



REPUBLIC OF KENYA



**KENYA LAW**  
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**Garissa Water Sewerage Company Limited v National Union of Water and Sewerage Employees & 2 others (Civil Application E659 of 2024) [2025] KECA 108 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 108 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E659 OF 2024  
DK MUSINGA, F SICHALE & FA OCHIENG, JJA  
JANUARY 24, 2025**

**BETWEEN**

**GARISSA WATER SEWERAGE COMPANY LIMITED ..... APPLICANT**

**AND**

**NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES .... 1<sup>ST</sup>  
RESPONDENT**

**FIRST COMMUNITY BANK (GARISSA BRANCH) ..... 2<sup>ND</sup> RESPONDENT**

**KENYA COMMERCIAL BANK (GARISSA BRANCH) ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Application for Stay pending the appeal against the Ruling of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 26th November 2024) in Nairobi ELRC Cause No. 1162 of 2018)*

**RULING**

1. By the motion on notice dated 26<sup>th</sup> November 2024 brought pursuant to the provisions of rule 5 (2) (b) of the Court of Appeal Rules, and the inherent power of the Court, Garissa Water Sewerage Company Limited (“the applicant”) has sought the following orders:
  - “a. Spent.
  - b. That this Honourable Court be pleased to issue an order of stay of execution of the Ruling of Abuodha J, in the Employment and Labour Relations Court at Nairobi in Employment and Labour Relations Court Cause Number 1162 of 2018 of the 26<sup>th</sup> November 2024 and garnishee orders dated 26<sup>th</sup> November 2024 ordering the release of the sum Kshs 13,660,701/= held in the applicant’s KCB Account Number 1107767741 to the Claimant pending the hearing and determination of the applicant’s intended appeal.



- c. That pending the hearing and determination of the intended appeal there be a stay of the Ruling of Abuodha J, in the Employment and Labour Relations Court at Nairobi in Employment and Labour Relations Court Cause Number 1162 of 2018 of the 26<sup>th</sup> November 2024.
  - d. Spent.
  - e. That the Honourable Court be pleased to make such a further order as it may deem just and expedient in the circumstances of this case.”
2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by Mohamed Dolal, (the Manager of the applicant herein), who deposed, inter alia, that vide a ruling delivered on 26<sup>th</sup> November 2024, Abuodha, J. issued garnishee orders absolute attaching the sum of Kshs 13,660,701.60/= held in the applicant’s KCB Account Number 1107767741.
3. He further deposed that the said garnishee orders were improperly issued without a valid decree and judgment, which had highly prejudiced the applicant and resulted to loss of funds to a fraudulent scheme. Further, that the consent dated 12<sup>th</sup> April 2019 for the amount of Kshs 764,822/= had already been settled over and above the amount by fraudulently garnisheeing of the applicant’s account for payment of Kshs 3,932,000/= instead of the decretal sum f Kshs 764,822/=.
4. That, the applicant wished to appeal against the impugned ruling owing to the fact that if money was paid out of its accounts, the same could not be recovered from the claimants, who were impersonating union officials, and that failure to grant stay of execution would render the intended appeal nugatory if the said garnishee orders absolute were implemented.
5. He further contended that one Elijah Otieno Awach, who filed the application for garnishee orders on behalf of the 1<sup>st</sup> respondent, had been suspended by the Union and charged with the offence of forgery contrary to Section 345 as read with Section 349 of the Penal Code in Milimani Criminal Case No. E162 of 2023, and that if the said sums were paid to him, the same could not be recovered.
6. The motion was opposed vide a Replying Affidavit sworn on 16<sup>th</sup> December 2024 by Elijah Otieno Awach, the then Secretary General of the 1<sup>st</sup> respondent, who deponed, inter alia, that the applicant had misrepresented facts to the effect that the ruling and garnishee order dated 26<sup>th</sup> November 2024 was granted irregularly without a valid judgment and decree but indeed, there was a valid judgment adopted from a consent of the parties dated 14<sup>th</sup> February 2019 and a decree arising therefrom of the same date.
7. When the matter came up for plenary hearing on 17<sup>th</sup> December 2024, Mr. Nura, learned counsel, appeared together with Mr. Ibrahim Abai and Mr. Moud Buani for the applicant, whereas Mr. Mageto appeared for the 1<sup>st</sup> respondent. There was no appearance on the part of the 2<sup>nd</sup> respondent. Ms Anne Mathenge appeared for the 3<sup>rd</sup> respondent. Both Mr. Nura and Mr. Mageto relied on their written submissions dated 13<sup>th</sup> December and 16<sup>th</sup> December 2024 respectively, which they briefly highlighted in Court. Ms. Mathenge did not file any submissions, though she intimated that she had left the matter to the Court.
8. It was submitted for the applicant that the 1<sup>st</sup> respondent had initiated garnishee proceedings against the applicant based on a consent order between the parties for the payment of the sum of Kshs 764,822/=, which decree had been fully satisfied, and that as such no further decree exists upon which the garnishee proceedings could be legitimately based.



