



**Chief Justice and President of the Supreme Court of Kenya & another v Khaemba
(Civil Application 299 of 2019) [2019] KECA 46 (KLR) (18 October 2019) (Ruling)**

*Chief Justice and President of Supreme Court of Kenya &
Judicial Service Commission v Bryan Mandila Khaemba*

Neutral citation: [2019] KECA 46 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 299 OF 2019
MK KOOME, HM OKWENGU & S OLE KANTAI, JJA
OCTOBER 18, 2019**

BETWEEN

**CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF
KENYA 1ST APPLICANT**

JUDICIAL SERVICE COMMISSION 2ND APPLICANT

AND

BRYAN MANDILA KHAEMBA RESPONDENT

*(Being an Application for stay of execution against the entire decision contained in the
judgment (Ongaya, J.) dated 30th August, 2019 in NRB. E & LRC PET. No 100 of 2019)*

RULING

1. By a Petition filed on June 17, 2019 before the Employment and Labour Relations Court (ELRC), Bryan Mandila Khaemba (respondent), a judicial officer of the rank of Principal Magistrate sought several reliefs and declarations. Key among them, was an order quashing the decision of the Chief Justice (1st applicant) contained in the letter dated June 13, 2019 and an order reinstating the respondent to his employment including his salary benefits and all other emoluments. The petition was resisted by the applicants vide some grounds of opposition dated June 18, 2018 and a replying affidavit sworn by Mrs Ann Atieno Amadi, the Chief Registrar of the Judiciary on the July 8, 2019.



2. The Petition was heard by Ongaya, J. and by a judgment dated August 30, 2019 the following orders were issued;

- a) The declaration that the 1st respondent's letter dated June 13, 2019 was illegal, null and void ab initio for being in contravention of article 41, 47(1) and 236 of the *Constitution of Kenya*, 2010.
- b) A declaration that the respondents to pay the petitioner all salaries, allowances and given all other due contractual and statutory benefits withheld throughout the suspension period to date and to continue in employment without loss of rank, status, and all attached benefits; and the respondents to pay the petitioner due sum of money by November 1, 2019 failing interest at court rates to be payable thereon from the date of this judgment till full payment; and further the petitioner to report to the respondents forthwith and not later than September 9, 2019 for appropriate deployment and assignment of duty.
- c) The declaration that the respondents infringed the petitioner's fundamental rights as guaranteed under articles 41 and 447 (1) of the *Constitution of Kenya*, 2010.
- d) The judicial review order of *certiorari* bringing to the honourable court and quashing the decision of the 1st respondent as contained in the letter dated June 13, 2019.
- e) The order of prohibition and permanent injunction prohibiting and permanently restraining the respondents by themselves, or by their officers or agents from implementing the decision contained in the 1st respondent's letter of June 13, 2019 and from taking any adverse action against the petitioner pursuant to the said decision.
- f) The order of Judicial Review of mandamus directing the respondents to reinstate the petitioner of his employment including the reinstatement of his salary and employment benefits.
- g) The petitioner to serve this judgment upon the Attorney General within 7 days towards the Attorney General taking appropriate action within his constitutional and statutory roles to correct the anomaly the court has identified in number of paragraphs as referred to in paragraph 15 of the third Schedule of the *Judicial Service Act*.
- h) The respondents to pay the petitioner's costs of the petition."

3. Aggrieved by the said orders, the 1st and 2nd applicants filed a Notice of Appeal on the September 14, 2019 which was followed by the instant Notice of Motion seeking an order of stay of execution of the decree emanating from the aforesaid judgment. The application is supported by the grounds stipulated thereunder and the matters deposed to in the supporting affidavit sworn by Paul Ndemo, the Deputy Chief Registrar of the Judiciary sworn on September 10, 2019. Briefly summarized as far as the arguability of the intended appeal is concerned, the applicants state that the appeal is arguable because Part IV of the Third Schedule to the *Judicial Service Act* No 1 of 2011 Paragraphs 25 (1) of the Third Schedule gives powers to the Chief Justice to initiate the disciplinary process by framing up the charge against a judicial officer. Thus the power to charge, interdict or suspend a judicial



officer is expressly delegated to the Chief Justice. Therefore the orders granted interfered with and contradicted the express provisions of the law. According to the applicants the said orders have the effect of interfering or obstructing the ongoing disciplinary cases that are before the Judicial Service Commission (2nd applicant) as the Judge faulted the exercise of the Chief Justice's power to suspend Judicial officers/ staff as delegated by Parliament.

