



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, MURGOR & J. MOHAMMED J.J.A)

CIVIL APPEAL (APPLICATION) NO. E125 OF 2021

BETWEEN

THE UNIVERSITY OF NAIROBI.....APPLICANT

AND

PROF. MICHAEL MADARA OGOT.....RESPONDENT

(Being an application for stay of implementation of the decision of the Employment and Labour Relations Court at Nairobi (Maureen Onyango, J.) dated 5<sup>th</sup> March 2021 pending the hearing and determination of the Appeal filed in Nai. ELRC Cause No. E617 of 2020)

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RULING OF THE COURT

1. In its application dated 17<sup>th</sup> March 2021, the applicant, The University of Nairobi, seeks an order for stay of implementation and/or enforcement of the judgment and orders issued by the Employment and Labour Relations Court (ELRC) at Nairobi (**Maureen Onyango, J.**) on 5<sup>th</sup> March 2021 in ELRC Cause No. E617 of 2020 pending the hearing and determination of an appeal.
2. Before the ELRC, Professor Michael Madara Ogot, the respondent challenged the termination of his appointment as Deputy Vice Chancellor (DVC), Research, Innovation and Enterprise by the applicant and sought a declaration that the termination was illegal, null and void; a mandatory injunction for reinstatement without any loss of pay or benefits; and damages for the unexpired term of his contract and a certificate of service. The applicant contested the claim.
3. In the judgment delivered on 5<sup>th</sup> March 2021 the learned Judge of the ELRC found that the procedure that the applicant followed in terminating the respondent's appointment was procedurally fair but that the termination was not justified. Accordingly, the Court declared that the termination was unlawful and unfair and ordered his reinstatement to the position of as Deputy Vice Chancellor, Research, Innovation and Enterprise without any loss of pay or benefits.
4. Aggrieved, the applicant filed a notice of appeal dated 9<sup>th</sup> March 2021 and subsequently lodged the present application. It is supported by the affidavit, and supplementary affidavit, of Prof. Julia A. Ojiambo, the Chairperson of the Council of the applicant. In opposition, the respondent filed a replying affidavit. We have considered the depositions in those affidavits alongside the submissions, both written and oral, made by learned counsel Fred Ngatia, SC for the applicant and Evans Makori for the respondent and the authorities cited.
5. For now, we limit our enquiry to whether the applicant has demonstrated that the appeal is arguable. Secondly, whether the appeal will be rendered nugatory if we decline to grant the orders sought and the appeal eventually succeeds. See ***Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012 [2013] eKLR.***
6. On arguability, it is contended for the applicant, among other complaints, that in reaching the conclusion that the termination of the appointment was unjustified, the learned Judge, having found that the termination was procedurally fair, wrongly relied on a witness statement that was introduced for the first time during the hearing before the ELRC and which had not been presented at the disciplinary proceeding; and that when issuing the order for reinstatement of the respondent into the position of Deputy Vice Chancellor, Research, Innovation and Enterprise, the learned Judge failed to have regard to the factors set out in Section 49(4) of the Employment and Labour Relations Act.
7. For the respondent, it is contended that the appeal is frivolous; that the applicant, as opposed to the respondent, had the burden to prove

that it had valid grounds for terminating the respondent's appointment but it failed to do so; that the 'witness statement' complained of was a sworn affidavit of Professor Mbeche and the applicant did not file an affidavit in response to it and neither did it apply to cross examine the deponent; and that the remedy of reinstatement was appropriate.

8. We are alive to the fact that an arguable appeal is not one that will necessarily succeed. The issues raised, including whether new evidence could be introduced during the trial against the background of a finding that the disciplinary process was procedurally fair, and whether the statutory factors for ordering reinstatement were considered, are in our view arguable.

9. On the nugatory aspect, it was urged that the effect of the orders granted by the ELRC is to impose the respondent as Deputy Vice Chancellor, Research, Innovation and Enterprise despite the fact that the applicant lost confidence in him; that if the respondent is reinstated, then the operations in the applicant's office will be disrupted as it may lead to unrest and chaos; and that there is an imminent threat of the applicant being held in contempt of court and if the contempt order is issued then the appeal will be rendered nugatory. The case of **George Otieno Gache & Another vs. Judith Akinyi Bonyo & Others [2017] eKLR** was cited.

10. For the respondent, it is contended that he has already been reinstated by the Vice Chancellor and is discharging the functions of the office having resumed work on 16<sup>th</sup> March 2021 and has been carrying out his duties as Deputy Vice Chancellor; that the present application has therefore been overtaken by events; that the respondent was directed by the Vice Chancellor to resume office and contrary to claims by the applicant there is no chaos. Accordingly, it was submitted, the appeal will not be rendered nugatory if the application is rejected.

11. In reply, counsel for the applicant submitted that the mandate to appoint a Deputy Vice Chancellor rests solely with the Council of the applicant and the Vice Chancellor, who the respondent claimed had facilitated his return to office, has no power to do so.

12. Evidently, there is controversy as to the current status of whether or not the respondent is in office as Deputy Vice Chancellor Research, Innovation and Enterprise. The applicant says that the respondent is not in office as the Deputy Vice Chancellor but that he continues to discharge his teaching duties as a professor. It was submitted that only the Council can reinstate the appointment as Deputy Vice Chancellor. For the respondent, it is stated on the one hand that the respondent was reinstated and deployed by the Vice Chancellor yet on the other hand asserts that the applicant is in contempt for not heeding the orders of the ELRC.

13. In **Shah Munge & Partners Ltd vs. National Social Security Fund Board of Trustees & 3 others [2018] eKLR** following on **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] I EA 227**, this Court held that an appeal would be rendered nugatory if refusal to grant an order of stay to the applicant would cause such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined. Bearing in mind that the respondent's employment with the applicant as a professor is unaffected and he continues to discharge his duties and earn remuneration as such, the order that commends itself to us is to order a stay of execution of the judgment of the ELRC given on 5<sup>th</sup> March 2021 pending the hearing and determination of the appeal on condition that the applicant shall not in the meantime fill the position of Deputy Vice Chancellor, Research, Innovation and Enterprise.

14. We direct that the appeal be fixed for hearing on basis of priority and in that regard the applicant/appellant is directed to file and serve written submissions on the appeal within the next 21 days with an equal number of days for to the respondent to similarly do so, after which the appeal is to be fixed for hearing before any bench.

15. Costs of the application shall be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF APRIL, 2021**

**S. GATEMBU KAIRU, (FCI Arb)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**