



Gulamhusein v Kenya Railways Corporation Limited (Civil Application E094 of 2023) [2024] KECA 447 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 447 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E094 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 12, 2024**

BETWEEN

GULAMHUSEIN F GULAMHUSEIN APPLICANT

AND

KENYA RAILWAYS CORPORATION LIMITED RESPONDENT

(An application for stay of proceedings against the ruling and order of the Environment and Land Court at Mombasa (Naikuni, J.) delivered on 4th May 2023 in Mombasa ELC No. 46 OF 2018)

RULING

1. By a Notice of motion dated 9th October 2023 brought pursuant to rules 5(2) (b), 42 and 47 of the [Court of Appeal Rules](#), the applicant, Gulamhusein F. Gulamhusein, seeks an order to stay proceedings in Mombasa ELC No 46 of 2018 - [Gulamhusein F. Gulamhusein vs Kenya Railways Corporation Limited](#) pending the hearing and determination of this application and the intended appeal.
2. The Notice is brought pursuant to the grounds on its face, and on an affidavit in support sworn on 9th October 2023 by the applicant, in which he reiterated the grounds on the face of the application, and further contended that he filed a Notice of Motion dated 4th July 2022 in the Environment and Land Court seeking to have Naikuni, J. recuse and disqualify himself from further hearing of the suit, which application the learned Judge found to be unmerited and accordingly dismissed, thereafter, the suit was fixed for hearing on 30th October 2023.
3. The applicant contended that, based on the manner in which the matter proceeded in the lower court, there was little or no hope that justice will be served because, when the matter was initially fixed for directions on 4th October 2022, it was not included on the causelist of 5th October 2022; that when the omission was noticed, they immediately sought to have it included but, on the hearing date, the Judge declined to hear the application and ordered that the file be returned to the registry to take another



- date; that the application was fixed for 2nd November 2022 and, on that date, the Judge reserved the ruling for 6th March 2023; that the ruling was not delivered as scheduled, whereupon, the learned Judge stated that the impugned ruling would be delivered on Notice; that no Notice was issued, but that they came to learn through their previous advocate that the ruling would be delivered, that same day of 4th May 2023; that his advocate immediately logged onto the platform, but when his matter was called out, the Judge muted the microphone and left the court, which necessitated his advocate having to inquire from the registry whether the ruling was delivered; that they were informed that the application had been dismissed with costs; that, dissatisfied with the ruling, the applicant instructed his advocates to lodge an appeal to this Court, and which is pending hearing and determination.
4. It was further contended that if the orders sought are not granted, he is likely to suffer great prejudice and irreparable loss as the court is not capable of being fair, just and impartial; that no prejudice would be suffered by the respondent if this application is allowed.
 5. In a replying affidavit sworn on 6th November 2023, Justine Omoke, the Regional Estate Officer of the respondent, opposed the application and deposed that the applicant does not have an arguable appeal with chances of success because the learned Judge correctly found that the application was not supported by evidence and failed to meet the threshold requirements for establishing bias on the part of a judge; that the allegations of bias that are mere falsehoods meant to mislead this Court because, contrary to the allegations that no notice of the delivery of the ruling was issued, the court issued a notice via email to both parties on 28th April 2023 to the effect that the ruling would be delivered on 4th May 2023; that the applicant's advocate was served with the date for ruling through email address ...@gmail.com, which is the email address indicated on all of the applicant's pleadings; that the applicant's advocate did not attend court on the ruling date, but that the Judge nevertheless read the ruling in the presence of the respondent's advocate, who thereafter notified the applicant's advocate of what had transpired in court.
 6. The deponent contended that the applicant will not suffer any prejudice if the matter is heard on merit because it is the applicant who filed the case and not the respondent or the court; that the respondent will be prejudiced if the proceedings are stayed as the suit filed in 2012 remains a liability to the corporation, and that further delay will defeat the overriding objective of the court to hear cases expeditiously; that the applicant's applications are merely tactics intended to delay the hearing of the suit; that when ELC No. 46 of 2018 came up for hearing of the applicant's case on 14th March 2022, the applicant testified but was stood down during cross examination on the grounds that he was unwell; that the matter was adjourned and fixed for further hearing on 18th March 2022 at the insistence of the applicant but that, on 16th March 2022, the court and the respondent were notified that the applicant could not proceed due to ill health; that, on 23rd May 2022, the applicant again informed the court that he was still unwell; that on 5th July 2022, he filed the application dated 4th July 2022 seeking orders for the Judge to recuse and disqualify himself from hearing and determining the suit on grounds of alleged bias; and that the application dated 4th July 2022 was intended to derail the hearing on 2nd November 2022.
 7. It was further deposed that, after the ruling of 4th May 2023, the suit was set down for hearing on 30th October 2023 and that, a week later on 17th May 2023, the applicant filed a Notice of appeal against the ruling, and a Notice of Motion dated 18th August 2023 in ELC 46 of 2018 seeking for orders of stay of proceedings which was certified urgent and listed for hearing and highlighting of submissions on 11th October 2023; that the respondent replied to the application only for the applicant to withdraw it on 2nd October 2023; and that the applicant has been delaying the hearing of ELC No. 46 of 2018.



