



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A.)**

**CIVIL APPLICATION NO. 36 OF 2016 (UR 23/2016)**

**BETWEEN**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> APPLICANT**

**THE INSPECTOR GENERAL,**

**NATIONAL POLICE SERVICE.....2<sup>ND</sup> APPLICANT**

**THE DEPUTY INSPECTOR GENERAL,**

**KENYA POLICE SERVICE.....3<sup>RD</sup> APPLICANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> APPLICANT**

**AND**

**POLICE CONSTABLE**

**HENRY NYAKOE OBUBA..... RESPONDENT**

***(An application for stay of execution of the Judgment/Decree in the Employment and Labour Relations Court of Kenya at Nyeri (Ongaya, J.) dated 13<sup>th</sup> May, 2015***

***in***

***Petition No. 14 of 2015)***

**\*\*\*\*\***

**RULING OF THE COURT**

[1] The Notice of Motion before us dated 21<sup>st</sup> June, 2016, and lodged on the same date is by *The*

**National Police Service Commission**, (the 1<sup>st</sup> applicant), **The Inspector General, National Police Service** (the 2<sup>nd</sup> applicant), **The Deputy Inspector General, Kenya Police Service** (the 3<sup>rd</sup> applicant) and **The Hon. Attorney General** (the 4<sup>th</sup> applicant) who were the respondents before the High Court in a petition filed by **Police Constable, Henry Nyakoe Obura** (now the respondent). The applicants seek one substantive order namely, that this Court stays execution of the judgment and decree of the *Employment and Labour Relations Court (E & LRC)* in **Nyeri Petition No. 14 of 2015** made on 13<sup>th</sup> May, 2016, pending the hearing and determination of their intended appeal.

[2] The Notice of Motion is brought under **Rule 5(2) (b)** of the **Court of Appeal Rules** even though **sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Rules 42(1) and 47** of this Court's Rules have also been needlessly invoked. In the petition before the E & LRC, the respondent sought two principal reliefs namely, a declaration that a notice served upon him to show cause why his removal from the Kenya Police Service would not be initiated was in breach of the respondent's Constitutional Rights under **Articles 27(1), (2) & (3), 28, 41, 47, 50 and 159** of the **Constitution** and **section 45** as read with **section 35(1) (c)** of the **Employment Act, 2007** and reinstatement of the respondent to the position he held prior to his removal with the consequent payment of Kshs.7,878,600.00 being accumulated salary and allowances.

[3] The learned Judge of the E & LRC (**B, Ongaya, J.**) found and held that the applicants, in serving the notice to show cause why the respondent should not be removed from the Kenya Police Service, did so in breach of **Articles 47(1), 236 (b)**

and **41 (1)** of the **Constitution** and that the respondent was entitled to reinstatement to his former position in the Kenya Police. In the alternative, the applicants were to pay the respondent Kshs.3,000,000/- being compensation under Article 23(3) (e) of the Constitution for violating his constitutional rights and protections under the cited provisions of the Constitution.

[4] The applicants being aggrieved by the decision of the learned Judge duly filed a notice of appeal and now pray that the execution of the said judgment and decree be stayed pending disposal of their intended appeal.

[5] The applicants have contended, in the affidavit in support of the notice of motion and orally before us, that they have an arguable appeal. **Mr. Makori**, learned counsel for the applicants, submitted, among other things, that the learned Judge of the E & LRC misinterpreted and misapplied **sections 12(3) (vii)** of the **Employment and Labour Relations Act, 2011**, **section 3(2)** of the **Public Authorities Limitation Act** and **Articles 47(1) 236(b) and 41(1)** of the **Constitution**. It was learned counsel's further submission that the order for reinstatement of the respondent was against the law and that the order for payment of money was not pleaded. In those premises, so learned counsel contended, the applicants have an arguable appeal.

[6] On the nugatory aspect of the application, **Mr. Makori** contended that execution for reinstatement is in progress, yet the respondent had been out of office

for over eleven (11) years and unless stay is granted, the applicants may be found guilty of contempt of court for which order the respondent has already moved the court below.

[7] **Mr. Mageto**, learned counsel for the respondent, resisting the application submitted, *inter alia*, that the applicants had not demonstrated that they indeed have an arguable appeal. In his view, the **Employment and Labour Relations Act** gives jurisdiction to the **Employment & Labour Relations Court** to resolve issues between an employer and employee which jurisdiction was properly exercised by that court. It was learned counsel's further contention that the E & LRC, was faced with a constitutional petition where issues of limitation have no relevance. On the submission that the order for payment of money was un-pleaded, **Mr. Mageto** submitted that the same was granted under the '**ominibus**', prayer of "**any other relief**".

[8] On the nugatory aspect of the application, learned counsel argued that if the respondent is reinstated,

he will render service to the Republic and in that event even if the appeal eventually succeeds, it will not have been rendered nugatory.

[9] We have considered the application, the submissions of learned counsel, the authorities cited and the applicable law. The principles applicable in determining an application under our **Rule 5(2) (b)** were succinctly stated in *Stanley Kangethe Kinyanjui -v- Tony Ketter & 5 Others* [2013] eKLR as follows: -

***"(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- Thortorn & 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 Silvestain -v- Atsango Chesoni - Civil Application No. 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. Demji 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 Gitahi Gachau & Another -v- Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2005.***

***(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 (Supra).***

***(ix) The term "nugatory" has been given its full meaning. It does not only mean worthless, futile or invalid, but also means trifling; Reliance Bank Limited -v- Norlate Investments Ltd. [2002] IEA 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 alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases -v- Kinyua [1990] KLR 403".***

See also *Drinks Control Committee -v- Kibao Savings and Credit Co-operative Society Limited & 6 Others* [2016] eKLR.

