



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, KIAGE, & SICHALE, J.J.A.)**

**CIVIL APPLICATION NO. E340 OF 2020**

**BETWEEN**

**KENYATTA NATIONAL HOSPITAL BOARD....1ST APPLICANT**

**MR. JUSTUS KIMATHI MBUL.....2ND APPLICANT**

**AND**

**STEPHEN KABURIA RUTEERE..... RESPONDENT**

**(An application for stay of execution of the Judgment and Decree of the Employment and Labour Relations**

**Court at Nairobi (Byram Ongaya, J.) delivered on 9th April 2020**

*in*

***E.L.R.C. Cause No. 181 of 2016.)***

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**RULING OF THE COURT**

1. The applicants' Notice of Motion brought under **rules 5(2)(b), 41, 42 and 49 (1)** of this **Court's Rules** seeks stay of execution of the judgment of **Ongaya, J.** delivered on 9th April 2020 and the ruling by the said judge delivered on 23rd October 2020 varying the terms of the said judgment in **Nairobi Employment and Labour Relations Court Cause No. 181 of 2016** pending the hearing and determination of an intended appeal.
2. In the applicants' affidavit sworn by **Evalyne Njeri Gicheru**, the Manager, Legal Services, she deposed, *inter alia*, that the respondent was an employee of the 1st applicant; that he was dismissed from his employment several years ago but he challenged the dismissal before the Employment and Labour Relations Court (ELRC) which, in its judgment on 9th April 2020 reversed the dismissal and directed his reinstatement to employment not later than on 2nd November 2020 at 8.00 a.m. The court also ordered payment of a considerable amount of money being salary and other benefits for the period the respondent was out of employment by 31st December 2020.
3. The applicants further stated that the position the respondent used to occupy had already been filled by another officer; and that due to restructuring of the applicant's organization it was impossible to reinstate the respondent.
4. The deponent further averred that the intended appeal is arguable and set out various grounds to so demonstrate, among them being that the learned judge ignored the fact that the position which the respondent used to occupy had been filled; that an order for reinstatement of the respondent was not the most viable or appropriate remedy; and that the prayer for reinstatement could not be granted because as at the time the impugned judgment was delivered the respondent had been dismissed for a period of over three years and his replacement had been made more than two and a half years prior to the judgment.
5. The applicants further contended that unless the orders sought are granted, the 1st applicant will suffer irreparable damage for various reasons, among them that: if the appeal is allowed, the order for reinstatement would be very disruptive to both the 1st applicant and the respondent, and that the respondent will be incapable of refunding the money paid.
6. Lastly, the applicants stated that they are ready and willing to deposit such sum as security as this Court may order as a condition for stay of the impugned judgment.

7. The respondent opposed the application. He stated that the intended appeal is not arguable because the applicants did not file a statement of response, witness statement and a list of documents, nor call any witness; that the appeal will not be rendered nugatory for various reasons, among them being that the trial court did not award him damages, it only reinstated him and awarded his withheld salary and allowances which he was entitled to and therefore the issue of failure to repay the judgment sum does not arise.

8. On the issue of reinstatement beyond 3 years, the respondent stated that his purported termination took place on 11th October 2017 when the matter was in court and with orders that he should not be terminated, and the court delivered its judgment on 9th April 2020, which was less than 3 years and that he reported back to work on 2nd November 2020 but was advised to allow the applicants two weeks to organize his resumption to duty. For those reasons, we were urged to dismiss the application.

9. Parties filed written submissions, which we duly considered. It is now well settled that for this Court to grant an order of stay of execution pending appeal the applicant must demonstrate that the appeal or intended appeal is arguable, and unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. An arguable appeal is not one that must necessarily succeed, but one which ought to be fully argued before the Court. See **Joseph Gitau Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008.**

10. The respondent argued that the intended appeal is not arguable because the applicants did not file a statement of defence, witness statements or tender any evidence to controvert the respondent's evidence. On the other hand, the applicants explained the circumstances that led to their failure to file a statement of defence, witness statements and adduce evidence, attributing that to a mistake of their previous advocates, and faulted the learned judge for failing to exercise his discretion to set aside the judgment and allow them to defend the suit.

11. Whether the learned judge exercised his discretion judiciously or not in dismissing the applicants' application to set aside the judgment is an arguable issue in the intended appeal. Apart from that, the applicants raised several other grounds that in our view are arguable, for example, whether reinstatement of the respondent was the most viable remedy in the circumstances, taking into account various decisions of this Court; and whether the position that the respondent used to occupy had been filled. As earlier stated, even one arguable ground of appeal suffices. Consequently, we are satisfied that the intended appeal is arguable.

12. Turning to the nugatory aspect, if the orders sought are not granted and the respondent is reinstated and paid all the money as ordered and eventually the appeal succeeds, the respondent may not be able to refund the public funds that he will have been paid. We say so because the respondent did not say anything about his financial status. We therefore think that the appeal will be rendered nugatory if the orders sought are not granted.

13. The applicants stated that they are ready and willing to deposit such sum of money as security as the Court may order as a condition for stay of the trial court's judgment pending appeal. The trial court did not compute the amount payable to the respondent. It simply ordered the applicants to pay the respondent: -

*“i. Unpaid salary for period the claimant continues to be on interdiction at Kshs.35,496.00 per month.*

*ii. Health worker extraneous allowance Kshs.20,000.00 per month.*

*iii. Health Risk Allowance Kshs.3,850.00 per month.*

*iv. Cost of the suit.”*

14. The respondent was interdicted on 20th December 2013. He was subsequently dismissed, and he filed his claim before the ELRC on 11th February 2016, and the impugned judgment was delivered on 9th April 2020. The respondent needs to be certain that if the appeal is unsuccessful, he will recover the judgment sum.

15. In the final analysis, we allow the application and grant stay of execution of the trial court's judgment as well as the ruling made on 23rd October 2020 pending appeal, on condition that the applicants deposit a sum of **Kshs.3,500,000** in an interest earning account in the joint names of the advocates for the parties within thirty (30) days from the date of this ruling. The applicants shall bear the costs of this application.

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

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**