9. It was further submitted that the person purporting to represent the 1<sup>st</sup> respondent has several allegations of fraud against him and has several cases against him (both civil and criminal) and that further, the Union that he purported to represent was now defunct and non-existent.
10. In view of the foregoing, it was submitted that the applicant had an arguable appeal.
11. Turning to the nugatory aspect, it was submitted that if the garnishee orders absolute were to be granted, public monies would be transferred to the 1<sup>st</sup> respondent's account and the appeal would have been overtaken by events. Further, the 1<sup>st</sup> respondent had written to the 3<sup>rd</sup> respondent directing that the monies be paid to account number 001120201219200, which is a personal account, and that if the allegations of fraud against the 1<sup>st</sup> respondent were to be true, then the orders absolute if executed would be irreversible.
12. On the other hand, it was submitted for the 1<sup>st</sup> respondent that the decree sought to be stayed arose from a consent judgment whose chances of being set aside were nil as variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated namely: fraud, collusion, illegality, mistake and the agreement being contrary to the policy of the Court, which was not the case herein. Consequently, it was submitted that the applicant did not have an arguable appeal.
13. On the nugatory aspect, it was submitted that the 1<sup>st</sup> respondent had demonstrated evidentially through bank statements its monthly income and its capability to refund the decretal sum and that as such, the applicant had failed to establish that the intended appeal would be rendered nugatory in the event the appeal succeeded.
14. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival oral and written submissions by the parties, the cited authorities and the law.
15. The applicant's motion is brought under rule (5) (2) (b) of this Court's Rules. The principles for our consideration in the exercise of our unfettered discretion to grant an order of stay of execution, injunction or stay of proceedings, as the case may be, are now old hat.
16. Firstly, an applicant has to satisfy the Court that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.
17. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal, if successful, would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by this Court (differently constituted), in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & 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.
  - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
  - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
  - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.



- viii. An applicant must satisfy the Court on both the twin principles.
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- x. 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.
- xi. 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.
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

18. Turning to the first limb, we have looked at the issues raised in the applicant’s motion and we are indeed satisfied that the applicant has an arguable appeal as the issue as to whether the garnishee orders absolute were irregularly issued without any decree or judgment is weighty and is not frivolous and cannot be simply wished away. In our view, it is worthy of consideration by this Court.

19. We are of course mindful to the fact that an arguable appeal is not one that must necessarily succeed and we will say no more regarding this issue at this stage, lest we embarrass the bench that will be eventually be seized of the appeal. Ultimately, therefore, we are indeed satisfied that the applicant has an arguable appeal.

20. Turning to the nugatory aspect, we are satisfied that the intended appeal would be rendered nugatory if stay orders are not granted because if the garnishee orders absolute are executed, public monies will have been paid out to an individual’s account as alluded to in paragraph 11 above. It was not demonstrated to us that this individual has the ability to refund the money and hence, the substratum of the appeal will have been lost.

21. Accordingly, the applicant having satisfied us on both limbs as aforesaid, the applicant’s motion dated 26<sup>th</sup> November 2024 is merited and the same is hereby allowed as prayed.

22. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. K MUSINGA (PRESIDENT)**

.....  
**JUDGE OF APPEAL**

**F. SICHALE**

.....  
**JUDGE OF APPEAL**



**F. OCHIENG**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

