



Waithaka v Tribunal appointed to investigate the conduct of the Honourable Lady Justice Lucy Njoki Waithaka & another; Kenya Magistrates & Judges Association (Interested Party) (Civil Application 8 of 2020) [2020] KECA 571 (KLR) (19 June 2020) (Ruling)

Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association (Interested Party) [2020] eKLR

Neutral citation: [2020] KECA 571 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 8 OF 2020
MK KOOME, MSA MAKHANDIA & AK MURGOR, JJA**

JUNE 19, 2020

BETWEEN

JUSTICE LUCY NJOKI WAITHAKA APPLICANT

AND

**THE TRIBUNAL APPOINTED TO INVESTIGATE THE CONDUCT OF THE
HONOURABLE LADY JUSTICE LUCY NJOKI WAITHAKA 1ST RESPONDENT
JUDICIAL SERVICE COMMISSION 2ND RESPONDENT**

AND

KENYA MAGISTRATES & JUDGES ASSOCIATION INTERESTED PARTY

(An application for stay of proceedings pending the hearing and determination of an appeal against the Judgment of the Employment and Labour Relations Court at Nairobi, (B. Ongaya, J.) dated 11th December, 2019 In ELRC Case No. 205 of 2019))

RULING

1. On 17th January, 2020 the applicant, Justice Lucy Njoki Waithaka filed a Notice of Motion pursuant to Rule 5 (2) (b) of this *Court's Rules*. The applicant sought an order staying the proceedings of the 1st respondent being the Tribunal that was appointed on 4th June, 2019 to investigate her conduct.
2. The motion was premised on the grounds that the applicant was an Environment & Land Court "ELC" Judge based in Nyeri until her suspension on 4th June, 2019. The suspension is what prompted



her to file a petition in Nairobi Employment & Labour Relations Court “ELRC” No. 205 of 2019 to challenge the constitutionality of her removal proceedings that were set to commence before the 1st respondent. The applicant is asserting her fundamental rights and freedoms which she claims will be violated should the 1st respondent proceed with the hearing. The applicant’s petition partially succeeded but she contends that in the impugned judgment, the court found some portions of the Gazette Notice No. 4851 published on 4th June, 2019 were unconstitutional to the extent that they were *ultra vires* the powers conferred upon the president under Article 168(5) of the Constitution and quashed them. The court further confined the 1st respondent’s investigations. Decision and report on the applicant to the petition or representations by the 2nd respondent against the applicant.

3. It was the applicant’s understanding that the impugned judgment allowed the 1st respondent to proceed with the investigation into her conduct limited to only considering and confining its investigation, decision and report thereof to the petition or representations by the 2nd respondent against her.
4. She was however dissatisfied with this decision and lodged a Notice of Appeal on 17th December, 2019 and also requested for typed proceedings and decree so as to lodge an appeal against the decision. She was however apprehensive that there was no order of stay of execution, injunction or stay of proceedings of the 1st respondent hence the 1st respondent was likely to commence investigations against her anytime. Indeed, the 1st respondent had already taken preparatory steps to commence the proceedings by serving her with a hearing notice. She claimed that her appeal was arguable with excellent chances of success as it raises important points of constitutional rights and freedoms and points of law as set out in the memorandum of appeal.
5. The applicant is also concerned that unless an order of stay of proceedings or injunction is granted against the 1st respondent, the appeal shall be rendered nugatory for reasons that: she would be forced to undergo a disciplinary process which violates and threatens to infringe on her fundamental rights and freedoms; the proceedings would undermine and violate her judicial independence as contemplated under Article 160 of the Constitution; and that the subject matter of the complaint against her being a judgment delivered in Kericho ELC Case No. 64 of 2008 is presently subject of an appeal before this Court in Nakuru. That unless there is prompt intervention by this Court the decision exposes the applicant to removal proceedings that would infringe on her constitutional rights and freedom as a judicial officer for actions undertaken in good faith and in the lawful performance of her judicial functions. That the application had been filed without undue delay and no prejudice would be caused to the respondents if the orders sought are granted.
6. The application was further supported by the applicant’s affidavit deposed to on the same date as the application. The said affidavit merely reiterates and expounds on the grounds exemplified above.
7. In a replying affidavit sworn by Anne A. Amadi, the Secretary of the 2nd respondent dated 3rd February, 2020 she deposed that the application was fatally defective, bad in law and an abuse of the court process. She contended that the 2nd respondent’s counsel was not served with the Notice of Appeal within the 14 days as required by Rule 75 of this Court’s rules. To her knowledge therefore there was no valid appeal pending before court hence the applicant had failed to satisfy the conditions for granting an order of stay under Rule 5(2) (b). The appeal could not in the circumstances be rendered nugatory. The 1st respondent and interested party did not file any papers either in support of or in opposition to the motion.
8. At the hearing of the motion, Mr. Muite, Senior Counsel and Mr. Nyaundi, learned counsel appeared for the applicant, Mr. Kioko, learned counsel appeared for the 1st respondent while Mr. Wamaasa,



learned counsel appeared for the 2nd respondent. There was no appearance by the interested party though served with the hearing notice.

