a member of staff from one department to another. In other words, the applicant will also have an uphill task to demonstrate the aguability of this contention which is one of the main grounds of appeal to be raised in the intended appeal.

11. In light of the aforesaid and the authorities by this Court we are of a firm view that the order made by the learned Judge is a negative one that is not capable of being stayed. On the second limb, the applicant has not demonstrated how the appeal will be rendered nugatory since he is still an employee of the respondent.

12. We therefore find the applicant's motion dated 3<sup>rd</sup> December, 2020 lacking in merit and it is hereby dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**