8. In a further affidavit sworn on 28th November 2023, the applicant denied delaying hearing of the suit and stated that he was unable to proceed due to ill health.
9. During the hearing on a virtual platform, Mr. Atancha, learned counsel for the applicant, relied on written submissions and stated that the application was brought without delay; that the applicant's fundamental right to a fair hearing as enshrined under Articles 25(c) and 50(1) of *the Constitution* cannot be abrogated; that the utterance by the Naikuni, J. cannot pass the impartiality test; that the applicant's appeal is arguable, and will be rendered nugatory if the orders sought are not granted.
10. In response, Mr. Karina, learned counsel for the respondent, submitted that the proceedings of 14th March 2022, which is the basis of the alleged bias on the part of the learned Judge were not extracted or annexed to the application; and that, further, that the ruling delivered on 4th May 2023 and resulting order dismissing the application were also not attached to the application for stay of proceedings. Counsel further contended that the appeal is not arguable, and that it is frivolous and an attempt to delay the hearing of the suit; that it would not be rendered nugatory as any decision made could always be set aside and the matter heard de novo, and that, if anything, it is the respondent who will suffer great prejudice were the orders sought granted.
11. The instant motion has been brought under rule 5(2) (b) of this *Court's rules*. The principles that guide this Court in determination of an application under rule 5(2)(b) of this *Court's Rules* are well settled to wit: that an applicant must demonstrate that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others* [2000] eKLR; *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR; and *Multimedia University & Another vs. Professor Gitile N. Naituli* [2014] eKLR.
12. An arguable appeal need not raise a multiplicity of points, but a single arguable point is sufficient to satisfy the first limb. See *Damji Premji Mandavia vs. Sara Lee Household & Body Care (K) Limited* Civil Application No. Nai.345 of 2005 (UR); and *Kenya Railways vs. Ederman Properties Ltd*, Civil Appeal No. Nai 176 of 2012; and *Ahmed Musa Isamel vs. Kumba ole Ntamorua & 4 others*, Civil Appeal No. Nai 256 of 2013.
13. Concerning the question as to whether the arguability aspect is established in this case, the applicant annexed a draft memorandum of appeal to the motion requesting that this Court interrogates, among other grounds, whether the trial judge was biased in favour of the respondent in the ruling and disregarded weighty issues raised by the applicant in his written submissions and documents filed in court; and whether the Judge was unreasonably biased against the applicant during the proceedings and outrightly favored the respondent and, by so doing, arrived at the wrong conclusion thereby giving rise to a grave miscarriage of justice to the applicant, which violated his right to a fair hearing and trial amongst other grounds.
14. But as to whether or not such grounds disclosed an arguable appeal, it was not discernable from the record because the applicant did not attach the impugned ruling or the proceedings before the trial court that gave rise to the allegations of bias on the part of the learned judge, or which would have disclosed the possibility of violation of his rights to a fair hearing. Without such crucial material, and in view of the orders sought, we are unable to determine whether the appeal is arguable, the effect of which is that the applicant has failed to satisfy the first limb as required for applications under rule 5(2) (b) of the rules of this Court.
15. Consequently, we need not consider the second limb, with the result that the Notice of Motion dated 9th October 2023 lacks merit and is hereby dismissed with costs in the appeal.



It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

