



**East Africa Portland Cement PLC v Kaleve & 2 others (Civil Application
E197 of 2024) [2025] KECA 515 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 515 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E197 OF 2024
DK MUSINGA, F TUIYOT'T & GV ODUNGA, JJA
MARCH 7, 2025**

BETWEEN

EAST AFRICA PORTLAND CEMENT PLC APPLICANT

AND

MUSA MOHAMED KALEVE 1ST RESPONDENT

PETER NDUNGU MATHERI 2ND RESPONDENT

CHARLES MAINA JESSE 3RD RESPONDENT

*(Being an application for stay of execution of the Judgment of the
Employment and Labour Relations Court (Makau, J.) delivered
by Ndolo, J. on 21st November 2024 in ELRC No. 248 of 2018)*

RULING

1. The applicant's notice of motion dated 27th November 2024, expressed to be brought pursuant to rules 5(2)(b), 41 and 47 of the Court of Appeal Rules, and sections 3A and 3B of the [Appellate Jurisdiction Act](#), substantially seeks an order for stay of execution of the judgement dated 14th February 2024 and the ruling delivered on 21st November 2024 pending the hearing of this appeal.
2. The grounds upon which the order is sought is that on 14th February 2020 the ELRC (Makau, J.) delivered a judgement in favour of the respondents in the sum of Kshs 14,226,341.32 less statutory deductions; that the applicant appealed against the whole judgement and sought stay of execution of the said judgement, which was granted pending the hearing of the appeal conditional upon the deposit of the entire decretal sum within 21 days into a joint interest earning account with effect from 5th February 2021 when the ruling was delivered; that due to the applicant's financial constraints and distress, the applicant was unable to meet the said conditions and filed another application dated 28th May 2021 seeking a review of the said ruling to allow the applicant deposit the said security by way of



monthly instalments by initially depositing Kshs 3,500,000 and thereafter by way of 11 equal monthly instalments of Kshs 975,122; that by an interim ruling given on 14th June 2021, the learned Judge directed the applicant to deposit the initial sum of Kshs 3,500,000 not later than 18th June 2021 which order the applicant complied with; that in compliance with the orders of 30th September 2021, the applicant duly deposited Kshs 5,850,731 comprising the instalments for the months of October 2021 as well as the balance of the decretal sum of Kshs 4,875,609 into court; that before the delivery of the said full ruling, the applicant's advocates filed an application to cease acting which application was not served on the applicant; that it was only later that the applicant became aware that the rulings on both applications was delivered on 21st September 2023 when the applicant was given a conditional stay of execution requiring it to file an appeal within 90 days from the date of the ruling, failure to which the respondent would be at liberty to request for the release of the decretal sum; that due to the delay in obtaining proceedings and being unaware of the said ruling, the applicant was unable to fully comply with the condition to file the appeal as directed; that the Record and Memorandum of Appeal were eventually filed on 14th March 2024 and directions on filing of the submissions issued; that in the meantime, the respondent moved the court by an application dated 7th February 2024 seeking the release of the deposited funds; and that by an application dated 15th March 2024, the applicant sought extension of time to comply with the directions set in the ruling of 21st September 2023 but by its ruling delivered on 21st November 2024, the trial court dismissed the applicant's application and allowed the respondents' application for the release of the deposited funds.

3. According to the applicant: unless the orders sought herein are granted there is a risk of the entire decretal sum being released to the respondent hence rendering the appeal nugatory; that on the other hand, no prejudice would be occasioned if the court continued holding the decretal sum; that the appeal raises serious and arguable legal and factual issues that require determination by this Court since the applicant intends to have the court interpret the employment laws and the application of key legal principles; that there is no credible evidence to support the assertion that the decretal sum has been released to the respondents' advocates' account since the purported proof, in the form of an e-filing printout, is unreliable and tampered with; and that the alleged printout from the e-filing system does not constitute proof of payment as it lacks the necessary details to verify the actual transfer of funds and fails to meet the legal requirements of admissibility.
4. In opposing the application, the respondent, while retracing the history of the matter as set out by the applicant stated: that there is no judgement delivered on 24th February 2024 that is sought to be stayed by the applicant; that therefore the application and the purported appeal have been overtaken by events; that the trial court, after hearing the application dated 28th May, 2021, issued orders that pending the delivery of the ruling on 30th September, 2021, the applicant deposits Kshs 3,500,00 in court not later than 18th June 2021 and the balance be deposited in monthly instalments of Kshs 975,122 with effect from 30th June 2021 and thereafter on every 20th day of each succeeding month; that whereas the applicant deposited Kshs 3,500,000 in time and the first two instalments as ordered, it defaulted on the rest of the monthly instalments for July and August and only made the deposits in September 2021; that the applicant was granted a stay of execution on 21st September 2023 conditional upon the appeal being filed within 90 days from the date of the ruling, a condition which the applicant did not comply with; that upon the failure by the applicant to comply with the said order, the respondents' advocates requested for the release of the amount de[posit]ed in court and the said refund was processed and the sum of Kshs 13,250,975 paid on 10th December 2024 and subsequently transmitted to the applicants; that the applicant did not copy and serve the letter bespeaking proceedings on the respondent within 30 days as required by rule 85 of the Court of Appeal Rules, hence the appeal has lapsed and the Notice of Appeal is deemed as having been withdrawn; that



the applicant has not demonstrated valid grounds for granting a stay of execution; that the applicant has failed to demonstrate the existence of any imminent risk of substantial loss or prejudice that would be suffered if the stay of execution is not granted; that on the other hand, the respondent will suffer prejudice if the stay is granted as it will be prevented from enjoying the fruits of the judgement; and that the applicant's appeal does not raise any substantial or arguable issues that warrant the stay of execution.

