



HHI Management Services Limited v Okeyo & another (Civil Application E341 of 2024) [2025] KECA 501 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 501 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E341 OF 2024
J MOHAMMED, M NGUGI & FA OCHIENG, JJA
MARCH 21, 2025**

BETWEEN

HHI MANAGEMENT SERVICES LIMITED APPLICANT

AND

STEVE OKEYO 1ST RESPONDENT

THE BOARD OF DIRECTORS HHI MANAGEMENT SERVICES LIMITED 2ND RESPONDENT

(Being an application from the Ruling of the Employment and Labour Relations Court at Nairobi (Gakeri, J.) dated 6th May 2024 in ELRC Cause No. E970 of 2023)

RULING

1. The applicant herein, HHI Management Services Limited, has moved this Court through an application dated 4th July 2024, brought under rule 5(2) (b) of the Court of Appeal Rules seeking orders, inter alia:
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of the intended appeal, the honourable Court be pleased to grant a stay of proceedings in Nairobi ELRC Cause No. E970 of 2023.
 4. Costs of this application be provided for.”
2. The application is premised on the following grounds:
 - a. Being dissatisfied with the impugned judgment, the applicant lodged a notice of appeal on 6th May 2024.



- b. The applicant had filed chamber summons before the trial court seeking to have Nairobi ELRC Cause No. E970 of 2023 referred to arbitration in accordance with the employment agreement dated 30th May 2016.
 - c. However, the trial court in the impugned ruling dismissed the applicant's application on the ground that the arbitral clause was unenforceable under Section 26 of the *Employment Act*.
 - d. The suit was scheduled for the highlighting of submissions on 2nd July 2024 on another application to expunge confidential documents.
 - e. The applicant is apprehensive that once the application is determined, the court will be ready to hear the main suit, and unless this Court grants the stay of any further proceedings, the applicant stands to suffer irreparable loss.
 - f. The applicant's right under Article 50(1) of *the Constitution* stands to be infringed upon should the proceedings in Nairobi ELRC Cause No. E970 of 2023 proceed in the current form.
 - g. The proceedings in Nairobi ELRC Cause No. E970 of 2023 will perpetuate illegality as the impugned ruling flies against the clear and unequivocal provisions of *the Constitution*.
 - h. The intended appeal is arguable and has a high chance of success based on;
 - i. Whether Section 15 of the *Employment and Labour Relations Court Act* excludes arbitration as an alternative dispute resolution mechanism for employment disputes and whether that does render arbitration clauses in employment contracts unenforceable.
 - j. Whether the court erred in rewriting the employment contract for the parties herein.
 - k. Whether the court erred in concluding that arbitral law in Kenya is primarily intended for commercial disputes.
 - l. Whether the court erred in finding that the inclusion of arbitration clauses in employment contracts is atypical and less favourable than litigation.
 - m. The respondents will suffer no prejudice should the application herein be allowed.
3. The application is supported by the affidavit of Arun Mathur, the chairman of the 2nd respondent's board of directors, sworn on 4th July 2024 in which he reiterated the grounds on the face of the application.
 4. In response to the application, the 1st respondent in his replying affidavit sworn on 10th July 2024 stated that:
 - a. A stay of further proceedings in the trial court would interfere with his right to prosecute his claim, and infringe on his rights to access justice, and fair trial.
 - b. The present application is a ploy to delay the hearing and determination of his claim before the trial court. This is the third application filed by the applicant in an effort to delay the determination of his claim by the trial court.
 - c. The applicant will suffer no irreparable loss if the application is not allowed, as the presence of an arbitration clause in an employment contract does not oust the ELRC's jurisdiction.
 - d. The applicant has failed to inform the court that it sabotaged any attempts to mediate the dispute as it proceeded to terminate his employment on 8th December 2023 in total disregard



of the directions of the court on 30th November 2023 for the parties to mediate and report to court on 7th December 2023.

5. When the application came up for hearing on 11th November 2024, Mr. Weru, learned counsel, appeared for the applicant while Mr. Morara Omoke, learned counsel, appeared for the 1st respondent.
6. Before the application could be heard, Mr. Omoke requested an adjournment because the matter had already been referred to court-annexed mediation by the trial court. He argued that pursuing court proceedings while mediation was ongoing was an abuse of the court process.
7. However, Mr. Weru opposed the request, stating that the ruling appealed against blocked them from going to arbitration, as provided in the employment contract. He acknowledged the court-mandated mediation but insisted that they prefer to go to arbitration.
8. Despite the court's concerns about the matter pending before two different fora (mediation and the court), one adversarial and the other consensual, Mr. Weru insisted on the matter proceeding for hearing and determination by this Court.
9. Mr. Weru submitted that the appeal was arguable because the ruling against the arbitration clauses in the employment contract contradicted Article 159 (2) (c) of *the Constitution* and previous court decisions. He also submitted that the opportunity to go to arbitration would be lost if the matter proceeded to a hearing before the trial court.
10. In its written submissions, the applicant submitted that the key issue was whether arbitral clauses in employment contracts are enforceable, and whether the Employment and Labour Relations Court erred by effectively rewriting the contract between the parties.
11. The applicant submitted that the decision in question contradicted judicial authority. It was for that reason that the applicant was convinced that the matter should be stayed because the appeal was not just arguable, but it had a high likelihood of success. The applicant cited Article 159(2)(c) of *the Constitution*, emphasizing the importance of alternative dispute resolution mechanisms.
12. The applicant submitted that if the matter before the trial court proceeds, the applicant would suffer irreparable harm, and its intended appeal would be rendered a mere academic exercise.
13. The applicant relied on the following authorities in support of its submissions: Multimedia University of Kenya v

