



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, OKWENGU & SICHALE JJ.A]

CIVIL APPEAL APPLICATION NO. 334 OF 2019

BETWEEN

KABALE TACHE ARERO.....APPLICANT

AND

DR. SALOME MUNUBI.....1ST RESPONDENT

DR. FIBIAN LUKALO.....2ND RESPONDENT

FRANCIS MUGO.....3RD RESPONDENT

LEONARD OMULLO.....4TH RESPONDENT

PROFESSOR MUHAMMAD SWAZURI

CHAIRMAN NATIONAL

LAND COMMISSION.....1ST INTERESTED PARTY

EMMANUEL BUSERA.....2ND INTERESTED PARTY

(Appeal from the ruling of the High Court of Kenya at Nairobi (Onyango, J)

dated 7th October, 2019 and all consequential orders issued on 11th October, 2019

IN

ELRC No. 8 of 2019)

RULING OF THE COURT

The applicant, **Kabale Tache Arero**, has come to this Court under **Rule 5(2) (b)** of the Court of Appeal Rules seeking the following orders:

“

(1) *Spent*

(2) *That this Honourable Court do issue an order of stay of the proceedings of ELRC Petition 8 of 2019 and stay of execution of the orders and any further orders from the Employment and Labour Relations pending the hearing and determination of this application and the intended Appeal.*

(3) That this Honourable Court be pleased to issue a temporary order of stay of execution of the Ruling delivered on the 7th October, 2019 by the Hon. Lady Justice Maureen Onyango and all consequential orders therein pending the hearing and determination of this application.

(4) That this Honourable Court be pleased to issue an order of stay of execution of the Sentencing and further Orders delivered on the 11th October, 2019 by the Hon. Lady Justice Maureen Onyango and all consequential orders therein pending the hearing and determination of the Appeal against the said ruling.

(5) That the costs of this application be in the cause.”

The dispute giving rise to the applicant’s Notice of Motion dated **15th October, 2019** stems from a judgment of the Employment & Labour Relations Court (**Onyango J.**) delivered on **24th May, 2019** where the court found in favour of **Dr. Salome Munubi, Dr. Fibian Lukalo, Francis Mugo and Leonard Omullo**, the 1st, 2nd, 3rd & 4th respondents respectively, by rendering herself as follows:

“I will therefore order and do hereby order, that the contracts of all the petitioners be renewed according to the resolution of the Commission at its meeting of 8th May, 2018, and the subsequent special meeting of the Commission held on 13th December, 2018 so that they do not become victims of the infighting among the Commissioners of the NLC”

Almost three weeks after this Judgment, on **13th June, 2019**, the respondents filed a motion under certificate of urgency seeking to have the acting chief executive officer of the National Land Commission (NLC) (the applicant) held in contempt of the orders issued on **24th May, 2019** with respect to the renewal of the respondent’s contracts.

Upon hearing the application and the grounds of objection raised by the applicant and the interested parties, the learned Judge exercised her discretion in the respondents’ favour, and held as follows:

“I find that KABALE TACHE ARERO the Secretary/CEO was aware of the orders of this(sic), was served with the decree and wilfully (refused to comply with the same. I further find that she further locked out the 2nd and 4th Petitioners/Applicants in direct and wilful disobedience of this court’s judgment delivered on 24th May and decree dated 3rd June 2018. I therefore find that the said KABALE TACHE ARERO is in contempt of the judgment and decree of this court. The case will be mentioned on 11th October 2019 for mitigation and sentencing.”

Aggrieved by the ruling, orders and directions given on **7th October, 2019**, the applicant filed an amended Notice of Appeal dated **8th October, 2019** and a Notice of Motion application before the High Court similarly dated urgently seeking to stay proceedings before the ELRC pending the determination of the application and the intended appeal.

However, on **11th October, 2019**, the trial court sentenced the applicant to pay a fine of Kshs. 300,000.00 and ordered the person currently holding the office of Secretary/Chief Executive Officer to implement the Judgment of the court delivered on **24th May, 2019** and that further disobedience and non-compliance would constitute further acts of contempt.

The applicant has consequently filed the present application before us seeking the orders earlier mentioned. The application is predicated on the grounds that the intended appeal is arguable to the extent that the applicant was not party to the proceedings before the ELRC and the execution of the judgment was not directed at her. Moreover, the term of the commissioners of the NLC had expired on **19th February, 2019** and the trial court declined to hear the applicant’s application dated **8th October, 2019** seeking stay of execution and strictly proceeded to mitigation and sentencing.

