



**Judicial Service Commission v Sironka (Civil Application
E381 of 2020) [2021] KECA 600 (KLR) (7 May 2021) (Ruling)**

Judicial Service Commission v Timothy Nchoe Sironka [2021] eKLR

Neutral citation: [2021] KECA 600 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E381 OF 2020
PO KIAGE, AK MURGOR & F SICHALE, JJA**

MAY 7, 2021

BETWEEN

JUDICIAL SERVICE COMMISSION APPLICANT

AND

TIMOTHY NCHOE SIRONKA RESPONDENT

RULING

1. By a Notice of motion dated 16th October 2020, brought pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act*, and rules 5 (2) (b) and 4 of the *Court of Appeal rules*, the applicant, the Judicial Service Commission has sought orders of stay of execution against the judgment and decree dated 17th September 2020 (Wasilwa, J), pending the lodging of an intended appeal. The application was supported by a sworn affidavit of Anne Amadi, the Secretary of the applicant on the same date.
2. In determining the dispute, the learned judge had found that the employment of the respondent, Timothy Nchoe Sironka had been unfairly and unlawfully terminated and had ordered the applicant to pay the respondent damages amounting to Kshs. 5,000,000 with costs, and the payment of salary withheld during the interdiction period of Kshs. 2,846,666.
3. The motion was brought on grounds that the applicant being aggrieved by the decision of the trial judge had appealed against the entire judgment; that the appeal is arguable for the reasons that the claim in the trial court was brought more than three years after the termination of the respondent's employment which was contrary to the requirements of section 90 of the *Employment Act*; that the trial court failed to establish how or why the disciplinary process conducted failed to comply with the procedures set out under the Judicial Service Commission Act, the principles of fair administration action and the rules of natural justice, particularly as the charges were framed in accordance with the law; that the respondent was notified of the charges and was given sufficient time to respond, he was



present during the disciplinary hearings, and though he did not call any witnesses, he was accorded a fair opportunity to present his case.

4. Furthermore, it was argued that the trial court was wrong in finding that no inquiry or report was submitted to the Chief Justice as required by paragraph 25 of the Third Schedule of the Judicial Commission Act particularly, as such requirement was not envisioned by the provision. It was further contended that the court failed to appreciate that the respondent had several delayed judgments in his court which had been outstanding for an inordinately long period; that the finding of unfair dismissal was unjustified and the damages award of Kshs. 5,000,000 was unwarranted.
5. The applicant stated that it was at risk of the sums ordered being executed against it, or that it would be subjected to contempt proceedings, and that if this was to happen, the appeal would be rendered nugatory, since the respondent would not be in any position to refund the sums if they are paid. The applicant's motion was also supported by written submissions.
6. Despite having been served with a hearing notice in the 31st March 2021, there was no reply from the respondent.
7. In so far as applications filed under rule 5 (2) (b) of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”
8. Turning to whether the intended appeal is arguable, the applicant's complaints are that the trial court failed to take into account that section 90 of the Employment Act was not complied with; that the court went further to apply the stipulations of paragraph 25 of the Third Schedule of the Judicial Commission Act, which requirements were not applicable to the circumstances of the case, amongst other complaints. Our view is that if indeed fundamental issues of law were not taken into account or were misconstrued by the trial court, then these are arguable matters, which are fit to be adjudged by this Court.
9. As to whether the appeal would be rendered nugatory in the event it were to succeed, we would agree with the applicant that following the judgment, execution or contempt proceedings are liable to be effected, and that would render the appeal nugatory. And, if the respondent were to be paid the decretal sums, there is every chance that he would not be in any position to refund such amount if it were paid, and the appeal were to succeed.
10. In sum, the Notice of motion dated 16th October 2020 is merited, and is allowed. Costs to abide by the outcome of the appeal.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

P. O. KIAGE

.....

JUDGE OF APPEAL



A. K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a truecopy of the original.

Signed

DEPUTY REGISTRAR

