



**Judicial Service Commission v Miyawa & 7 others (Civil Application  
118 of 2017) [2018] KECA 385 (KLR) (31 July 2018) (Ruling)**

*Judicial Service Commission v Maxwell Miyawa & 7 others [2018] eKLR*

Neutral citation: [2018] KECA 385 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 118 OF 2017  
PO KIAGE, K M'INOTI & AK MURGOR, JJA  
JULY 31, 2018**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... APPLICANT**

**AND**

**MAXWELL MIYAWA & 7 OTHERS ..... RESPONDENT**

**RULING**

1. This Notice of Motion dated 17<sup>th</sup> October 2017 is made under Sections 3A and 3B of the *Appellate Jurisdictions Act* and rule 5 (2) (b) of the *Court of Appeal Rules*, and has been brought pursuant to a decision of the Employment and Labour Relations Court (Radido, J).

In the motion the applicant seeks for Orders that;

1. The...
2. Pending hearing and determination of this application there be a stay of execution of the judgment and decree in Employment and Labour Relations Court Dispute No. 29 of 2016;
3. Pending the hearing and determination of the intended appeal there be a stay of execution of the judgment and decree in the Employment and Labour Relations Court Dispute No. 29 of 2016;
4. Pending the hearing and determination of the Applicant's application there be a temporary injunction prohibiting the Respondents from executing and or effecting judgment and decree in the Employment and Labour Relations Dispute No. 29 of 2016.
5. Pending the hearing and determination of the Applicant's appeal there be a temporary injunction prohibiting the Respondents from executing the judgment and decree in the Employment and Labour Relations Court Dispute No. 29 of 2016.



6. Costs of this application be provided for.
2. The application was made on the grounds that the applicant is aggrieved by the trial court's judgment in favour of the 7<sup>th</sup> and 8<sup>th</sup> respondents, that declared that the applicant had breached their right to fair labour practice and awarded them Kshs. 750,000 each for the alleged breach; that the applicant intends to file an appeal that raised several arguable issues; that the stay of execution pending hearing and determination of the appeal is merited. It was further contended that Government agencies are not liable to deposit security in court and that the respondents intended to execute the judgment against the applicant before the substantive appeal is heard and determined, which would render the appeal nugatory, as the sums, if paid out, will be difficult to recover.
3. The application was supported by the affidavit sworn on 17<sup>th</sup> October 2017 by Winfrida Mokaya, the applicant's Registrar, where it was deposed that the trial court erred in awarding the 7<sup>th</sup> and 8<sup>th</sup> respondents the sum of Kshs. 750,000 each as damages, for violation of their rights to fair labour practices and breach of contract; that following an application for stay of execution filed in court on 30<sup>th</sup> March 2017, the court granted stay of execution on condition that the applicant deposits the decretal sum in court. It was further deposed that due to budgetary constraints, the applicant sought to have the court review its decision on the deposit the decretal sum; that instead, the court extended the period; that in the meantime other intervening events had led to a reduction in funding to the Judiciary, which inhibited the applicant from depositing the sums in court. Furthermore, it was deposed, the judge failed to appreciate that Government agencies are not authorized to provide security for pending appeals.
4. It was also averred that in the event the appeal was to succeed, it would be rendered nugatory as the respondents would be unable to repay the sums paid; that the applicant was not in a position to know the resources that the respondents had at their disposal; and that the refusal to grant the stay of execution will occasion the applicant undue suffering and hardship.
5. As a brief background, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents against whom this application has been brought, were offered by the applicant renewable contracts of employment as Law Clerks on 22<sup>nd</sup> November 2012, while the 7<sup>th</sup> and 8<sup>th</sup> respondents were offered open ended contracts on 13<sup>th</sup> June 2012 as Legal Researchers. They were all deployed to the Supreme Court of Kenya.
6. Save for the provision that the appointment was on probationary terms, no period of appointment was specified for the 1<sup>st</sup> to 7<sup>th</sup> respondents' appointment, while the 8<sup>th</sup> to 11<sup>th</sup> respondents' employment contracts specified that the contracts were for a period of 2 years.
7. At a meeting of 5<sup>th</sup> December 2013, the applicant decided to alter or vary the respondents' terms of contract and resolved that the Legal Researchers including the 7<sup>th</sup> and 8<sup>th</sup> respondents be re-designated as Law Clerks under the new terms and conditions of service. This followed appraisals by the Judges of the Supreme Court. On 6<sup>th</sup> August 2013, the Chief Registrar wrote to the 7<sup>th</sup> and 8<sup>th</sup> respondents informing them of the re-designation and the new terms and conditions of service. The new terms varied the respondents' contracts from open ended to contracts with a duration of 3 years inclusive of the period already served and improved remuneration for each of the respondents. The petitioners and the respondents accepted the varied contracts which subsequently expired sometime in July 2015 for the 7<sup>th</sup> and 8<sup>th</sup> respondents and December 2015 for the 1<sup>st</sup> to 6<sup>th</sup> respondents. Thereafter the respondents' contracts were subject to various extensions. When on 20<sup>th</sup> April 2016, the applicant again revised their contracts, this time it was with a reduction of their benefits and remuneration, and fixing the tenure of the contract to 2 years nonrenewable, the petitioners and the respondents were aggrieved and objected to the unilateral variation of their contractual terms, but to no avail. From 27<sup>th</sup> April to 6<sup>th</sup>