Professor Gitile N. Naituli (2014) eKLR; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR; and Dock Workers Union Limited v Messina Kenya Limited eKLR.
14. Opposing the application, Mr. Omoke contended that there was no evidence of an arguable appeal because the applicant did not serve the notice of appeal within the stipulated timelines. He further submitted that granting a stay of proceedings was a drastic order that should only be granted in special circumstances, which the applicant had not demonstrated.
15. Counsel referred us to paragraphs 14 to 49 of the ruling, where the learned Judge analyzed the jurisdiction and authority of the Employment and Labour Relations Court, concluding that there was no intention to apply arbitration in such disputes.
16. In his written submissions, the 1st respondent submitted that the applicant aimed to delay the proceedings through multiple applications and appeals. They had initially sought arbitration and to expunge his documents from the court record, but these attempts were dismissed. He submitted that



the applicant was causing him distress, as he was without income, yet the applicant was delaying justice. He submitted that the applicant has not justified a stay of proceedings, which should only be granted in exceptional cases, as granting a stay would violate his right to a timely hearing.

17. The 1st respondent submitted that the notice of appeal was not properly served, rendering the application incompetent. He stated that the applicant allegedly used an incorrect email address when attempting to serve the notice of appeal. The 1st respondent argues that without proper service, he couldn't be expected to file an application to strike out the notice.
18. The 1st respondent concluded by submitting that the application lacked merit and that it was a waste of judicial time. He urged that the application be dismissed with costs.
19. To buttress his submissions, the 1st respondent relied on the following cases in support of his submissions: *Mwawasi v Shako* [2024] KECA 632 (KLR); *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR; *Mbarak v Registrar of Titles & 3 others*; *Omido & another (Interested Parties)* [2024] KECA 687 (KLR); *Khan v International Commercial Company (K) Ltd (Consolidated)* [2023] KESC 84 (KLR); and *Kenya Wildlife Service v James Mutembei* [2019] eKLR.
20. We have carefully considered the application, the rival affidavits, the submissions, the authorities cited, and the law. The issue for determination is whether the application has met the threshold for granting a stay of further proceedings: and whether the ongoing court-annexed mediation affect the application for a stay.
21. The 1st respondent argued that the applicant's notice of appeal is incompetent due to failure to serve it within the stipulated time according to Rule 79(1) of the Court of Appeal Rules. He also contended that the applicant had not filed the appeal within 60 days of the notice. He further argued that granting a stay is a drastic order requiring a very high standard of proof, which the applicant had not met. He highlighted that the ELRC court has the authority to apply various methods of resolving disputes, but arbitration was omitted, questioning the intention to apply arbitration in this kind of dispute.
22. On the other hand, the applicant submitted that the impugned ruling, which found arbitral clauses in the employment contract unenforceable, was contrary to Article 159 (2) (c) of *the Constitution*. It argued that this raises an arguable point for appeal, especially since the Court has previously upheld arbitration clauses in employment disputes. It also stated that without a stay, the matter would proceed to a hearing on its merits before the ELRC, thus causing the applicant to miss out on the opportunity to go to arbitration, as agreed by the parties. It maintained that the jurisdictional question should be determined before proceeding to the merits of the case.
23. The Court notes the concerns raised by the 1st respondent regarding the service and filing of the notice of appeal. However, the Court also acknowledges that the proper forum to argue the validity of the notice of appeal is through an application to strike out the appeal, which has not been done.
24. The Court recognizes that granting a stay of proceedings is a serious matter that should only occur in deserving cases, as it affects the right to a timely trial. The applicant must demonstrate an arguable appeal and the potential for the appeal to be rendered nugatory if a stay is not granted. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the court held that:
 - 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. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.



- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - vii. 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - viii. 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. *Damji Pragji (supra)*.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227* at page 232.
 - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
25. This Court finds that the applicant has presented an arguable case concerning the enforceability of arbitration clauses in employment contracts, especially in light of Article 159 (2) (c) of *the Constitution* and previous decisions of this Court. As an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, and one which is not frivolous, we hold that the applicant has an arguable case.
26. In the case of *Reliance Bank Ltd v Norlake Investments Ltd [2002] I EA 227*, the Court held that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case, and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated inter alia:
- “To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
27. In the application before us, the applicant merely stated that if the matter proceeds before the trial court, the applicant would lose the opportunity to have the dispute resolved through arbitration, as was provided for in the employment contract. This Court is not convinced that the intended appeal would be rendered nugatory if the proceedings before the ELRC, especially the mandated court-annexed mediation, proceed. This is so because a mediation settlement agreement is the product put together



by the parties themselves. It is thus inconceivable that the applicant could help formulate a settlement which was prejudicial to it.

28. Meanwhile, if the appeal were successful after the trial court had determined the case, it would imply that the Court's decision was a nullity, as it would have been rendered in the absence of jurisdiction. In effect, the consequences of the trial are reversible, and the applicant could be compensated by an award of costs.
29. Therefore, we are not inclined to exercise the Court's discretion in favour of the applicant. Consequently, the application dated 4th July 2024 lacks merit and is accordingly dismissed with costs to the 1st respondent.

Orders accordingly.

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

JAMILA MOHAMMED

.....

JUDGE OF APPEAL MUMBI NGUGI

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

F. OCHIENG

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

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

Signed

DEPUTY REGISTRAR

