



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTALJA**

**CIVIL APPLICATION NO. E364/2020**

**BETWEEN**

**TEACHERS SERVICE COMMISSION.....APPLICANT**

**AND**

**HELLEN KHAMALI.....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**(Being an application for stay of execution of the orders of the Employment & Labour Relations Court at Nairobi**

**(H. Wasilwa, J.) dated 17<sup>th</sup> September, 2020**

**in**

**Petition no. 184 of 2019)**

**RULING OF THE COURT**

The dispute in the Employment and Labour Relations Court pitted **Hellen Khamali** “the applicant” against Teachers Service Commission “the respondent” The respondent who was a secondary school teacher claimed that she was unlawfully terminated from Employment by the applicant. That in dismissing her from Employment due process was not followed and as a result her right to fair labour practices had been infringed upon. She therefore sought various declarations among them reinstatement to her previous job as well as compensatory damages.

In defence, the applicant averred that the termination was arrived at after thorough investigations and she was taken through the disciplinary process as provided for in its manual. Thus she was given an opportunity to be heard.

The court heard the petition and delivered its judgment on the 17<sup>th</sup> September 2020 and ordered that she be reinstated back to service without loss of salary and other benefits from the time of dismissal and costs. Aggrieved by the judgment and decree, filed a notice of appeal thereby evidencing its intention to appeal. Pursuant to the same notice, the applicant took out a motion on notice dated 23<sup>rd</sup> November 2020 in terms of rule 5(2)(b), 41, 42 and 47 of this court’s rules. The applicant prays that we grant stay of execution of the judgment and decree aforesaid pending the hearing and determination of the appeal.

The grounds in support of the application are that: the applicant is aggrieved by the entire judgment and has filed an appeal, it is apprehensive that if stay of execution is not granted then execution would ensue meaning that it will be compelled to reinstate the 1<sup>st</sup> respondent to work and pay the damages awarded; the appeal raises arguable points of law and fact with high chances of success and in the event the judgment and decree was enforced then it was likely to suffer irreparable loss and damage thus rendering the appeal nugatory. Thus it would be in the interest of justice that the appeal be preserved.

In support of the motion there was an affidavit sworn by **Mary Rotich**, the Director in charge of Field Services. The affidavit however merely reiterated and expounded on the grounds on the face of the application. Suffice however to add that the 1<sup>st</sup> respondent had extracted and served a decree threatening to execute in the event she was not reinstated; there was need to protect its interest while the appeal was pending; the decretal sum if paid may not be recoverable in the event the appeal was successful as the 1<sup>st</sup> respondent was a person of straw.

In opposing the application, the 1<sup>st</sup> respondent swore an affidavit deposing that the applicant had filed a similar application in trial court but lost. Further the orders being asked were discretionary in nature and could only be granted if the applicant can establish that the appeal was

arguable and that should stay not be granted the appeal if successful shall be rendered nugatory. The applicant had not satisfied any of the aforstated two limbs.

We have considered the application, the rival affidavits, the submissions by both parties and the authorities cited.

The application is premised on rule 5(2)(b) of this court's rules. The purpose of this rule is to preserve the substratum of the appeal. The principles that apply to applications of this nature are well known. First the applicant has to demonstrate the appeal or intended appeal as the case may be, is arguable and secondly that in the absence of stay, the same shall be rendered nugatory. See **Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR.**

We have perused the draft memorandum of appeal to determine the appeal is arguable. Th grounds hinge on the mandate of the applicant under The Teachers Commission Act; the documentary evidence on record tendered against the respondent and the principles on infringement of constitutional rights under the contract of employment. No doubt the issues raised are not idle.

They are certainly arguable points of law, which need to be ventilated and determined on appeal. As it has been constantly stated the grounds raised need not succeed. See **Joseph Gitahi Gachau & Another v Pioneer holdings (A) Limited & 2 Others [2009] eKLR.** For an arguable an arguable appeal, the applicant is not obliged to establish a multiplicity or a plethora of grounds, it will suffice even if one issue is raised as was held in *Damji Praji Mandaria v. Sara Lee Househlo d & Bodty Care(K) Ltd*, CA no. 345 of 2004.

On the nugatory aspect, the applicant urged that the decretal amount payable was colossal, recovering the same will be an uphill task now that she has been out of employment for a long time. The 1<sup>st</sup> respondent on her part remained silent on how she would repay amount in the event that the appeal succeeds.

In the end we are persuaded that the applicant has met the threshold for grant of stay. The application is accordingly allowed as prayed. Costs shall abide the outcome of the appeal in the cause.

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

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**