9. Mr. Muite relied on the applicant's written submissions which he opted to highlight. He pointed out that a substantive appeal had been filed. His argument was that the appeal raised arguable grounds. He referred the Court to the impugned judgment and argued that the trial court abdicated its jurisdiction when it stated that the proper forum to deal with the constitutional issues raised in the petition by the applicant, was before the 1st respondent, but according to counsel, the 1st respondent had no jurisdiction to quash the decision of the 2nd respondent. Counsel submitted that the applicant heard a matter in Kericho which gave rise to the complaint before the 2nd respondent. His contention was that the issues in the Kericho judgment were decided in favour of both the plaintiff and the defendant therein and therefore the applicant could not be faulted for discharging her official duties. He refuted the allegation that the applicant wrote two judgments. On the nugatory aspect, counsel submitted that it was not appropriate for the applicant to go through the proceedings before the 1st respondent, when she should not have been there in the first place. That way, the appeal would be rendered nugatory.
10. Mr. Nyaundi on his part reiterated that there was an appeal pending before this Court in Nakuru arising from the judgment in Kericho, the subject matter of the complaint against the applicant and therefore there was a danger of two conflicting judgments emanating from this Court. He relied on the case of *Global Tours & Travels Limited; Nairobi Winding Up Cause No. 43 of 2000* in invoking the discretion of this Court in deciding whether or not to grant stay of proceedings. He contended that Article 168 of the *Constitution* deals with a party aggrieved with the decision of the tribunal on merit and that the tribunal cannot make a decision on Article 165 of the *Constitution* as the petition hinged on violation of constitutional provisions. He further refuted the allegation that the Notice of Appeal was not served and urged that it would be in the interest of justice for the application to be allowed.
11. Opposing the appeal, Mr. Kioko pointed out that the 1st respondent was not a conveyor belt and therefore the applicant would be accorded a fair trial. That the proceedings would be distinct and without interference from any quarters. He was of the view that if the application is allowed it will interfere with the constitutional mandate of the 1st respondent as appointed by the President. Counsel argued that Article 168(8) provided for recourse for a party aggrieved by the decision of the 1st respondent to the Supreme Court. That in any event the applicant was satisfied with the proceedings before the 2nd respondent.
12. Mr. Wamaasa similarly opposed the application. He contended that there was no appeal before Court that could be rendered nugatory. He reiterated that he had not been served with the notice of appeal within seven (7) days of filing. He was of the view that since the applicant's petition had been dismissed there was nothing to stay and that the 2nd respondent was functus officio having determined the issue.
13. We have anxiously and carefully perused the motion, the affidavits in support of and in opposition thereof, submissions by respective counsel and the law. The only issue for determination is whether the application has satisfied the conditions necessary for the grant of stay of proceedings.
14. The jurisdiction of this Court under Rule 5(2) (b) of the *Court of Appeal Rules* to entertain an application of this nature, is now well settled. The jurisdiction is original, unfettered and discretionary. The discretion though has to be exercised judiciously and with reason; not on the craze of impulse or pity. Further, for the applicant to succeed, he must first demonstrate that he has an arguable appeal, and secondly, that if the application is denied, the appeal if successful will be rendered nugatory. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others*, (2013) eKLR, this Court stated inter alia:



- 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 Gitabi 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. *Damji Pragji (supra)*.
 - 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 impecuniness, the onus shifts to the latter to rebut the allegation. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.
15. We adopt the above parameters in considering this application. We note that stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation. (See: *Francis N. Gitihari v Njama Limited* [2006] eKLR). It impinges on the right of access to justice, right to be heard without delay and the right to a fair trial. While addressing the issue of stay of proceedings in the persuasive case of *Global Tours & Travels Limited (supra)*, Ringera, J as he then was stated thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the



need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of whether or not the intended appeal will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

16. On the arguability aspect of the appeal, we have looked at the grounds raised by the applicant in the Memorandum of Appeal. The applicant alleges violation of her constitutional rights and fundamental freedoms, the failure by the court to exercise its jurisdiction under Article 23 and 165(3) (b) of the *Constitution* among other grounds. These grounds are not frivolous nor idle. They certainly make the appeal arguable. As already stated an arguable ground does not mean that it must necessarily succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. We are thus satisfied that the applicant has raised arguable issues sufficient to invite the respondents’ reaction and also deserving of the Court’s consideration.
17. Turning to the second limb, the factors which can render an appeal nugatory have to be considered on case to case basis and in doing so, the court is bound to consider the conflicting claims of both sides. It is common ground that there is an appeal pending before this Court arising from the judgment rendered by the applicant in Kericho. Should the proceedings before the 1st respondent continue, the outcome will be irreversible despite the outcome in the pending appeal. The complainant having been aggrieved had options on the cause of action to take and chose to file an appeal in this Court and also a complaint before the 2nd respondent. There is no telling the embarrassment the applicant is likely to face should the appeal be successful. At the end of the day, her image in the public eye would have been destroyed for good. These fears are certainly genuine and well founded. Further, the proceedings may well end up violating the applicant’s guaranteed constitutional rights under Article 160 of the *Constitution*. We are, in the circumstances satisfied that if the foregoing was to happen it will cause the applicant unnecessary hardship and render the appeal nugatory. In *Reliance Bank Ltd v Norlake Investments Ltd* (2002) E.A. 227, this Court stated thus:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
18. For the foregoing reasons, we are satisfied that the applicant has made a case for the grant of the orders sought. In consequence, we exercise our discretion and allow the application and order stay of proceedings before the 1st respondent pending the hearing and determination of the appeal. We also direct the appeal be given a priority hearing date. Costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE, 2020.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

