IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & MWERA, JJ.A.)

CIVIL APPLICATION NO. NAI . 227 OF 2013 (UR 163/2013)

BETWEEN

TEACHERS SERVICE COMMISSION.....APPLICANT

AND

SARAH NYANCHAMA RATEMO…….RESPONDENT

(An application for stay of execution pending the lodgment, hearing and determination of intended appeal from the Ruling of the Industrial Court of Kenya at Nakuru (Byrum Ongaya, J.) dated 28th June, 2013

in

INDUSTRIAL COURT CAUSE NO.4 OF 2013

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RULING OF THE COURT

The applicant Commission filed the notice of motion dated 28th August, 2013 under Rules 5(2)(b), 42, 47 of the Court's Rules. The main prayer was:

> ***(i) that this Court do grant a stay of execution of the judgment in Nakuru Industrial Court Cause No.4 of 2013, until an intended appeal is heard and determined.***

The motion was supported by an affidavit. The brief background of the case in question is that the respondent, a teacher employed by the applicant with effect from 13th October, 2005 went away from her duty station at Riabigutu Secondary School to attend to her sick husband. On or/about 28th August, 2009 she sent an application for study leave to the applicant to approve. The applicant found that she did not qualify for such leave. That was communicated to the respondent, through her Principal but seemingly the respondent went off to study. The Principal reported that the respondent had not been on duty since 8th August 2009. The applicant considered her conduct as evidence of desertion and commenced disciplinary action. She was interdicted and later dismissed from the service. As a result, she filed the Industrial Court Cause under review, claiming reinstatement and payment of her salary and allowances which she was not paid from the time of her dismissal – 2nd July 2010. The applicant responded to the claim maintaining that the respondent was dismissed from the service as per the law and procedure. And further that she had indeed earned salary when she was not on duty and so the Commission indicated that

that sum be refunded.

The cause was heard in the Industrial Court, Nakuru (***Ongaya, J.)*** who found that the respondent's services were not properly terminated and ordered her reinstatement with effect from 2nd July, 2010. She was also granted payment of salary, allowances and other benefits plus interest over the affected period of about three (3) years. Further, there was a specific order that the applicant issue the respondent with:

> ***"…a deployment letter to any secondary school or relevant learning institution within Uasin Gishu County…"***

The applicant's counter-claim was dismissed.

M/S Busienei, learned counsel for the applicant submitted that the order to reinstate and deploy the respondent in Uasin Gishu County in essence took away from and undermined the Commissions' constitutional mandate stated in Article 237(2) of the Constitution. That the Commission alone was vested with that power and by its order, the Industrial Court appeared to usurp it. And further that the respondent did not seek orders to be reinstated and deployed in Uasin Gishu. Counsel urged us to find that this was a point to canvass on appeal.

On the order to pay salary to the respondent over a period of 3 years, ***Ms. Busienei*** told us that under Section 49 of the Teachers Service Commission Act, such payment could only extend to a maximum of 12 months and thus the court's order went against the law. That this, too, formed an arguable point on appeal. She concluded that in the circumstances of this case, the working relationship between the applicant and the respondent had soured to a point where reinstatement of the latter could only mean friction.

Turning to the point of whether the appeal could be rendered nugatory if the stay order was not granted, ***Ms. Busienei*** submitted that the respondent would not be in a position to refund the decretal sum if paid, and at the end the appeal succeeded. On the other hand, the applicant would be able to do so. And that the respondent had not appended evidence of means to back her claim that she could refund the sum if paid.

Mr. Shivaji, learned counsel for the respondent relied on the replying affidavit filed and posited that as per Section 17(2) of the Industrial Court Act, only matters of law can be argued on appeal before this Court, yet the applicant had stated in the memorandum of appeal (exhibited) that the learned judge erred:

> ***"…in law and fact…".***

The appeal was thus incompetent and not arguable at all.

He continued that under Section 12(3) of the Industrial Court Act the Judge had a wide discretion to award any relief including reinstatement of an employee, but within 3 years of dismissal. The respondent fell well within that time frame.

We heard that Section 21(1) of the Teachers Service Commission Act states that any execution against it is as if it is done against the Government under the Government Proceedings Act which provided for a particular process of execution. The respondent had not taken any step to execute the decree herein. ***Mr. Shivaji*** appeared to concede that although the payment of salary in such cases is capped to 12 months, but still the trial court could order for a longer period. Accordingly, an arguable appeal had not been made out.

Whether the appeal could be rendered nugatory, counsel argued that the respondent had deponed in her replying affidavit that she was capable of making a refund if the decretal sum was paid and the appeal succeeded. Quoting Section 21(1)(1), of the Teachers Service Commission Act, ***Mr. Shivaji*** posited that the applicant had powers to remove or restore any staff on its register. He asked us to dismiss the

application.

As has been stated time without number in applications that come before this Court under Rule 5(2) (b) of the Court of Appeal Rules, the applicant should satisfy us:

i. ***that the appeal is arguable and not a frivolous one; and***
ii. ***that if the stay order sought is not granted the appeal will be rendered nugatory.***

(See the cases of ***Damji Pragji Mandavia vs Sara Lee Household Body Care (K) Ltd, Civ. Application No.345/2004*** and ***Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd & others Civil Application No.124/2008***).

Without delving in the detail and import of each of these two conditions our view is that the applicant has made out two grounds which are arguable on appeal. It has brought out two points of law. One, whether a body other than the applicant can order deployment of a teacher. The learned Judge made a specific order that the applicant do deploy the respondent in Uasin Gishu County. We are of the mind that that point deserves to be argued on appeal. The other point is on the power of the trial court to grant payment of salary as the respondent's case is. The learned Judge ordered that that payment do cover over 3 years while the statutory limit is 12 months. To this, even as ***Ms. Shivaji*** appeared to agree that there must be a cap on salary payable, but nonetheless added that the trial court had powers to order payment over a longer period. To us that point is also arguable on appeal. The applicant needed to demonstrate only one arguable ground but it placed two before us.

As to whether the intended appeal could be rendered nugatory if the stay order is refused, we think it will be. The respondent did not place before us evidence of her means from which she could refund the sum of Sh.1.9m if it is paid to her. And in such circumstances one cannot overlook the long and litigious process it may take to recover such money, all to be indulged into by the applicant - a public body at public expense. All in all we are satisfied that the order sought be and is hereby granted.

Costs of this application will be paid by the respondent to the applicant.

Dated and delivered at Nairobi this 14th day of February, 2014

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR