



**St. Marys Mission Hospital Limited & another v Alex Makau & 343 others (Civil Appeal E139 of 2021) [2021] KECA 299 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 299 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E139 OF 2021  
W KARANJA, MA WARSAME & P NYAMWEYA, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**ST. MARYS MISSION HOSPITAL LIMITED ..... APPELLANT**

**AND**

**ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES . APPLICANT**

**AND**

**ALEX MAKAU & 343 OTHERS ..... RESPONDENT**

*(An Application for stay of further proceedings pending the hearing and determination of an appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) dated 6th March, 2020 in ELRC Cause No. 2 of 2018 Consolidated with ELRC Cause No. 3 of 2018)*

**RULING**

1. The Application before us dated 31st March, 2021 seeks stay of execution of the judgment of Maureen Onyango (J) dated 6th March, 2021 and stay of further proceedings in ELRC No. 2 of 2018 as consolidated with Cause No. 3 of 2018 pending the hearing and determination of the appeal. A brief background of this matter will help place the application in perspective.
2. St. Mary's Mission Hospital is a limited liability company registered in Kenya as a company limited by guarantee. It was incorporated in Kenya on 22nd June, 1999 to among other things, run a hospital and training facility for medical interns, postgraduate students and nurses. The company operates two hospitals, St. Mary's Mission Hospital in Langata Nairobi, and St. Mary's Mission Hospital, Elementaita, Nakuru County.
3. The respondents herein were employees of the two hospitals in Langata, Nairobi and Elementaita. The origin of this suit was Nakuru Civil Suit No. 224 of 2010 between William Charles Fryda vs



Assumption Sisters of Nairobi Registered Trustees and Another as consolidated with Nakuru ELC Civil Suit No. 238 of 2012 between Regina Pacis University College (through the Board of Trustees) and Another vs William Charles Fryda. The two suits arose out of disagreement over ownership and management of the two hospitals in Langata, Nairobi and Elementaita. In his judgment delivered on 28th September, 2017 Sila J. gave orders that required change of ownership/management of the said institutions.

4. In the cause of the change of management, which is alleged to have been marred with violence, the operations were disrupted, some employees are said to have left, others were absorbed in the new management while others claim to have been terminated unfairly. Some of the employees filed claims before the Employment and Labour Court (ELRC) claiming several reliefs. The court considered the pleadings filed by the parties, their submissions and the evidence presented before it. It emerged during the hearing that the applicants herein had since reinstated and or issued fresh contracts to several employees, some of who have withdrawn from the suit. It further emerged that although there were orders preserving their employment, the applicants went ahead and dismissed some employees for failure to either submit employment records or for absconding duty.
5. The Court noted that apart from such dismissal being in disobedience of the court orders of 4th January 2018, it was evident from the testimony of the witnesses for both the appellants and respondents that the employees who were dismissed were never taken through disciplinary process as envisaged in Sections 41, 43 and 45 of the *Employment Act*. The Court held that having found that the respondents lost their jobs as a direct consequence of the violent manner in which the appellants took over the hospitals and their disobedience of the court orders preserving such employment, in both suits herein and in ELC Case No. 224 of 2010, the Court found that the respondents were unfairly terminated.

For those reasons the court awarded each of the respondents against the applicants jointly and severally – salary for January 2018, one month’s salary in lieu of notice and 6 months’ salary as compensation.

