



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAI, JJA)**

**CIVIL APPLICATION NO. 89 OF 2017 (UR 63/17)**

**BETWEEN**

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

**AND**

**NEWTON MURIU MURIUKI.....RESPONDENT**

*(Being an application for stay pending the lodging, hearing and determination of an intended appeal against the Judgment of the Industrial Court of Kenya at Nyeri,*

*(Ongaya, J.) dated 9<sup>th</sup> June, 2017*

in

*E. L. R. No. 31 of 2014)*

\*\*\*\*\*

**RULING OF THE COURT**

The **Judicial Service Commission** (JSC), the applicant herein filed a Notice of Motion under Rule 5(2)(b) of this Court's Rules and Sections 3A and 3B of the Appellate Jurisdiction Act. **Newton Muriu Muriuki** was named as the respondent. In the motion, the applicant sought the following orders:

**“1. Spent**

**2. THAT there be a stay of execution and enforcement of the Judgment and Orders made by Justice Byram Ongaya on 9<sup>th</sup> June 2017 in Employment and Labour Cause No. 31 of 2014 – Nyeri pending the hearing and determination of the intended appeal.**

**3. THAT there be a stay of any further proceedings for enforcement of the judgment or any other orders issued by the Court in Employment and Labour Cause No. 31 of 2014 – Nyeri pending the hearing and determination of the intended appeal.**

**4. THAT costs of this application be provided for.”**

A brief background to the Motion is that the applicant's (the then respondent) were the respondent's (the then claimant) employer having been appointed on 13<sup>th</sup> December 1997 as a clerical officer. However the respondent was dismissed with effect from 6<sup>th</sup> February, 2012 on grounds of absence from duty. The respondent resisted the dismissal by filing a Memorandum of Claim on 17<sup>th</sup> February, 2014. In the memorandum of claim, he sought the following orders:-

*“1. That due to the urgency of this application, this application be certified urgent.*

*2. That the Honourable Court be pleased to stay the Claimant's dismissal by the respondent's letter dated 15<sup>th</sup> January, 2014 and forwarded on 5<sup>th</sup> February 2014 pending the hearing and determination of the Claimant's claim herein.*

*3. That the Claimant's salary between, February 2012 and January 2014 be forthwith paid pending the hearing of this suit.*

*4. That costs of this application be borne by the Respondent.”*

The applicant filed a statement of response on 3<sup>rd</sup> May 2016 and refuted the averments in the respondent's Memorandum of Claim and maintained its dismissal of the respondent was justified.

The dispute between the two was heard and determined by **Ongaya J**, who in a judgment dated 9<sup>th</sup> June 2017 ordered as follows:-

*“1. The declaration that the claimant's dismissal is unfair, unlawful and against the established and applicable labour laws and regulations.*

*2. The respondent to pay the claimant all the due basic salary and remunerative allowances as prevailing at all material times for designation 4AAFG Clerical Officer (2) from 06.02.2012 to 05.02.2014.*

*3. Consequential to the partial reinstatement whose pay back will be limited to 12 months' gross pay prevailing as at 05.02.2014 (the last day the claimant was at work), the respondent to pay the claimant accordingly.*

*4. The claimant to compute, file and serve, within 14 days, the schedule of the amount due accordingly and for recording the quantum in court on a convenient mention date in view of order 2 and 3 above.*

*5. The respondent to pay the claimant the money due under orders 2, 3, and 4 above by 01.08.2017 failing interest to be payable at court rates from the date of the suit till full payment.*

*6. The respondent shall re-engage the claimant in the designation of 4AAFG Clerical Officer (2), if the claimant opts to be so re-engaged not later than 01.08.2017, by reporting to the respondent's secretary, the Chief Registrar of the Judiciary, for deployment to any station other than at Nyeri Law Courts and in that event, for pension purposes, there be no break in claimant's service as any days of absence flowing from the unlawful and unfair termination or from terms of this judgment, be treated as leave of absence.*

*7. If the claimant opts not to be re-engaged per order 6 above, it is hereby declared that he is entitled to his accrued retirement benefits or pension or gratuity dues as at 05.02.2014 and the accrued retirement benefits, pension or gratuity to be paid in accordance with the applicable law or other relevant provisions.*

*8. The respondent to pay the claimant's costs of the suit.”*

The applicant was dissatisfied with the said outcome and duly filed a Notice of Appeal on 16<sup>th</sup> June 2017, thus paving the way for the motion before us which seeks an order of stay of **Ongaya's J**, judgment pending the hearing and determination of the applicant's intended appeal.

On 17<sup>th</sup> October 2017, the Motion came before us for hearing. **Mrs. Akomo**, learned counsel for the applicant urged us to find that

the respondent had a poor work ethics that led to his dismissal; that the respondent had indicated his desire to be relieved of his duties; that the order of reinstatement of the respondent was prejudicial to the applicant and finally that the respondent had not controverted the applicant's contention that if the respondent is paid the decretal dues, he will be unable to refund, should the intended appeal be successful.

**Mr. King'ori**, learned counsel for the respondent, whilst relying on the respondent's affidavit sworn on 16<sup>th</sup> August 2017, opposed the motion. He argued that the applicant's intended appeal was not arguable; that the award included payment of salary arrears of two years, which arrears are not disputed by the applicant; that the order for reinstatement was in the alternative and finally, that the respondent is now a businessman and is not impecunious.

As has been variously stated by this Court, in applications that come before this Court under Rule 5 (2)(b) of this Court's Rules, an applicant has to satisfy the Court that:-

- 1) He/she has an arguable appeal and not a frivolous one.
- 2) That unless stay is granted, the appeal would be rendered nugatory.

In *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.”***

Without making definitive findings, we think that the applicant has brought out grounds which are arguable. It is arguable whether the respondent's dismissal was justifiable and whether the trial court could order reinstatement, albeit as an alternative order more so given the fact that the respondent had indicated his wish not to work for the judiciary for what he considered as mistreatment by the applicant. We do find that although the respondent contended that he was not impecunious and he is now a businessman, his income was not disclosed. We further note that he has in the past complained of financial embarrassment because of the non-payment of his salary and we are in agreement with the applicant's counsel that the respondent has not demonstrated that he is in a position to repay the sum awarded, should the intended appeal be successful. Accordingly, we come to the conclusion that the Motion herein is for allowing, albeit conditionally. We order that there be stay of execution and enforcement of the judgment of Ongaya J. delivered on 9<sup>th</sup> June 2017 pending the hearing and determination of the intended appeal SUBJECT TO the payment of the respondent's undisputed two years salary from 6<sup>th</sup> February 2012 to 5<sup>th</sup> February 2014 within 30 DAYS from today's date. Costs of the Motion shall be in the intended appeal.

*Dated and delivered at Nairobi this 20<sup>th</sup> day of December, 2017*

**G.B.M. KARIUKI SC**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**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**



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