



REPUBLIC OF KENYA



**Permanent Secretary Ministry of Defence v Mwaniki & 25 others (Civil Application 311 of 2018) [2021] KECA 157 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 157 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 311 OF 2018  
F SICHALE, J MOHAMMED & S OLE KANTAI, JJA  
NOVEMBER 19, 2021**

**BETWEEN**

**PERMANENT SECRETARY MINISTRY OF DEFENCE ..... APPLICANT**

**AND**

**SIMON MWANIKI & 25 OTHERS ..... RESPONDENT**

*(An application for stay of execution of the Judgment and Order of the Employment and Labour Relations Court at Nairobi (H. Wasilwa, J.) delivered on 18th June 2018 in Nairobi ELRC Petition No. 97 of 2015)*

**RULING**

1. Before us is a Notice of Motion dated 30th October, 2018 in which the Permanent Secretary Ministry of Defence (the applicant) seeks an order of stay of execution pending appeal of the judgment of the Employment & Labour Relations Court (ELRC) in Nairobi (Wasilwa, J.) dated 18th June, 2018. The application is brought under Rule 5(2) (b) of the [Court of Appeal Rules](#) (this Court's Rules). Simon Mwaniki & 25 others are the respondents herein.
2. A brief background of the application is that in the impugned judgment, the learned Judge granted the respondents (who were former employees of the applicant) damages of Kshs 500,000/= each and made an order for payment of salary arrears and costs.
3. The application is premised inter alia on the ground that the respondents are at liberty to proceed with execution of the impugned judgment to the serious detriment of the applicant.
4. It is the applicant's case that it filed an appeal (Civil Appeal No. 37 of 2019); that the appeal is arguable with a high probability of success and that the appeal will be rendered nugatory if the orders sought are not granted; and that if the decretal sums are paid out to the respondents before the hearing and determination of the appeal, the applicant will not be able to recover the same from the respondents who have no capacity to refund the decretal sum.



5. In an affidavit sworn by Mr. Saitoti Torome, (Mr. Torome), the applicant's Principal Secretary, it was deponed: that the respondents obtained judgment in their favour from the ELRC; that the applicant was aggrieved and appealed to this Court; that the subject matter appealed against the ruling and order concerns the award of a colossal Kshs 20 million in claimed damages and alleged withheld salaries and allowances which funds will be drawn from the public coffers thereby funded by the tax payers of this Country; that should the execution proceed in the absence of stay, there is a likelihood of contempt proceedings being preferred against Mr. Torome and other Government officials for lack of payment considering the non-budgetary allocation of the colossal sum awarded; that should the payment be effected as ordered by the ELRC and the appeal succeeds it would difficult to recover the amount from the respondents considering the colossal nature of the amount, and lack of knowledge on the part of the applicant of the net worth of the respondents.

### **Submissions**

6. The application was heard by way of written submissions due to the Covid 19 pandemic. The applicant submitted that it has an arguable appeal with a high probability of success and that their draft memorandum of appeal raises arguable grounds inter alia: that the learned Judge erred in finding that the respondents violated the right to fair trial under Article 47 of the Constitution on the basis of lack of an oral hearing; that the learned trial Judge misdirected herself by finding that the respondents were employees of the Armed Forces and hence not subject to the *Employment Act*; that the learned Judge erred in fact and law by holding that the rights of the respondents under Articles 41, 47 and 50 of the Constitution were infringed upon by the 1st respondent; and that the learned Judge erred in law by finding that the provisions of the 3rd respondent's Human Resource Manual was flawed and did not comply with the Constitution on fair administrative action.
7. On the nugatory aspect, it was the applicants' contention that if the orders sought are not granted, the fruits of the appeal will be futile for the reasons that the ELRC found that the Constitutional rights of the respondents had been infringed and ordered that they be paid all their dues which were withheld during the interdiction period, which order still stands pending the determination of this application; that the learned Judge ordered that each petitioner be paid Kshs 500,000/= as damages for breach of their Constitutional rights; that if the respondents proceed to execute the impugned judgment, the applicant will have no recourse and the appeal will be totally spent; and that the respondent will not suffer any prejudice if the execution is stayed pending the hearing and determination of the appeal.
8. There was on record no replying affidavit or written submissions filed by the respondents despite service.

### **Determination**

9. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
10. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and another v. Investech Bank Limited and 3 others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is



arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

11. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction.
12. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR (Civil Application No. Nai. 31 of 2012) where this Court described an arguable appeal in the following terms:
  - “vii). 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.
  - viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
13. We have carefully considered the grounds set out in the motion. In our view it is arguable inter alia whether the ELRC erred in law in finding that the respondents were subjected to a flawed disciplinary process; and whether the ELRC misdirected itself in finding that the respondents were employees of the Armed Forces and therefore not subject to the *Employment Act*. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
14. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (supra) this Court stated that:
  - “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
  - x). Whether or not an appeal will be rendered nugatory 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.
15. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. We find that in the circumstances of the instant application, it may be difficult to recover the amount paid to the respondents considering the colossal amount and the lack of knowledge of the net worth of the respondents, absent stay. Further if the orders sought are not granted and execution proceeds, there is a likelihood of contempt proceedings being preferred against Government officials for failure to make payment as ordered in the impugned judgment.
16. In the circumstances of the instant application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted.



16. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange’the Kinyanjui (supra).
18. The upshot is that the Notice of Motion dated 30th October, 2018 is allowed. Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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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**