5. We heard the application on this Court's virtual platform on 12th February 2025 when learned counsel, Mr Gideon Kamau Muturi, appeared for the applicant, while learned counsel, Mr Alfred Nyabena, appeared for the respondents. Both learned counsel relied on their written submissions which they briefly highlighted.
6. The applicant's submissions, in summary, were: that the principles guiding the grant of stay of execution were established in the cases of *Githunguri v Jimba Credit Corporation Ltd. No 2 (1988) KLR 838*; that the appeal is arguable as it raises several bona fide and weighty issues that warrant a determination by this Court; that one of the issues raised is that the learned Judge erred in law by holding that the terms of a Collective Bargaining Agreement continue to bind parties even after the lapse of the period of its term notwithstanding the express intention of the parties and whether that decision is contrary to section 59(1) and
 3. of the *Labour Relations Act*; that on the nugatory aspect, the applicant has fully complied with the trial court's directions by depositing the entire sum into the court's account, albeit after some delay; that the applicant only failed to file the appeal within the time given due to unavailability of proceedings; that the applicant is a State corporation listed on the Nairobi Securities Exchange and regulated by the Capital Markets Authority with substantial obligations to the public and its stakeholders while the respondents are former employees of the applicant whose financial capacity to refund the decretal sum in the event that the appeal succeeds remains unsubstantiated; that on the authority of the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR*, the burden shifted to the respondents to prove otherwise; that if the decretal sum is released to the respondents before the appeal is heard and determined, the applicant is likely to face significant challenges in recovering the amount thereby rendering the appeal nugatory; and that on the other hand, the respondents would suffer no prejudice as the decretal sum remains securely deposited in the court's account.
7. On behalf of the respondents, it was submitted: that there is no judgement by Makau, J. dated 14th February, 2024; that the judgement has been complied with by the release of the decretal sum to the respondents' advocates and thereafter to the respondents hence on the authority of the case of *Uzuri Foods Limited v Ngwenze & 169 others (Civil Application E067 of 2024) [2024] KECA 1226 (KLR) (20 September 2024) (Ruling)*, the stay cannot be granted; and that the applicant is guilty of laches.
8. We have considered the application and the affidavit in support thereof as well as the submissions filed. As regards the limb of the application seeking stay of the ruling delivered on 21st November 2024, no notice of appeal was filed against that ruling. In any case, that ruling dismissed an application by the applicant, hence was a negative order which this Court has held many times is incapable of being executed and therefore is not amenable to an order of stay. See *Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 Others [2008] eKLR*.
9. In applications of this nature, the burden is on the applicant to prove to the Court that the conditions necessary for grant of the orders sought exist and have been fulfilled. It is therefore important for the applicant to show, at the time the application comes up for hearing, that the substratum of the



application still exists since the Court ought not to grant orders in the dark. Courts do not grant orders in vain. In this application, the respondents contend that the decretal sum that was deposited in court was released to the respondent's advocates pursuant to a ruling delivered on 21st November 2024, and has since been passed on to the respondents. The applicant, while not positive about the fact of the release of the funds, has contented itself with challenging the documentation relied upon by the respondents. We would have thought that in light of the averments by the respondents, nothing would have been easier than for the applicant to obtain a confirmation from the Registrar of the trial court regarding the status of the said funds. In the case of *Uzuri Foods Limited v Ngwenze & 169 others* (supra), this Court set out the conditions that are required to be satisfied before a stay of execution can be granted and stated as follows:

10. In its appeal, the applicant submitted that it intends to urge the Court to find, inter alia, that the learned Judge erred in law by holding that the terms of a Collective Bargaining Agreement continue to bind parties even after the lapse of the period of its term notwithstanding the express intention of the parties and whether that decision is contrary to section 59(1) and (3) of the *Labour Relations Act*. The law is clear that what makes an appeal arguable is not the certainty of its success but whether the issues to be raised are bona fide and worth of consideration by the Court. Multiplicity of issues need not be set out since a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition. see *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR). We are satisfied that the issues to be raised before the Court on appeal are not idle ones and are deserving of consideration.
11. As for the second requirement, in *Uzuri Foods Limited v Ngwenze & 169 others* (supra) expressed itself as follows:

“But the applicant must also demonstrate that the appeal will be rendered nugatory if a stay of execution is not granted. The position here is that after the judgment was delivered on 11th November, 2020 in favour of the respondents the applicant successfully applied in ELRC for orders of stay of execution pending appeal. That court considered the application and determined it in favour of the applicant ordering in addition as a condition for granting orders of stay of execution, that a sum of Kshs.5,000,000/= be deposited in a joint interest earning account in the joint names of the advocates of the parties. The said sum was deposited as ordered but with the passage of time the respondents applied successfully that the said sum be released to them as an appeal had not been filed. The parties agree before us that the money deposited at Stanbic Bank, Upperhill Branch, Nairobi was released to the respondents on 19th February, 2024 as ordered by Abuodha, J. This means that there is no money at the said bank belonging to the parties herein for which a “don't release” order can be made, and therefore, we find that the appeal against the order of Abuodha, J. will not be rendered nugatory if we decline to make an order of stay. That is also why we refused to give an order for temporary stay of execution when we heard the motion on 15th April, 2024.”

12. Before us there is prima facie evidence that the decretal sum was released to the respondents' advocates on 10th December 2024. In the circumstances, the applicant has failed to persuade us that unless we grant the stay sought, the appeal, if successful, will be rendered nugatory.
13. We dismiss the application with costs to the respondents.
14. It is so ordered.

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

D. K. MUSINGA, (PRESIDENT)



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JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

F. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

