



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI JJA.)

CIVIL APPLICATION NO. 17 OF 2020

BETWEEN

KENYA COUNCIL OF EMPLOYMENT AND MIGRATION AGENCIES.....APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF ENVIRONMENT AND FORESTRY.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY BOARD.....3RD RESPONDENT

DIRECTOR GENERAL –NATIONAL ENVIROMENTAL MANAGMENT.....4TH RESPONDENT

AND

STATE DEPARTMENT FOR PUBLIC SERVICE.....1ST INTERESTED PARTY

PUBLIC SERVICE COMMISSION OF KENYA.....2ND INTERESTED PARTY

KENYA SCHOOL OF GOVERNMENT LOWER KABETE.....3RD INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....4TH INTERESTED PARTY

(Being an application for stay of execution pending hearing and determination of the

ruling/order of the Employment and Labour Relations Court (Hon. O. N.Makau, J.)

dated 13th January, 2020, in Nairobi ELRC Cause No. 167 of 2019)

RULING OF THE COURT

Before us is a Notice of Motion dated 22nd January, 2020 under **Rules 5(2)(b) and 96** of the **Court of Appeal Rules 2020, Orders 18, 25, 40, Rules 1** and 2 of the **Civil Procedure Rules, Cap 21 Laws of Kenya, Articles 159, 160(1), 164(3)** of the **Constitution of Kenya, 2010** and all enabling provisions of law, substantively seeking an order of stay of execution of the ruling/order dated 13th January 2020 by **O. N. Makau, J.** of the Employment and Labour Relations Court (ELRC) at Nairobi and all consequential orders arising therefrom pending the determination of the appeal lodged in Nairobi Court of Appeal Registry; and an attendant order for liberty to consolidate it with Notice of Appeal arising from the ruling or order dated 6th January, 2020 by **B. Ongaya, J.** and for costs to be provided for.

It is supported by grounds on its body and a supporting affidavit of **Evans Nyambega Akuma**, described as the Chairman of the applicant herein together with annexures thereto. It has been opposed by written submissions of the 1st to 3rd respondents dated 26th August, 2020 and those of the 3rd and 4th respondents dated 28th January, 2021, respectively. It was canvassed virtually through applicant’s sole pleadings and written submissions filed by the respondents, in their absence and without oral highlighting.

The background to the application albeit in summary form as gleaned from the record is that the applicant filed:

- a) **Nairobi ELRC Cause No. 167 of 2019;**
- b) **Nairobi ELRC Cause No. 168 of 2019;**
- c) **Nairobi ELRC Judicial Review No. 18 of 2019;**
- d) **Nairobi ELRC Judicial Review No. 5 of 2020.**

The proceedings triggering the application resulting in this ruling relate to ELRC No. 167 of 2019 in which **B. Ongaya, J.** upon hearing oral representations from the rival parties on 6th January, 2020 made orders as follows:

“Court: I have considered the submissions made and material on record and order that:

- 1) As the advertisement of the vacancy in the office of National Environmental Authority (NEMA) Director General is said to have been cancelled and the applicant is pursuing a compromise, the parties are given an opportunity to conclude the compromise with a view of recording a consent at the next mention.**
- 2) Mention on 13th January, 2020 at 9.00am or soon thereafter before the duty Judge for recording a compromise or further orders on the application for leave to file for judicial review orders.**
- 3) The applicant to serve a mention notice in 2 days upon all parties who are absent today.**
- 4) Costs in the cause.**
- 5) The applicant to file and serve further affidavit for mention.”**

On 13th January, 2020, the matter was listed for mention before the duty Judge, **O. N. Makau, J.** for recording a compromise or further orders in the cause as directed by **B. Ongaya, J.** on 6th January, 2020. Counsel for the applicant informed the Court that they were ready to record a consent order, dated 9th January 2020, which they had already filed and served. In response to that request, counsel on record for the respondents and interested parties informed the Court that the advertisement forming the basis for the alleged consent or compromise intended to be recorded on that date had since been cancelled and the consent was therefore overtaken by events. The learned Judge upon hearing representations from the respective parties made orders as follows:

“Court:

The Court is satisfied that the impugned advertisement was cancelled on 4th January, 2020 and 5th January, 2020. I therefore agree with the respondents and interested parties. The suit is overtaken by events. I therefore mark the suit as closed with no order as to costs because by its nature the suit is a public interest case.”

Aggrieved, the applicant filed a notice of appeal dated 13th January, 2020 intending to appeal against the whole of the said ruling/order by **O. N. Makau, J.** on which the application under consideration is anchored. Supporting the application, the applicant contends in his pleadings that since he filed no written submissions in support of the application as those on record and attributed to him dated 21st January, 2021 were filed in support of *inter partes* hearing on the certificate of urgency. It is his assertion that he has an arguable appeal and if the stay order is not granted, the intended appeal will be rendered nugatory.

In rebuttal, the common response as gleaned from the respondents’ respective written submissions alluded to above is that there is no arguable appeal as the learned Judge cannot be faulted for marking the intended consent/ compromise as overtaken by events. There has been no rebuttal submissions filed by the applicant either in support of the application or in rebuttal of those filed by the respondents hence our reliance wholly on the applicant’s pleadings as basis for determination of this application.

This being an application for stay of execution, the applicant has to satisfy the twin requirements of **Rule 5(2)(b)** of the **Court of Appeal Rules** as restated in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (2013) eKLR**. The requirements are that an applicant in an application of this nature has to demonstrate that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.

In satisfaction of the first requirement under this **Rule**, the applicant intends to fault the learned judge as already highlighted above namely for acceding and conducting the matter based on the respondents’ submission that the impugned advertisement had been cancelled and as such the intended consent/compromise had been overtaken by events. It is his position that the consent dated 9th January, 2020, ordered to be entered by **B. Ongaya, J.** on 6th January, 2020 was still alive and the learned Judge should have allowed it to be recorded to pave way for its enforcement and execution. Also that the learned Judge had no jurisdiction to revise the orders of **B. Ongaya, J.**

It is appreciated that in law an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement.

See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.**

Applying the above threshold to the rival positions herein, we are satisfied that the learned judge cannot be faulted for reaching the conclusion reached that the advertisement being the substratum of the intended consent/compromise having been cancelled and by virtue of that cancellation, orders of **B. Ongaya, J.** dated 6th January, 2020 had been overtaken by events. We find nothing arguable on this point as the record explicitly indicates that this was the correct position on record as at the time the learned Judge was confronted with this issue. That being the case, this limb has no legs on which to stand. This prerequisite is therefore not satisfied.

Turning to the second prerequisite, the position in law is that this 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. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227.**

Applying this threshold, to the rival position herein given that the advertisement which was the substratum of the order/ruling intended to be recorded was cancelled, there was nothing capable of being stayed. This prerequisite is also not satisfied. The position in law is that both limbs have to be satisfied before a party can earn relief under the **Rule 5(2)(b)** of the Court's **Rules**.

In the result, we find that the applicant has failed to satisfy the twin prerequisites for granting of a relief under **Rule 5(2)(b)** of the Court **Rules**. The application therefore fails. It is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 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