- May 2016 they resigned themselves to signing the revised contracts and were issued with formal letters of appointment dated 28<sup>th</sup> June 2016 which they all signed.
8. The applicant denied any wrong doing, and contended that as an employer, it had the powers to vary or alter the terms of employment of the respondents. It was further averred that the respondents accepted the altered terms of employment when they signed the new contracts of employment, and that by so doing, they waived, accepted and acquiesced to the new contractual terms and were estopped from asserting a repudiatory breach of the old contractual terms.
  9. In its judgment, the trial court found that the applicant had unilaterally varied the 7<sup>th</sup> and 8<sup>th</sup> respondents' contracts from open ended to fixed term which was unlawful, and amounted to an unfair labour practice. As a consequence, the court awarded them Kshs. 750,000 each as damages. With respect to the claims by the 1<sup>st</sup> to 6<sup>th</sup> petitioners, the court found that they were not merited and accordingly dismissed them.
  10. On the question of whether the intended appeal was arguable, learned counsel, Mr. Wakwaya for the applicant submitted that one of the grounds in the draft memorandum of appeal was that the respondents, having signed contracts that varied their terms, were deemed to have waived their rights to demand any rights accrued under their previous contracts; that despite this provision, the learned judge concluded that the applicant had engaged in an unfair labour practice.
  11. And whether in the event the stay of execution sought was declined and the appeal were to succeed, it would be rendered nugatory, counsel argued that there would be no way for the respondents to refund the sums paid. It was further argued that once a fear was expressed that the respondents would be unable to repay the sums, then it was upon the respondents to show that they were in a position to pay, which they had not done, as no replying affidavit was filed.
  12. Mr. Ongoya, learned counsel for the respondents submitted in reply that, by a Notice of motion lodged in the court below on 30<sup>th</sup> March 2017, the applicant sought an order of stay of execution and implementation of the judgment of 24<sup>th</sup> February 2017. On 12<sup>th</sup> April 2017, the court allowed the stay of execution on condition that the decretal sum was deposited in court before 1<sup>st</sup> June 2017. Instead of complying with the court-imposed condition, the applicant filed another motion dated 26<sup>th</sup> May 2017 seeking a review of the order of 12<sup>th</sup> April 2017 and an extension of time by 120 days from 1<sup>st</sup> June 2017 to deposit the decretal sum. The application was granted and time was extended to 20<sup>th</sup> June 2017, and on 10<sup>th</sup> October 2017 a further extension upto 30<sup>th</sup> October 2017 was granted to the applicant to make the deposit. Counsel stated that despite the extensions, there has been no compliance with the court's order. And neither has there been any appeal against the condition upon which the order for stay of execution was premised. Counsel argued that this application was an abuse of the court process, as the applicant had already been granted all the indulgence by the lower court, and having failed to comply with the conditions, now seeks orders from this Court.
  13. Mr. Wakwaya submitted in reply that the conditional orders of the trial court had lapsed, and that as a consequence the applicant has the right to seek the protection of this Court.
  14. The principles which guide the court in considering applications under rule 5 (2) (b) are now well settled and we need only restate them from
  15. *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (ur), thus;

“Hitherto, this Court has consistently maintained that for an application under rule 5(2)(b) to succeed, the applicant must satisfy the court on two matters, namely:-



1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal;
  2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
16. As to whether the appeal is arguable, we have seen a draft memorandum of appeal, wherein the applicant has questioned whether the learned judge rightly determined that the respondents had the right to take up new contracts of employment and at the same time sue for breach of the previous contracts, and in failing to find that the respondents had acquiesced to the variation of terms of the new contracts of employment.
17. Clearly, the applicant has raised pertinent questions that will require to be addressed by this Court, in particular whether by signing the new contracts the respondents signed away any rights and benefits that had accrued to them under their previous contract, and in so doing, also acquiesced to the terms and conditions of the new employment contract. We do not consider that these are frivolous or whimsical questions for determination. But so as not to preempt or embarrass the bench that will ultimately determine the intended appeal, we will say no more regarding this first precondition.
18. Concerning the nugatory aspect about which it must also satisfy us in order to succeed, the applicant argues that in the event the sums are paid to the 7<sup>th</sup> and 8<sup>th</sup> respondents, they have not shown that they would be in a position to refund such sums. But this notwithstanding, the applicant also admitted having sought a stay of execution in the lower court, which stay was granted conditional upon its depositing the decretal sum in court, but it has been unable to do so due to budgetary constraints.
19. To the respondents, this is an abuse of the court process because, despite the trial court having granted the applicant sufficient time within which to deposit the decretal sums, the applicant has failed and or refused to do so. And without complying, the applicant has instead chosen to abandon the conditional stay in the lower court, and now comes in search of another stay of execution in this Court.
20. When we consider the facts as placed before us, the applicant has not shown why it alleges that the respondents will be incapable of refunding the sums paid. We have not been told that after entering into their current contract of employment with the applicant, that they have since left their employment, and therefore would be unable to refund the sums, or that the applicant would have no way of recovering the amounts if paid. If anything, it is the applicant which has been unable to demonstrate its bonafides by continually failing to deposit the decretal sums as ordered by the trial court.
21. This being the current state of affairs, we are not satisfied that the intended appeal will be rendered nugatory in the event it were to succeed.
22. As such, the motion is without merit, and it is dismissed with costs to the respondents.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS DAY OF 31<sup>ST</sup> DAY OF JULY, 2018.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**



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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

