



REPUBLIC OF KENYA



**Judicial Service Commission & another v Njora (Civil Appeal (Application)  
486 of 2019) [2020] KECA 713 (KLR) (24 April 2020) (Ruling)**

*Judicial Service Commission & another v Lucy Muthoni Njora [2020] eKLR*

Neutral citation: [2020] KECA 713 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 486 OF 2019  
W KARANJA, HM OKWENGU & F SICHALE, JJA**

**APRIL 24, 2020**

**BETWEEN**

**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> APPELLANT**

**THE CHIEF REGISTRAR OF THE JUDICIARY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LUCY MUTHONI NJORA ..... RESPONDENT**

*(Being an application for stay of execution against the judgment of the  
Employment and Labour Relations Court at Nairobi (Nelson Abuodha,  
J.) delivered on 20th September, 2019 in Petition No. 50 of 2018)*

**RULING**

1. Lucy Muthoni Njora, the respondent herein was employed by the Judicial Service Commission (1st applicant). At the material time, she was deployed in the Supreme Court as a Deputy Registrar of that Court. On the 15th of June, 2016 she was served with a letter of interdiction accusing her of gross misconduct. Subsequently, disciplinary proceedings were initiated by the 1st applicant. On 26th January, 2018 the respondent was served with a letter from the 1st applicant terminating her employment. The respondent who was aggrieved filed a suit in the Employment and Labour Relations Court against the 1st applicant and the Chief Registrar of the Judiciary (2nd applicant).
2. On the 20th September, 2019 the E&LRC (Abuodha, J) delivered a judgment in which it declared that the disciplinary proceedings involving the respondent and her eventual termination from service were unfair, lacked valid reasons, and therefore null and void. Consequently, the learned Judge ordered the 1st applicant to reinstate the respondent back to judicial service from the date of dismissal, without loss of salary and benefits.



3. The applicants were dissatisfied by the judgment and filed a notice of appeal on 25th September, 2019. By a notice of motion dated 4th October, 2019, the applicants moved the Court for an order of stay of execution of the decree emanating from the E&LRC pending the hearing and determination of the intended appeal.
4. The motion was supported by an affidavit sworn by Winfrida Mokaya, the Registrar of the 1st applicant, who maintained that the applicants have an arguable appeal. She listed five grounds which they intend to argue. She further deponed that the position that the respondent was holding as a judicial officer was one of trust involving the exercise of judicial administrative functions, such that her reinstatement would have an impact in the overall administration of justice, and that if the appeal succeeds, any decisions or actions of the respondent during the pendency of the appeal would be rendered null and void, thereby occasioning grave injustice and disruption of the administration of justice to litigants. Further, that such an action would cause loss of public confidence in the judiciary.
5. Mr. Cyril Kubai, learned counsel who argued the motion on behalf of the applicants, faulted the judgment of the E&LRC arguing that contrary to its mandate, which was review of the disciplinary process, the E&LRC usurped the jurisdiction vested in the 1st applicant as it considered the merits of the decision. Relying on Nairobi, Civil Appeal (Application) No. 299 of 2019, Chief Justice and President of the Supreme Court of Kenya & Anor. v Brian Mandila Khaemba, counsel argued that because the respondent's position involves the exercise of judicial power, which may affect the public, the intended appeal is likely to be rendered nugatory if the applicants are compelled to reinstate the respondent before the appeal is heard and determined.
6. In a replying affidavit sworn on 21st November, 2019, respondent contended that in issuing the impugned judgment the the E&LRC was exercising its jurisdiction conferred under Article 165(6) of the *Constitution*, to adjudicate disputes between an employer and an employee, as well as the powers conferred under the *Fair Administrative Actions Act* and the *Judicial Service Act*; that the E&LRC was right in finding that the disciplinary process was not conducted in accordance with the law; that the intended grounds of appeal raised against the impugned judgment are vexatious frivolous and lacked merit; and that her reinstatement would not negatively impact the overall administration of justice because her docket involved administration and not judicial duties.
7. The respondent pointed out that although she has been reporting on duty on a daily basis since 23rd September, 2019 following her reinstatement, the applicants had not reinstated her to payroll as ordered by the trial court, nor has she been assigned any duties. She urged that the applicants did not merit the exercise of the court's discretion in their favour, as they had not complied with court orders.
8. Mr. Siganga, learned counsel who represented the respondent at the hearing of the motion reiterated that the intended appeal does not raise any arguable issues; that the respondent was dismissed for a different reason other than the original charge subject of the disciplinary proceedings; that the appeal will not be rendered nugatory as the respondent's work in the Supreme Court as the Deputy Registrar is mainly administrative; that although the respondent has reported back to work, she has not been assigned any work or restored into the payroll, and therefore the applicants have ignored the court order and are not entitled to the order of stay of execution which is a discretionary order. In this regard counsel relied on *Judicial Service Commission v Maxwell Miyawa & 7 Others* [2018] eKLR.



9. The circumstances under which an application under Rule 5(2)(b) of the *Court Rules* is to be determined is now well settled. These were well summarized in *Stanley Kangethe Kinyanjui v Tony Ketter & 2 others* [2013] eKLR). They include:

- “(iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- (iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- (v) An applicant must satisfy the court on both of the twin principles.
- (vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- (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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- (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.
- (ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- (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.”

10. The issue that we must therefore address is whether the threshold provided in the twin principles have been met. The twin principle requires an applicant to demonstrate that the appeal or intended appeal is arguable and not capricious or frivolous; secondly, that unless the applicant is granted an order of stay of execution, the intended appeal, if successful, would be rendered nugatory. (*Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1EA 227.

11. On the first limb as to whether the intended appeal is arguable and not frivolous, this Court’s decision in *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* Civil Application Nai. No. 72 of 2001 is instructive:

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”

12. The applicants have already filed a substantive appeal, which is Civil Appeal No. 486 of 2019. The record of appeal contains a memorandum of appeal, which raises 7 grounds of appeal. As pointed out by the applicants’ counsel, the issue whether the learned Judge properly appreciated the jurisdiction



of the E&LRC in dealing with the respondent's claim and whether the court usurped the powers of the 1st applicant, is a pertinent issue that needs to be resolved. This suffices to demonstrate that the appeal is arguable.

13. On the second limb regarding whether the appeal would be rendered nugatory if the orders sought are not granted, the applicants are concerned that the order made by the learned Judge for reinstatement of the respondent to her judicial position, is likely to result in gross injustice to the public as any decisions made by her during the pendency of the appeal may be challenged if the appeal is successful, and this will result in loss of confidence in the judicial process.
14. Although it was argued that the respondent is currently deployed in carrying out administrative duties, the respondent's position as a judicial officer includes discharging both administrative and judicial duties. This means that if reinstated to her position, the respondent has the mandate to carry out both these duties and may, therefore, exercise judicial power and authority. At this stage, the position of the respondent is nebulous and should the intended appeal succeed, any judicial decision or authority that she may have exercised during the pendency of the appeal may be brought into question, and it may not be possible to reverse the position of affected innocent litigants. This Court has the responsibility to protect litigants and the integrity of the court, even as it protects the interest of the parties before it.
15. For the above reasons, we find that an order of stay of execution of the order of the E&LRC in regard to the order for reinstatement of the respondent back to judicial service should issue pending the hearing of the appeal. As regards the order for payment of salary and benefits, we direct that the respondent be restored into the payroll and be paid half salary pending the hearing and determination of the appeal, and that the hearing of the appeal be fast tracked. Costs of the application be in the main appeal.

Those shall be the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2020.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