4. On the other twin principle that the appeal will be rendered nugatory in the event that it was to be successful, it is indicated that if the decree is satisfied and the respondent continues to discharge his duties as a judicial officer, his judicial pronouncements may be brought to question thereby inconveniencing the members of the public as matters may have to be tried de novo. Moreover the position occupied by the respondent is one of trust and until the allegations that touch on his integrity and independence are investigated on merit and his name is cleared, if he continues to exercise judicial functions, it will erode public confidence in the administration of justice. Lastly if the decree is satisfied, the 2nd applicant will be unable to recover the monies in the form of salaries and benefits paid to the respondent for the entire period of suspension including all the other monetary and non- monetary benefits.
5. The motion was vigorously opposed by the respondent *vide* his replying affidavit sworn on the September 19, 2019. The respondent opposed the argument that there is an arguable appeal to warrant the granting of orders of stay as the learned Judge found that his suspension vide a letter dated June 13, 2019 did not comply with the administrative safeguards and structures of the Third Schedule of the [Judicial Service Commission Act](#) No 11 of 2011. He went on to state that under Article 160 of the Constitution, his judicial pronouncements are protected even in the unlikely event that the intended appeal may be successful. Moreover, the applicants had filed a consent before the trial court on the June 19, 2019 stating *inter alia* that the respondent was a judicial officer but on suspension which did not affect his role as a member of the Kenya Magistrates and Judges Association (KMJA) and the East African Magistrates and Judges Association (EAMJA) and that he would be paid his half consolidated monthly remuneration.
6. Further, according to the respondent, no disciplinary action was started as the learned Judge quashed the unlawful termination by upholding the Constitution that protects a judicial officer in execution of the judicial functions that are undertaken in good faith. On the nugatory aspect, the respondent asserted that he is not a man of straw, having been in employment for nine (9) years, he has made substantial savings with the SACCO; he is also a member of the Judicial Service Staff Superannuation Scheme to which he has been contributing and also as the Secretary General of the EAMJA he is entitled to sitting allowances and per diems during his many travels within the region therefore he would be able to refund any amount paid.
7. When the motion came up for plenary hearing on September 24, 2019 the applicants were represented by Mr. Gumbo, assisted by Mr. Kipkogei and Mr. Matenya. Counsel relied on their written submissions and made some brief highlights. Mr Gumbo restated that the intended appeal was arguable in that the trial Judge misconstrued the provisions of paragraph 17 (3) of the third schedule of the [Judicial Service Act](#) by holding that judicial officers /staff on suspensions are entitled to their full salary which is contrary to the express provisions of the law. So was the finding that the Judiciary Human Resource Policies and Procedure Manual which provides for the alimentary allowance was declared unconstitutional. Counsel invited us to find the intended appeal arguable because the orders issued by the trial judge prematurely interfered with the statutory powers given to the 1st and 2nd applicants to discipline the respondent before venturing into the merits and demerits of the disciplinary case.



8. Opposing the application was Mr. Havi learned counsel for the respondent teaming up with Mr. Musomi and Mrs. Kashindi. Counsel for the respondent also relied on their list of authorities. According to counsel, the intended appeal has very dim chances of success because the learned Judge held that it was unconstitutional to suspend the respondent on nil salary. Although counsel conceded that there are some arguable issues, he was emphatic that the appeal will not be rendered nugatory. Counsel cited the consent order whereby the respondent was treated as a judicial officer on suspension on half pay and that position prevailed until the matter was heard and determined. In counsel's view, the matter was fully determined by the trial Judge who quashed the letter of interdiction. Therefore, the respondent was not found culpable of any impropriety so as to impede the discharge of his judicial functions.
9. On the interpretation of the *JSC Regulations*, counsel stated that the entitlement of salary while on suspension is not dependent on regulations but it is guaranteed under article 41 of the Constitution and Part IV of the *Employment Act*. Counsel was of the view that this motion does not meet the threshold set out in the case of *Judicial Service Commission v Maxwell Miyawa & 7 others* [2018] eKLR which reiterated the guiding principles in granting orders of stay or injunctions premised under rule 5 (2) (b) of the *Court of Appeal Rules*.
11. [10] We have considered the submissions, the arguments for and against the order of stay of execution of the orders issued on August 30, 2019 as sought in the notice of motion before us and deliberated on the same. It is trite that two principles must be satisfied by an applicant who applies for stay of execution under rule 5 (2) (b). Firstly, the applicant must establish that there is an arguable appeal which is to say that it is not frivolous, and secondly, that the intended appeal, would be rendered nugatory if stay of execution applied for was not granted. See *Ismael Kagunyi Thande v Housing Finance Company Limited* - Civil Application No. 156 of 2006 (ur) where these principles were restated thus:

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”
11. We are also conscious of the fact that an arguable appeal is not one that must necessarily succeed but one which has merits to be argued fully before court. Looking at the summary of the material that was presented before us, rival submissions, the draft grounds of the intended appeal and several authorities that were cited, we are satisfied that there are some arguable points that have been demonstrated for determination in the intended appeal. This was indeed almost common ground as even counsel for the respondent recognised that there are some arguable points. To wit whether the Judge misinterpreted the disciplinary process regarding judicial officers as provided for under part IV of the *JSC Act* and other disciplinary Regulations and Manuals. All a party needs to establish in an application for way of execution pending appeal is just one arguable point.
12. On the nugatory aspect, we are also satisfied that if the orders are not granted, the applicants will be compelled to reinstate the respondent before the disciplinary issues are determined on merit. This is of concern as the position held by the respondent involves exercise of judicial power and authority and judicial pronouncements that are made in the period before the appeal is heard and determined may be brought to question in the event that the appeal was successful.
13. Accordingly, we are satisfied that the applicant has satisfied the twin principles upon which an application of this nature is granted and we therefore grant a stay of execution of the entire judgment



delivered on August 30, 2019 by Ongaya, J. in Nairobi ELRC Petition No 100 of 2019 and any consequential orders, pending the hearing and determination of the applicants' intended appeal. This being an employment matter and while recognizing the parties had entered into a consent order on June 19, 2019 prior to the hearing and determination of the petition before the trial court, we are inclined to grant the same orders and direct that the respondent will remain a judicial officer under suspension, and pending the hearing and determination of the appeal, he shall be entitled to half salary.

Costs of the application shall abide the outcome of the appeal

DATED AND DELIVERED IN NAIROBI THIS 18TH DAY OF OCTOBER, 2019

M. K. KOOME

JUDGE OF APPEAL

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HANNAH OKWENGU

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

