



**Electro Research Limited v Wayodi (Civil Application
E340 of 2024) [2025] KECA 206 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 206 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E340 OF 2024
F TUIYOTT, P NYAMWEYA & FA OCHIENG, JJA
FEBRUARY 7, 2025**

BETWEEN

ELECTRO RESEARCH LIMITED APPLICANT

AND

BONIFACE WAYODI RESPONDENT

(An application for a stay of execution pending appeal of the Judgment and Order of the Employment and Labour Relations Court at Nairobi (Nzioki wa Makau J.) delivered on 22nd May 2023 in ELRC Cause No. 503 of 2019)

RULING

1. Electro Research Limited, the applicant herein, lodged an application in this Court dated 3rd July 2024 seeking a stay of execution of the judgment and orders of the Employment and Labour Relations Court (ELRC) at Nairobi (Nzioki wa Makau J.) delivered on 22nd May 2023 in ELRC Cause No. 503 of 2019, pending the hearing of the appeal therefrom. Max Kadosh, a director of the applicant, deponed in an affidavit in support of the application that a claim by Boniface Wayodi (the respondent herein), was allowed by the ELRC, and he was awarded one month's salary in lieu of notice of Kshs 85,000/-, leave pay of Kshs 22,356/-, salary for days worked in June 2019 of Kshs 27,945/-, service pay for 24 years of Kshs 1,020,000/-, 6 months' salary of Kshs 510,000/- as compensation and interest at the Court's rates from the date of judgment till payment in full payment and costs.
2. The applicant is aggrieved by the decision of the ELRC and has filed a Notice of Appeal, and avers that it has an arguable appeal with good prospects of success for various reasons, that were detailed in the supporting affidavit. Further, that if the decision is not stayed the intended appeal if successful, will be merely academic and thereby rendered nugatory, and the applicant's property risked being sold by the respondent, yet it is not aware of the respondent's financial status and if he will be able to refund the decretal sum if the intended appeal succeeds.



3. Boniface Wayodi filed a replying affidavit sworn on 11th July 2024, and asserted that the applicant has not demonstrated what substantial loss it would suffer if the stay of execution pending appeal is not granted. Further, that the application was brought with the sole intention of stopping him from enjoying the fruits of his lawfully obtained judgment, and the applicant has not offered any security for the due performance of the decree should the stay of execution be granted. Lastly, that the order sought should only be allowed on the condition that the applicant deposit the entire decretal sum in a joint interest-earning account in the name of the advocates.
4. We heard the application on 24th September 2024 on the Court's virtual platform, and learned counsel Ms. Waliaula, appeared for the applicant while learned counsel Mr. Patrick Mbugua, appeared for the respondent. The two counsel highlighted their written submissions that they lodged with this Court, dated 17th July 2024 and 24th July 2024 respectively.
5. The principles applicable in exercising this Court's discretion under Rule 5 (2) (b) of the Court of Appeal Rules of 2022 to grant an order of stay are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see Republic vs Kenya Anti-Corruption Commission & 2 others (2009) KLR 31; Reliance Bank Ltd vs Norlake investments Ltd (2002) I EA 227; and Githunguri vs Jimba Credit Corporation No (2) (1988) KLR 838). In addition, this Court exercises original jurisdiction under Rule 5 (2)(b) as held in Ruben & 9 others vs Nderitu & another (1989) KLR 459.
6. Ms. Waliaula, while citing the decisions in Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others SC Application No. 5 of 2014 [2014] eKLR and Mbugua alia George Boniface Nyanja v Iqbal (Personal Representative of the Estate of the Late Ghulam Rasool Jammohammed) (Miscellaneous Application 7 (E011) of 2021) [2021] KESC 41 (KLR) (Civ) (6 August 2021) (Ruling), submitted on the applicable principles for an order of stay, and that the intended appeal is arguable as demonstrated by the draft memorandum of appeal attached to the application. Counsel faulted the judgment by the ELRC for declaring the respondent's termination as redundant without adequately considering the contents of the termination letter, and for deeming the termination unlawful without duly considering the reasons that led to the termination. In response, Mr. Mbugua submitted that the draft Memorandum of Appeal did not raise any arguable appeal or points of law.
7. We have considered the arguments by the two counsel and are alive to the interpretation of the requirement of arguability. By the term "arguable", it is not meant an appeal or an intended appeal that will definitely succeed, but one which raises a bona fide issue worth of consideration by the Court (see Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR). The appeal need not raise a multiplicity or any number of such points, and demonstration of one arguable point will suffice (see Kenya Railways Corporation vs Ederman Properties Ltd Civil Appeal No. Nai. 176 of 2012). In the present application, we note that the applicant has raised an issue as regards the propriety of the findings by the ELRC as regards the legality and fairness of the termination of the respondent's employment. It is our view that this issue is not a frivolous, and merits consideration by this Court. We therefore find that the applicant has satisfied the first limb of arguability.
8. On the nugatory limb, Ms. Waliaula contended that if the stay is not granted, the intended appeal will be rendered nugatory for the reason that if the respondent proceeds with the execution of the award, it may be irreversible considering that the respondent's means of income are unknown and presumably



