



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, J.J.A)

CIVIL APPLICATION NO. 14 OF 2017 UR 9 OF 2017

BETWEEN

TEACHERS SERVICE COMMISSION.....APPLICANT

AND

DOUGLAS MURIITHI MAGIRI..... RESPONDENT

(Being an application for stay of execution pending the lodgment, hearing and determination of intended appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nyeri delivered by (Ongaya, J.) dated 9th December, 2016

in

CAUSE NO. 97 OF 2014)

RULING OF THE COURT

The applicant, the TEACHERS SERVICE COMMISSION filed a Notice of Motion dated 13th February, 2017 predicated on **Rule 5(2)(b)** as well as **Rules 41,42 & 47** of this Court's Rules. The Applicant sought the following orders:-

“1. Spent

2. That this Honourable Court be pleased to order stay of execution of the judgment of Hon. Justice Byram Ongaya delivered and dated 9th December, 2016 pending the hearing and determination of this application.

3. That this honourable court be pleased to order stay of execution of the judgment of Hon. Justice Byram Ongaya delivered on 9th December, 2016 pending the lodgment, hearing and determination of the intended appeal.

4. That the costs of this application be in the cause.”

DOUGLAS MURIITHI MAGIRI the then claimant, was named as the respondent.

The motion was supported by the affidavit of DINAH MWAITA, the then Senior Deputy Director in charge of Teacher Management in the applicant's employment sworn on 13th February, 2017. She deponed that the applicant was aggrieved by the judgment of Ongaya J. dated 9th December, 2016 wherein it ordered the applicant to reinstate the respondent in the register of teachers and to pay six months' gross salary for unfair termination; that if the said sum is paid to the respondent, it is unlikely for the applicant to recover it from the respondent, should the applicant's intended appeal succeed.

The respondent did not file a replying affidavit to counter the applicant's averments.

On 6th November, 2017 the motion came before us for plenary hearing. There was no representation from the firm of **Basilio Gitonga, Murithi & Associates** inspite of service of the hearing notice upon them on 5th August, 2017.

Miss Mambo for the applicant urged the motion and contended that the applicant has an arguable appeal as the learned Judge erred in making a finding that the outcome of a criminal trial has supremacy over an employer's internal disciplinary process. On the nugatory aspect it was the applicant's position that the respondent has failed to counter the applicant's assertions that the respondent may not be in a position to refund the 6 months' pay ordered by the learned trial judge, should the applicant's intended appeal succeed.

We have considered the motion and its supporting affidavit, the submission of the applicant's counsel and the law in light of the twin principles to be satisfied before a court can grant the orders sought under **Rule 5(2)(b)** of this Court's Rules. In the Case of **ISHMAEL KAGUNYI THANDE VS HFCK CA NO. 156 OF 2006** this court stated:-

“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 maybe, the success of the appeal will be rendered nugatory.”

In establishing an arguable appeal, it need not be one that will necessarily succeed, but suffice to state that one that is not frivolous.

In the instant matter, it is our view that it is arguable whether an employer is bound by the findings of a criminal trial in the disciplinary process of its employee. On the nugatory aspect we note that the respondent did not contest (either by affidavit in response to the averments in the affidavit in support of the motion or otherwise) that he was unlikely to refund the 6 months' salary should the intended appeal succeed.

Accordingly, we are satisfied that the two limbs have been satisfied and we hereby grant stay of execution of the Judgment of **Ongaya, J.** delivered on 9th December, 2016 pending the hearing and determination of the intended appeal.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 20th day of December, 2017.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

.....

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