6. For the avoidance of doubt, the court held that all employees who were dismissed would be paid as per the award as the dismissal did not comply with the relevant provisions of the *Employment Act* and the employees who were re-employed and/or withdrew from these proceedings will not benefit from the award therein and the respondents would jointly and severally pay the claimants’ costs.
7. Being aggrieved the applicants filed an Appeal vide the Notice of Appeal dated 16th March, 2020 and filed the instant application. In the application, the applicants aver that unless the orders sought are granted the applicants would suffer irreparable loss; that they have an arguable appeal which is not a sham, that the court has powers to grant the orders sought and that it was in the interest of justice that the orders sought be granted.
8. The application is opposed by the respondents vide the affidavit sworn by Peter Lemaiyan on 12th April, 2021. The respondent deposes that the learned Judge in her judgment excluded all the employees who had withdrawn their claims and all those who had been reinstated from benefitting from the award. He maintains that the award is not ambiguous as claimed and further, that the applicant had actually admitted that those who were sacked were entitled to their terminal benefits.
9. Both parties have filed submissions in which they have reiterated and amplified their rival positions. On whether the appeal is arguable, the applicants rely on the five grounds as captured in their Memorandum of Appeal and specifically submit that the learned Judge erred in making a finding that the employees at Elementaita were justified in taking the action they took as they had reasonable apprehension that their fate would be like that of the employees at Langata; that the learned Judge erred in law in finding that the employees’ actions were based on reasonable apprehension and that



- courts do not make decisions based on speculation. That it is from these facts that they submit that this appeal is arguable. On whether the respondents were unfairly terminated from employment or not they submit that they were not unlawfully and/or unfairly terminated.
10. On whether the appeal will be rendered nugatory, they submit that based on the award by the ELR Court, the respondents have proceeded to file two bills of costs dated 19th August, 2020 each seeking a total of Kshs. 24,671,885/=, that directions have been given in the said bills of Costs and the same came up for mention on 13th April, 2021 for purposes of taking date for ruling, that if the said bills are taxed the respondents herein could proceed with execution and the applicants are likely to suffer substantial financial loss, and the appeal herein will be rendered nugatory. They submit that they have met the threshold for granting Orders under Rule 5(2)(b) of the *Court of Appeal Rules* and pray that the application be allowed as prayed.
  11. On their part, the respondents in their written submissions are emphatic that the application is frivolous and that there are no reasons given to persuade the Court to stay taxation of the bills of costs. Furthermore, other than stating that the amount in the bills of costs, which have not even been taxed, is huge, the respondents have failed to demonstrate how the appeal will be rendered nugatory in the event stay is denied and the appeal eventually succeeds.
  12. What we need to do now is to subject these facts to the applicable test in order to determine whether this application passes the threshold required of applications predicated on Rule 5(2)(b) of the Rules of this Court. The test is set out in what has come to be referred to as the twin principles of arguability and the nugatory aspect.
  13. To entitle the applicants to the order of stay of execution that it has sought, the applicants are obliged to satisfy us that the intended appeal is arguable and that if we do not grant stay of execution and the appeal succeeds, it will be rendered nugatory. (*See Jaribu Holdings Ltd vs Kenya Commercial Bank Ltd.*, CA No. 314 of 2007). To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues. (*See Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union*, CA No. Nai. 72 of 2001).
  14. On the arguability of the intended appeal, as stated earlier, the applicant faults the learned Judge for including in the award employees who had withdrawn their claims and others who may have been re-hired. A cursory look at the impugned judgment, reveals that indeed the learned Judge did state in her decision that these two categories of workers were excluded from benefitting from the judgement. What perturbs us however is how this list is going to be determined and by whom. We agree with the applicants that the impugned judgment is ambiguous to that extent and may be difficult to execute. The applicants also aver that the respondents who claim to have been dismissed actually left in protest following the change of management of the hospitals and were not actually dismissed. These are issues which in our view are not frivolous and need to be determined on appeal. The application therefore, passes the test on arguability.
  15. On the nugatory aspect, we have seen the figures given as the amounts claimed in the two bills of costs and to say the least, they are humongous. The applicant is a charitable institution offering health services to members of the public at subsidized cost. Execution of such costs against them would definitely bring the institutions onto their knees. In the event the appeal succeeds, it would be difficult to reverse the effects of such execution, thus rendering the appeal nugatory.
  16. We are satisfied that the application passes the threshold set for applications of this nature. Accordingly, we allow it and stay execution of the impugned judgment and also stay any further proceedings in



ELRC Cause No. 2 of 2018 as consolidated with Cause No. 3 of 2018 until the appeal herein is heard and determined. Costs of the application will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