Secondly, the applicant contended that the intended appeal would be rendered nugatory if the orders sought were not granted because there was a real likelihood that the respondents would file a further application for contempt with the intention to execute against the applicant despite being served with the amended Notice of Appeal. In a further supporting affidavit by the applicant dated **30th October, 2019** it was deposed that indeed on **24th October, 2019** the

NLC was served with a further Notice of Motion application seeking primarily to cite the applicant for further acts of contempt and to commit her to civil jail for a period of six months.

In opposing the application, the respondents vide a Replying Affidavit dated **28th October, 2019** sworn by **Dr. Fibian Lukalo**, director-research and advocacy at the NLC, deposed that the instant application was overtaken by events given that the applicant had already been cited and punished for contempt. Furthermore, the applicant could not seek a stay of the Judgment dated **24th May, 2019** since the Judgment had not been challenged on appeal.

It was also deposed that the applicant did not have an arguable appeal given that the chief executive officer/secretary of the NLC had all the powers to implement the decisions of the NLC including decisions made by previous commissioners whose contract had lapsed. Nonetheless, the applicant had removed the respondents from the payroll and locked their offices and intentionally refused to abide by court orders. Lastly it was deposed that the effect of the orders sought would be to deny the respondents the fruits of the judgment and to aid the applicant in furthering her acts of contempt.

Elaborating on the arguability of the intended appeal, counsel for the applicant **Mr. Ahmednasir** appearing with **Miss Kanyiri**, submitted that the Petition before the ELRC was dismissed for lack of merit but the learned Judge on her own motion granted prayers which had not

been sought for and which could not be implemented since the respondents' contracts had expired. Relying on the case of *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another [2019] eKLR, Civil Appeal No. 379 of 2017*, counsel contended that the learned Judge had no power to alter the orders it had made earlier. The orders issued on **11th October, 2019**, constituted a fresh order to be specifically enforced by the applicant. Citing the decision in the case of *National Bank of Kenya Limited & another v Geoffrey Wahome Muotia [2016] eKLR, Civil Application No NAI 283 of 2015 (UR 241/2015)* counsel stated that if the court did not grant the orders sought, the High Court proceedings would continue, the applicant may be sentenced leading to loss of liberty and in any event the intended appeal will be rendered nugatory.

On his part, **Mr. Malenya**, learned counsel for the respondents, contended that the Petition before the trial court was to determine a single issue- whether the respondents were on permanent and pensionable terms or on contract terms.

The court determined that they were on contract and ordered their contracts to be renewed. Albeit conceding that the appeal was arguable he maintained that the intended appeal would not be rendered nugatory. Citing this Court's decision in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government vs Miguna Miguna & 4 others [2018] eKLR, Civil Application No. Nai. 1 of 2017 (Ur 1/2018)*, Counsel espoused the position that once a party is found to have breached, disobeyed or violated court orders such person will not be given audience before court until he first purges his contempt.

The applicant had been cited for contempt of court orders and no remedy could lie on appeal or in an application for stay of execution.

Opposing the application **Mr. Okubasu** learned counsel for the 1st Interested Party stated that there was nothing to stay given that the applicant had been cited for contempt and had paid the requisite fine. Referring to the applicant's further supporting affidavit dated **30th October, 2019**, counsel stated that it was evident that the applicant had not complied with court orders in spite of the fact that she was the CEO of the NLC.

We have considered the motion and the supporting affidavit, the further supporting affidavit sworn on **30th October, 2019**, the 2nd respondent's affidavit sworn on **28th October, 2019**, the applicant's list of authorities and digest dated **30th October, 2019**, the respondents' list and digest of authorities filed on **19th October, 2019**, the submissions made before us and the law.

The applicant's motion is predicated on Rule 5(2) (b) of this Court's Rules.

In consideration of an application under Rule 5 (2) (b), an applicant has to satisfy that he/she has an arguable appeal that will be rendered nugatory absent stay.

As always, our jurisdiction under *Rule 5(2) (b)* is discretionary and fairly wide, guided only by the interests of justice. In the judicious exercise of this discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of *Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR* as follows :

"

- 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. See *Ruben & 9 others v Nderitu & Another (1989) KLR 459.***
- ii) The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**
- 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.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by the evidence they claim". International Laboratory for Research on Animal Diseases v. Kinyua [1990] KLR 403.

One of the issues that the applicant wishes to urge on appeal is whether orders can be made against a party who is not a party to proceedings and that no specific directions were given to the appellant. In our view, this is not an idle grievance and we are satisfied that the applicant has satisfied the condition of arguability.

On the 2nd limb of nugatory, the applicant had contended that he is likely to face incarceration, thus she would lose her liberty and if her appeal was to be successful, then the incarceration cannot be undone. In our view, the applicant has satisfied the 2nd limb of nugatory.

In view of the above, we grant the order sought in the motion of 15th October, 2019.

We make no order as to costs.

Dated and Delivered at Nairobi this 3rd Day of April, 2020.

W. KARANJA

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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