



**University Council of Technical University of Mombasa v Kenya Union  
of Domestic, Hotels, Education Institutions and Hospital Workers (Civil  
Application E099 of 2023) [2024] KECA 555 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 555 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E099 OF 2023  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
MAY 24, 2024**

**BETWEEN**

**THE UNIVERSITY COUNCIL OF TECHNICAL UNIVERSITY OF  
MOMBASA ..... APPLICANT**

**AND**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS AND  
HOSPITAL WORKERS ..... RESPONDENT**

*(Being an application for stay of execution pending appeal from the Judgment  
and Decree of the Employment and Labour Relations Court of Kenya at Mombasa  
(M. Mbaru, J.) delivered on 29th June 2023 in E.L.R.C Cause No. E002 of 2021)*

**RULING**

1. By a Memorandum of Claim dated 8<sup>th</sup> January 2021, the respondent, Kenya Union of Domestic Hotels, Educational Institutions and Hospital Workers, lodged a claim on behalf of 67 grievants against the applicant, the University Council of Technical University of Mombasa, in the Employment and Labour Relations Court at Mombasa in ELRC Cause No. E002 of 2021 seeking: a declaration that the applicant’s refusal to pay service gratuity to the grievants was unlawful and illegal; an order directing the applicant to pay to the grievants a total sum of KShs. 25,910,295/80 on account of service gratuity; an order directing the applicant to issue certificates of service to the grievants; costs of the proceedings; and interest at court rates from the date of termination.
2. The respondent’s case was that the grievants were employed by the applicant on contract during the period between 2011 and 2018 when their contracts ended; that the applicant refused to renew their contracts but, instead, outsourced their services thereby denying them employment; and that the grievants were victimised as a result of the petition filed by the respondent seeking their permanent and pensionable terms of employment with the applicant.



3. In its Memorandum of Response dated 20<sup>th</sup> April 2021, the applicant denied the respondent's claim and averred that the respondent lacked locus standi to represent 12 of the grievants, who were not members of the union; that there was no termination of the grievants' employment as their contracts had expired by effluxion of time; that the applicant was under no obligation to renew their contracts; and that the grievants' contracts did not provide for payment of service gratuity.
4. In its judgment dated 29<sup>th</sup> June 2023, the ELRC (Monica Mbaru, J) allowed the respondent's claim with costs to the respondent. In particular, the learned Judge awarded the grievants a total sum of Kshs. 25,910,295/80 on account of service gratuity computed at the rate of 31% of their respective monthly basic salary for the total number of months worked.
5. Aggrieved by the learned Judge's decision, the applicant moved to this Court on appeal on two grounds set out in its undated Memorandum of Appeal, namely that the learned Judge erred in law and fact: by holding that the grievants were entitled to service gratuity; and by holding that the respondent had locus standi to represent 12 of the grievants who were not members of the respondent union.
6. In addition to its appeal, the applicant filed a Notice of Motion dated 8<sup>th</sup> November 2023 pursuant to rule 5(2) (b) of the *Court of Appeal Rules* praying for: stay of execution of the judgment and decree of the ELRC delivered on 29<sup>th</sup> June 2023 in Mombasa ELRC Cause No. E002 of 2021 pending hearing and determination of its intended appeal; and an order that costs of the Motion do abide the outcome of the appeal.
7. The applicant's Motion was supported by the annexed affidavit of Professor Leila Abubakar, the applicant's Vice-Chancellor, essentially deposing to the grounds on which the applicant's Motion is anchored. Relevant among those grounds are, inter alia: that the court, in the impugned judgment, awarded members of the respondent gratuity in the sum of KShs. 25,910,295/80 for which they did not qualify; that, if the respondent executed the judgment and decree, the applicant will suffer substantial loss; that the applicant has an arguable appeal with a probability of success; that the intended appeal would be rendered nugatory if stay is not granted; that if the applicant was to pay the sums awarded to the grievants, and the appeal succeeded, it would not be able to recover it in view of the fact that the 67 grievants are not currently in gainful employment, and that their whereabouts remains unknown; that the applicant has presented this application without undue delay; and that it is in the interest of justice that the orders sought are granted.
8. Learned counsel for the applicant, M/s. Oluga & Company, filed written submissions dated 14<sup>th</sup> November 2023 urging the Court to allow the applicant's Motion and grant stay of execution pending appeal as sought. Counsel did not cite any judicial authorities in support of the Motion.
9. Opposing the Motion, the respondent filed a replying affidavit of Hezron Onwong'a, its Chief Industrial Relations Officer, sworn sometime in November 2023. According to the deponent, the applicant's Motion is flawed and misguided, misconceived and an abuse of the court process. He deposes further that the grievants are law abiding citizens and taxpayers within the Republic of Kenya, and that the notion that the applicant would lose its money is ill-motivated since the grievants own properties in Kenya; that the decretal amount legally accrued and fell due at the end of the grievants' separation of employment; and that the applicant would not lose any money as the same can be refunded.
10. On their part, learned counsel for the respondent, Mr. Hezron Onwong'a, also filed written submission dated 16<sup>th</sup> November 2023 requesting us to dismiss the applicant's Motion with costs. Likewise, counsel cited no judicial authorities to buttress his submissions.



11. The twin principles that apply in applications under Rule 5(2)(b) of this *Court's Rules* for stay of execution pending appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must also demonstrate that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution of the impugned judgment, decree or order were not stayed.
12. On the 1<sup>st</sup> limb of this twin principle, this Court held in *Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, absent stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another v Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Ahmed Musa Ismail v Kumba Ole Ntamorua and 4 others* [2014] eKLR).
13. A cursory look at the grounds of appeal advanced in the applicant's undated memorandum of appeal, viewed against the backdrop of the record as put to us reveals substantive issues of law and fact deserving of the Court's inquiry on appeal. Moreover, and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principles. *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR is a case in point.
14. We need not say more with regard to those grounds lest we embarrass the bench that will ultimately pronounce itself on the merits or otherwise of the intended appeal. Suffice it to observe that, as this Court held in the case of *Wasike v Swala* [1984] KLR 591, an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court as is the case here (also see *Stanley Kangethe Kinyanjui vs. Tony Ketter & others* [2013] eKLR. Put simply, an arguable appeal is one that is not idle and/or frivolous.
15. With regard to the 2<sup>nd</sup> limb of the twin principle, the term "nugatory" was defined in *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as "worthless, futile or invalid". It also means "trifling".
16. Having concluded that the applicants' intended appeal is arguable, the decisive question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted. We are persuaded by the applicant's submission that, if the colossal amount constituting the decretal amount were to be paid to the 67 grievants, it would be difficult to recover such sums in the event that its appeal succeeded. In effect, the appeal would be rendered nugatory absent stay.
17. On our careful examination of the impugned judgment and decree, the applicant's Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the applicant and for the respondent, the cited authorities and the law, we reach the conclusion that the applicant has satisfied the conjunctive limbs of the twin principles for grant of the stay orders sought under rule 5(2) (b) of the *Rules* of this Court. Accordingly, its Motion dated 8<sup>th</sup> November 2023 succeeds and is hereby granted with orders that:
  - a. execution of the judgment and decree of the Employment and Labour Relations Court of Kenya at Mombasa (M. Mbaru, J) delivered on 29<sup>th</sup> June 2023 in ELRC Cause No. E002 of 2021 be and are hereby stayed pending hearing and determination of the intended appeal; and
  - b. that the costs of the applicant's Motion shall abide the outcome of the intended appeal.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2024**



**A.K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

