



REPUBLIC OF KENYA



KENYA LAW
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**Njoka v Nyang'au & 3 others (Civil Application E291 of 2020)
[2021] KECA 182 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 182 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E291 OF 2020
HM OKWENGU, F SICHALE & J MOHAMMED, JJA
NOVEMBER 5, 2021**

BETWEEN

EVANGELINE NJOKA APPLICANT

AND

CATHERINE NYAKOBOKE NYANG'AU 1ST RESPONDENT

**KENYA NATIONAL COMMISSION FOR UNESCO (KNATCOM) 2ND
RESPONDENT**

**INSPECTOR - GENERAL OF THE NATIONAL POLICE
SERVICE 3RD RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

*(Being an application for stay of the ruling of the Employment and Labour Relations Court
at Nairobi (Wasilwa,J) dated 17th September, 2020 in ELRC Petition No. 82 of 2020)*

RULING

1. By a Notice of Motion predicated mainly on Rule 5 (2) (b) of this Court's Rules, the applicant Dr. Evangeline Njoki sought the following orders:

"(1) Spent.

(2) That pending the hearing of this application interpartes, this Honourable Court to order a stay of proceedings in Nairobi ELRC No. 82 of 2020 Catherine Nyakoboke Nyang'au vs. Dr Evangeline Njoka, KNATCOM, Inspector General of Police and Attorney General and all consequential orders issued thereon.

(3) That pending the hearing of this appeal, this Honourable Court do order a stay of proceedings in Nairobi ELRC No. 82 of 2020 Catherine Nyakoboke Nyang'au vs. Dr.



Evangeline Njoka, KNATCOM, Inspector General of Police and Attorney General and all consequential orders issued thereon.

(4) That the Honourable Court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.

(5) That costs of this application be provided for”.

2. The motion was supported by the applicant’s affidavit, sworn on 22nd September, 2020 in which she deponed as the Chief Executive Officer of the 2nd respondent that the 1st respondent (Catherine Nyakobo Nyang’au) had obtained an order injuncting the 2nd respondent against terminating her employment; that on 17th September, 2020, following the 1st respondent’s application for contempt, Wasilwa, J. found the applicant to be in contempt of the order of 27th May, 2020 of reinstatement of the 1st respondent and that the said order was made inspite of the fact that the court order which she is alleged to have breached had lapsed by effluxion of time; and that should the 1st respondent who had since been charged with a Criminal Offence be reinstated, this would ... create a scene at the office and completely spoil the working environment ...” and finally, that her reputation as a public officer is at stake, absent an order of stay.
3. On 3rd March, 2021, the motion came before us for hearing via the virtual platform in presence of learned counsel Mr. Kirimi for the applicant, Mr. Manwa for the 1st respondent and Mr. Migwa holding brief for Mr. Gitonga for the 2nd respondent. There was however no appearance for the 3rd and 4th respondents inspite of service of a hearing notice vide an email of 19th January, 2021.
4. Mr. Kirimi placed reliance on the appellant’s written submissions filed on 22nd September, 2020. He contended that it is arguable as to whether one can be found in contempt of a Court order whose tenor and import had lapsed; that Wasilwa, J erred in finding against the applicant based on a “dead order” and that absent stay, the applicant will be greatly prejudiced were she to be found guilty of contempt of Court.
5. Mr. Manwa relied on the 1st respondent’s submissions dated 5th October 2020 in which it was contended that contrary to the appellant’s assertions, the exparte orders issued on 27th May, 2020 did not lapse by operation of the law on expiry of 14 days as the order was to the effect that: “2. That the respondent be and is hereby injuncted against termination of the petitioners’ services pending the hearing of this application interparties (sic) or until further orders of this Court”; thus, the orders of 27th May, 2020 had not lapsed. On the nugatory aspect, it was contended that the respondent will be greatly prejudiced as the issue before the court was about her employment. Further that the orders issued on 17th September, 2020 are reversible and in the alternative, damages can reasonably compensate the applicant herein.
6. On his part, Mr. Migwa for the 2nd respondent supported the motion.
We have considered the motion, the rival oral and written submissions, the authorities cited and the law.
7. The motion before us is predicated on Rule 5(2)(b). As often stated, this is now a well beaten path. An applicant such as the one before us has to demonstrate that he/she has an arguable appeal that will be rendered nugatory, absent stay. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2103] eKLR where it was held:
 - i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.



- v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- viii. An applicant must satisfy the Court on both the twin principles.
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- x. 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.
- xi. 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.
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

8. In the motion before us, we are in agreement that it is arguable as to whether one can be found guilty of an order of court that has lapsed by effluxion of time and as to whether an order issued for a specified period requires extension, failing which one cannot be found to have been in contempt.

9. On the nugatory aspect, the applicant states that she would be greatly prejudiced if she was to be found guilty of an order of contempt, the consequences being obvious. We agree. Defiance of a Court order is a serious issue that would attract consequences, most times penal that may be irreversible even if the intended appeal were to succeed. We are satisfied that the 2nd limb has also been satisfied.

10. It is in view of the above that we find that the two limbs have been satisfied. Accordingly, we grant prayer 3 of the motion dated 24th September, 2020 and issue an order of stay of proceedings in Nairobi ELRC No. 82 of 2020 Catherine Nyakoboke Nyangáu vs. Dr. Evangeline Njoka, KNATCOM , the Inspector General of Police and the Attorney General pending the hearing and determination of the appeal. The costs of the motion shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE



.....
JUDGE OF APPEAL

J. MOHAMMED

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