[10] The above are the principles we shall take into account as we consider this Notice of Motion. We have examined with care the grounds of appeal in the proposed memorandum of appeal annexed to the Notice of Motion. The applicants, among other things, complain about the learned Judge's failure to appreciate and apply **section 12(3) (vii)** of the ***Employment and Labour Relations Court Act, 2011***

with respect to the issue of reinstatement of the respondent to the Kenya Police Service after about eleven (11) years of leaving the service. That omission as an issue, in our view, cannot be said to be frivolous as the section expressly limits the period within which reinstatement may be ordered and so is the issue of the learned Judge's interpretation and application of **section 3(2)** of the **Public Authorities Limitation Act**. Whether the respondent's constitutional rights and protection under **Articles 47(1), 236 (b) and 41 (1)** of the **Constitution** were breached is also an issue which, in our view, is not frivolous especially as there is controversy as to whether those provisions could apply retroactively. Even the award of Kshs.3,000,000/- as damages in lieu of reinstatement, cannot be said to be unarguable given that it was not pleaded. The principles are plain that the applicants needed to demonstrate a single *bona fide* arguable ground and that ground need not be one which will necessarily succeed when the appeal is eventually considered. In our view, the applicants have surmounted the first hurdle as they have demonstrated, to our satisfaction, that their appeal is not frivolous.

[11] The second hurdle, the applicants were required to surmount is whether the intended appeal will be rendered nugatory if we do not grant the stay sought. The applicants intend to challenge, among other things, the determination by the learned Judge of the E & LRC that the respondent be reinstated as a Police Officer. This is the option the respondent has sought to execute before the court below. If we do not grant the order sought, the applicants will be required to reinstate the respondent which is the very event they seek to challenge. The applicants also risk

being held in contempt of court unless a stay of that order is granted. If the contempt proceedings were to succeed, the applicants could lose their liberty which event cannot be reversed.

[12] Even if the respondent were to opt to execute to recover the sum of Kshs. 3,000,000/- awarded to him as damages instead of reinstatement, the eventual success of the appeal will, in our view, be pyrrhic. We say so, because the respondent has not, in his replying affidavit, demonstrated that he will be able to refund the said sum should he be required to do so, in the event the applicants' intended appeal succeeds.

[13] After considering all the relevant issues and the above principles for orders under **Rule 5(2) (b)**, our conclusion is that the success of the applicants' intended appeal will be rendered nugatory unless the order sought is granted.

The case of ***R.F.S. -v- J.D.S. [2013] eKLR*** upon which the respondent placed reliance to resist this motion is clearly distinguishable from the facts herein. There, the applicants failed to demonstrate the twin limbs of the application. The appeal was also from a negative order dismissing the applicants' application for recusal of a judge. The order being challenged herein is a positive order. Further reliance was placed on the case of ***Attorney General -v- The Law Society of Kenya & Another - Civil Application No. 144 of 2009 (JR 97/2009)***. The High Court, in that case, had declared certain provisions of the **Work Injury Benefits Act, 2007**, null and void. The applicant was aggrieved and after instituting the process of appeal, applied for stay of execution under **Rule 5(2) (b)**. This Court declined to grant the order sought as no positive order had been made against the applicant which is not the position here.

There was also reliance on this Court's decision in ***Charles Wahome Gethi -v- Angela Wairimu Gethi [2008] eKLR***, where the High Court had dismissed the applicant's claim for adverse possession. The applicant appealed and in the interim sought stay of execution of the High Court decision. This Court, despite finding the appeal arguable, declined to order a stay as, in the court's view, the success of the appeal would not be rendered nugatory unless stay was ordered. That is not the position here where we have found that unless we grant the order sought the appeal will be rendered nugatory.

[14] This segment of our analysis clearly demonstrates that each case must depend on its own facts and peculiar circumstances. The rest of the cases relied upon by the respondent are of the same genre and are clearly distinguishable from the facts of this case. The decisions therein depended upon the special facts and circumstances obtaining therein.

[15] The upshot is that the applicants have demonstrated the twin prerequisites for the grant of stay under **Rule 5(2) (b)**. The Notice of Motion dated 21<sup>st</sup> June, 2016, is allowed in terms of prayer three (3)

thereof with the result that there will be a stay of execution of the judgment and decree of the ***Employment and Labour Relations Court in Nyeri Petition No. 14 of 2015*** made on 13<sup>th</sup> May, 2016, and any subsequent orders in furtherance of the said decree, pending the hearing and determination of the applicants' intended appeal.

[16] The costs of this application shall abide the results of the intended appeal.

[17] The respondents have liberty to apply in the event the applicants fail to lodge the substantive appeal.

***Dated and delivered at Nyeri this 9th day of November, 2016.***

***P. N. WAKI***

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***JUDGE OF APPEAL***

***R. N. NAMBUYE***

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***JUDGE OF APPEAL***

***F. AZANGALALA***

.....

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***