insufficient as they were not attested to in the response to the application. Therefore, it cannot be guaranteed that the respondent would be in a position to refund the judgment sum of Kshs 1,665,301/- plus cost and interest if the appeal succeeds. Counsel sought discretion of the Court to deposit Kshs 600,000/- as security for costs, and urged us to consider the purpose of a stay of execution, namely to preserve the subject matter in dispute.

9. Mr. Mbugua on his part submitted that the applicant had failed to satisfy the nugatory limb. Additionally, that it was upon the applicant to prove that the respondent would not be able to refund the decretal sum if paid to him in satisfaction of the decree. Counsel urged that in the event we find that the applicant has satisfied the two limbs of arguability and nugatory, we should secure the decretal sum by ordering for stay of execution on condition that the applicant deposits the full decretal sum in a joint interest-earning account in the names if the advocate for the parties within 30 days. Lastly, that the proposal by the applicant to deposit Kshs 600,000/- as security for costs is unreasonable, and it would only be just that the full decretal sum is deposited as security to balance the interest of both parties. Reliance was placed on the decisions in *George W. Omondi vs Guilders International Bank Limited* [2014] eKLR and *Margaret Wanjiku Godwin vs Henry Mwangi Gatai & 3 others* [2019] eKLR for these submissions.
10. An appeal or intended appeal will be rendered nugatory where the resulting effect of not granting a stay of execution is likely to be irreversible or, if it is not reversible, where damages will not reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui vs Tony Keter & 5 others Civil* (supra)). Hence the various decisions of this Court that the purpose of a stay of execution is to preserve the subject matter of the appeal. In the present application, concerns were raised as regards the respondents' capacity to refund the decretal sum if the applicant's appeal succeeds. The respondent did not confirm that he will be in a position to refund the sum of money, and instead threw the obligation to do so back to the applicant. To this extent, the effects if a stay is not granted may not be reversible. However, while the applicant has met the threshold for grant of a stay of proceedings, we are alive to the fact that the respondent has a money judgment in his favour. We are therefore persuaded that this is a matter where a conditional stay is merited, to balance the interests of both parties.
11. In the circumstances, we order that there shall be a stay of execution of the judgment and orders of the Employment and Labour Relations Court (ELRC) at Nairobi (Nzioki wa Makau J.) delivered on 22nd May 2023 in ELRC Cause No. 503 of 2019, pending the hearing and determination of the appeal therefrom, on condition that the applicant deposits the sum of Kshs 800,000/= in a joint interest-earning account opened in the names of the advocates on record for the applicant and respondent within 30 days of today's date. Upon default, the stay orders shall automatically lapse. We make no orders as regards the costs of the application.
12. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG'



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

