



**Said v Bliss Healthcare Limited (Civil Application E706 of 2024)
[2025] KECA 284 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 284 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E706 OF 2024
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
FEBRUARY 21, 2025**

BETWEEN

DR. ILIYIN MOHAMED SAID APPLICANT

AND

BLISS HEALTHCARE LIMITED RESPONDENT

*((Being an application for stay of execution of the judgment and decree
of the Employment and Labour Relations Court at Nairobi (B.O
Manani, J.) dated 28th November 2024 in ELRC Cause No. E513 of 2022))*

RULING

1. In the application dated 11th December 2024, the applicant, Dr. Iliyin Mohamed Said, asks for an order of stay of execution of the costs from the judgment dated 28th November 2024, and of all consequential orders arising therefrom. The application is brought under rules 5(2)(b) and 41 of this Court’s Rules. It is based on the grounds on its face and is supported by the applicant’s affidavit which she swore on 11th December 2024.
2. The applicant avers that in the judgment dated 28th November 2024, the trial court dismissed her suit with costs to the respondent. She was aggrieved by the decision and intends to appeal against it. That in the absence of orders of stay, the respondent will execute for the costs; that there is a high likelihood that execution may be issued at any time in the absence of stay orders; that she has an arguable appeal that raises serious triable issues, hence the need to allow determination of the appeal on merit as any execution will render the appeal nugatory; and that the respondent will suffer no prejudice if the orders sought are granted. The applicant also filed a supplementary affidavit sworn on 15th January 2025 in which she reiterates the averments in her affidavit sworn in support of the application.
3. The respondent filed a replying affidavit sworn on 13th January, 2025 by Rufus Maina, the respondent’s Legal and Strategic Initiatives Manager. He deposes that the trial court gave due consideration to



the applicant's allegations presented in her memorandum of claim dated 19th July 2022 vis-à-vis the respondent's evidence and exercised its mind judiciously in dismissing the applicant's claim; that no execution process has been put in motion to necessitate the filing of this application; that the application is not only lacking in merit but is also prematurely before the Court, and ought to be dismissed in its entirety with costs.

4. The applicant filed submissions dated 16th January 2025 which were highlighted by her counsel, Mr. Mohamed. Mr. Mohamed submitted that the ELRC court failed to take into account the fact that the applicant was discriminated against on grounds of maternity and pregnancy, contrary to section 29(1) and 29(4) of the *Employment Act*. Further, that she was fired during her maternity period and was denied the right to go on maternity at that time, a fact that the court failed to take into account in its judgment.
5. While conceding that the applicant's case had been dismissed and the costs she was seeking stay with regard to had not yet been taxed, Mr. Mohamed nonetheless submitted that the costs would be high. With regard to the manner in which the applicant's appeal would be rendered nugatory, Mr. Mohamed submitted that the costs that would accrue would dissuade the applicant from proceeding with the matter any further.
6. The respondent filed submissions dated 14th January 2025 which were highlighted by its learned counsel, Mr. Mbugua. Mr. Mbugua submitted that in its judgment, the ELRC dismissed the applicant's suit, which was a negative order, incapable of being stayed. He further submitted that the respondent had not yet filed a bill of costs, nor had it demanded to be paid any costs by the appellant.
7. Learned counsel further submitted that the intended appeal was purporting to amend the cause of action by hammering the point of dismissal on account of maternity or pregnancy, while the issue that was before the ELRC was whether the applicant's contract of employment lapsed owing to effluxion of time. It was the respondent's submission that the applicant did not have an arguable appeal; that the application is seeking to pre-empt the action that the respondent intends to take; and that granting the order of stay of execution at this stage is tantamount to granting orders that would be in vain.
8. We have considered the application and the depositions of the parties in support of or opposition thereto, and the oral and written submissions of the parties. The essence of the applicant's submissions is that her intended appeal raises arguable issues; and she will suffer prejudice and her appeal rendered nugatory should her application not be allowed. The respondent's submissions in response are essentially that the applicant has failed to satisfy the two limbs required for the Court to exercise its discretion in favour of a party on an application under rule 5(2)(b).
9. The jurisdiction of this Court under rule 5(2)(b) is discretionary. In exercising its discretion under the rule, the Court must be satisfied, first, that the applicant's appeal is arguable and, secondly, that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory-see *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR.
10. The nature and scope of the jurisdiction of this Court under rule 5(2) (b) has also been considered by the Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers*, Sup. Ct. Appl. No. 16 of 2015 where the Court stated as follows:

“It is clear to us that Rule 5(2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...Rule 5(2) (b) of the Court of Appeal Rules, 2010 is derived from Article 164(3) of *the Constitution*. It illuminates the Court of Appeal's



inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.” (Emphasis added).

11. In determining this matter, we note that the decision of the trial court resulted in the dismissal of the applicant’s claim. There is therefore no order capable of being stayed. But she does not ask us to stay the order of the Court. She asks us to stay costs that are yet to be assessed or demanded.
12. In an application under rule 5(2)(b), parties and their counsel must pause and ask themselves what they are placing before the Court, and whether their intended application is a good use of precious judicial time. What, in this case, is the substratum of the applicant’s appeal? It is not costs but the alleged error of the trial court in not finding that there was discrimination against the applicant by the respondent on the basis of pregnancy. How will execution for costs, even had they been assessed, render the determination of that question on appeal nugatory? The answer is obvious.

While the applicant may have an arguable appeal- see *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR with respect to what amounts to an arguable appeal- execution for costs will have no bearing whatsoever on the appeal. Accordingly, we find that there is no merit in the application dated 11th December 2024, and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA (PRESIDENT)

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

MUMBI NGUGI

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

G. V. ODUNGA

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

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

Signed

DEPUTY REGISTRAR.

