



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL (APPLICATION) NO 476 OF 2019

BETWEEN

HON. WILSON SOSSION.....APPLICANT

AND

TEACHERS SERVICE COMMISSION.....RESPONDENT

(An application for stay of execution of the judgment of the

Employment and Labour Relations Court (Abuodha, J) made on

26th July 2019

in

ELRC Petition No 12 of 2018)

RULING OF THE COURT

(1) By way of a notice of motion dated 3rd October 2009, **Hon. Wilson Sossion** (the applicant) urges this Court to exercise its jurisdiction under **Rule 5(2)(b)** of the **Court of Appeal Rules** (this Court's Rules) and grant him orders in the main that:

a) Pending the hearing and determination of the appeal from the judgment of the Employment and Labour Relations Court in *ELRC Petition No 12 of 2018 (Hon Wilson Sossion v Teachers Service Commission)* this Court be pleased to grant an order of injunction against the enforcement by the respondent of the impugned judgment and to maintain the status quo ante; and

b) Pending the hearing and determination of the appeal from the judgment Employment and Labour Relations Court in *ELRC Petition No 12 of 2018 (Hon Wilson Sossion v Teachers Service Commission)* this Court be pleased to grant a stay of any further proceedings of the impugned judgment against the applicant.

(2) In this motion which is filed under **Rule 5(2)(b)** of this Court's **Rules**, the **Teachers Service Commission** is the respondent herein. A brief background is that the applicant was appointed by the respondent as a Diploma Teacher on permanent and pensionable basis on 1st September, 1993; that he was released by the respondent to the Kenya National Union of Teachers (KNUT) upon being elected as the Bomet Branch Secretary to serve on a full time basis from 1st June, 2001; that he was nominated by Orange Democratic Movement (ODM) party as a member of the National Assembly; and that the respondent issued him with a letter of termination dated 17th January, 2018.

(3) The applicant filed a petition on 23rd February, 2018 against the respondent in the ELRC seeking *inter alia*: a declaration that the respondent's purported termination of the applicant did not accord with the law, it was thus null and void and of no effect in law; a declaration that the respondent's letter of termination to the applicant dated 17th January, 2018 is of no effect in law; that a permanent injunction be issued against the respondent against terminating the applicant otherwise lawfully; and

COSTS.

(4) The learned Judge dismissed the petition and held as follows:

“The Petitioner complained that the respondent violated its [Code of Regulation for Teachers] CORT by not first interdicting him and subjecting him to disciplinary hearing before termination. The petitioner is not in active teaching service and in any event, he had accepted nomination as a member of parliament and had been sworn in as such. He was consequently subject to Parliamentary Service Commission and Speaker of the House. Interdicting him would therefore have been of no effect. The show cause letter issued to him and his response thereto was sufficient hearing under the circumstances. In conclusion the court finds the petition without merit and is hereby dismissed with costs.”

(5) Aggrieved by this decision, the applicant filed a Notice of Appeal and the instant application on which the instant application is based. The motion was supported by the applicant’s affidavit in which he deposes *inter alia* that he has an arguable appeal with good prospects of success as the trial court erred in law by finding: that there were valid reasons for termination of his contract as a teacher; that the show cause letter issued to him and his response thereto was sufficient hearing under the circumstances; and that the applicant’s nomination to Parliament amounted to taking part in partisan political activities despite having found that the applicant was nominated to represent the interests of workers.

(6) It is the applicant’s further contention that if the orders sought are not granted, his appeal will be rendered nugatory. He contends that the respondent has already written a letter to him purporting to terminate his contract as a teacher despite the fact that he had already expressed his intention to appeal the decision of the lower court. The applicant further contends that should the respondent not be restrained from acting upon the impugned judgment, the respondent will take action that will directly undermine the operations and the independence of KNUT (the Union) being the teachers’ union.

(7) The applicant therefore argues that the balance of convenience tilts in his favour, and that it is in the interests of justice that his application be allowed. It is his further claim that the respondent would suffer no prejudice if the orders sought are granted, whereas he would suffer greatly if the impugned judgment is enforced, and that such prejudice could not be recompensed by an award of damages. In the circumstances, he urges that the instant application be granted as prayed.

(8) The respondent opposed the application by way of a replying affidavit sworn by **Josephine Mueni Maundu** (Ms. Maundu), the respondent’s Director in Charge of Human Resource Management and Development. **Ms. Maundu** contends that the applicant does not have an arguable appeal on the grounds *inter alia* that under Section 43 of the Employment Act, an employer is only required to justify terminating a contract by demonstrating that the termination is based on justifiable and valid grounds and that a fair process was followed prior to termination; that in the instant case, the reason for termination was valid as the applicant admitted being a Member of Parliament without resigning from public service; and that due process of law encompassing procedural fairness was strictly adhered to prior to the termination of the applicant as the applicant was accorded a fair opportunity to be heard prior to the termination.

(9) **Ms. Maundu** further contended that the applicant’s appeal will not be rendered nugatory if the orders sought are denied as his termination from service was effected on 17th January, 2017 and he has not suffered any prejudice on account of termination of service; that the termination of the applicant’s employment which is the sole subject of his appeal cannot interfere with his position as the Secretary General of the Union as alleged; that the applicant’s position as Secretary General of the Union is statutorily protected under Section 31(4) (a) of the Labour Relations Act and cannot be ousted by either termination from employment or removal from the Register of Teachers; that since the applicant’s lawful termination from service of 17th January, 2017, he has remained the Secretary General of the Union and continues to serve the Union by virtue of Section 31(4)(a) of the Labour Relations Act; that the applicant has not demonstrated any prejudice, loss or injury that he will suffer if the stay is not granted as his position both as the Secretary General and Member of Parliament are secure under the law; and that there is no nexus between the applicant’s termination from service and independence of the Union or lack thereof.

Counsel for the respondent further submitted that the appeal will not be rendered nugatory if the orders sought are denied and the appeal succeeds as the applicant would have a remedy available to him including re-instatement as a teacher, or an award of damages.

DETERMINATION

(10) The jurisdiction of this Court in granting orders of stay of execution or proceedings or of injunction is provided for under **Rule 5(2)(b)** of the Court’s rules. The principles for the exercise of such jurisdiction are well settled and were elaborated on by this Court in ***Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)*** in the following terms:

“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.

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.

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.

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.

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.

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.

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 impecunity, the onus shifts to the latter to rebut the allegation.”

(11) These are the principles that will guide us in the determination of the application that is now before us. In considering whether the appeal is arguable we remind ourselves that an arguable point is not necessarily one that must succeed, but merely one that is deserving of full ventilation before this Court.

(12) We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the issues *inter alia*, whether the applicant's nomination to Parliament amounted to taking part in partisan political activities; whether the applicant's position as Secretary General of the Union is statutorily protected under Section 31(4)(a) of the Labour Relations Act; and whether the show cause letter issued to the applicant and his response thereto was sufficient hearing under the circumstances, are arguable.

(13) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, we find that the appeal will not be rendered nugatory because, should the appeal be successful, the applicant would have a remedy available to him including re-instatement as a teacher, or an award of damages. The applicant has therefore demonstrated that the appeal is arguable but has failed to demonstrate that the appeal would be rendered nugatory if the interim orders sought are denied.

(14) Having failed to demonstrate the second limb of **Rule 5(2)(b)** of this Court's Rules, the notice of motion dated 3rd October, 2019 fails. The costs of the application will abide the outcome of the appeal.

Dated and delivered at Nairobi this 9th day of October, 2020.

M. K. KOOME

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR