



**Kerio Valley Development Authority v Kibogy (Civil Application
E055 of 2023) [2024] KECA 915 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 915 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E055 OF 2023
F SICHALE, FA OCHIENG & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

KERIO VALLEY DEVELOPMENT AUTHORITY APPLICANT

AND

ROSE CHEPKOECH KIBOGY RESPONDENT

*(Being an Application for Stay of Execution of the Judgment of the
Employment and Labour Relations Court at Eldoret (M. Onyango J),
dated 21st September 2023)in(Eldoret Elrc Appeal No. E023 of 2021)*

RULING

1. By the motion on notice dated 18th October 2023, brought pursuant to the provisions of Sections 3A and 3B of the [Appellate Jurisdiction Act](#) and Rules 1, 5 (2) (b), 41 and 47 of the Court of Appeal Rules, Kerio Valley Development Authority (the applicant herein) has sought the following orders:
 - a. Spent.
 - b. Spent.
 - c. This Honourable Court be pleased to stay the whole of the judgment in the Employment and Labour Relations Court at Eldoret Appeal No. E021 between Rose Chepkoech Kibogy and Kerio Valley Development Authority delivered on 21st September 2023 pending the hearing and determination of the intended appeal.
 - b. Costs of this application be in the course.” (sic)
 1. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Gertrude Mabele, a legal officer of the applicant, who deposed inter alia that the applicant was aggrieved by the judgement of the Employment and Labour



Relations Court at Eldoret (M. Onyango J), delivered on 21st September 2023 and as a result filed a Notice of Appeal manifesting its intention to challenge the aforesaid decision.

2. She further deposed that in its judgment, the Court made several orders including awarding the respondent Kshs 1,232,780.12/=, which amount the respondent was now at liberty to execute and that the appeal in the Superior Court arose from the Eldoret Chief Magistrate's ELRC Cause No. 43 of 2019, in which the subordinate court had dismissed the respondent's claim in its entirety.
3. She further deposed that the Superior Court had without justification set aside the decision of the subordinate court and that the applicant's intended appeal was arguable and that there was great apprehension that if the applicant succeeded on appeal, then it would not be able to recover any money paid to the respondent in satisfaction of the decree.
4. The motion was opposed vide a replying affidavit sworn by the respondent on 8th November 2023, who deposed inter alia that the intended appeal was not arguable as the Superior Court delivered its judgment after hearing the parties, considering the evidence on record and the parties' submissions and hence it was not true that the judgment of the lower court was set aside without any justification.
5. She further deposed that though execution was a lawful process, she had not commenced the same and the same could not be equated to irreparable loss and that further, she was a former employee of the applicant for a period of 30 years and prior to leaving employment, she was serving in the highest cadres of employment earning a decent salary which she used to invest in commercial maize and wheat farming which gives her considerable income and would thus be able to refund the decretal amount in the event of the intended appeal being successful.
6. She further deposed that in totality of the foregoing, the applicant had failed to satisfy the Court that it had an arguable appeal and that the intended appeal would be rendered nugatory if an order of stay was not granted.
7. When the matter came up for plenary hearing on 5th December 2023, Mr. Maiyo learned counsel appeared for the applicant whereas Mr. Lagat appeared for the respondent. Both parties relied on their written submissions dated 16th November 2023 and 22nd November 2023, which they briefly orally highlighted in Court.
9. The brief facts in this case are that the respondent was a former employee of the applicant who voluntarily retired from employment after the applicant rolled out a voluntary early retirement program with its employees, with a clear remuneration criterion.
10. Subsequently thereafter, Kenya Planters Agricultural Workers Union which was then in a collective bargaining agreement with the applicant moved to court and challenged the remuneration criterion.
11. Immediately thereafter, negotiations commenced pursuant to which a consent was reached and recorded as an order of the court, which consent stipulated a new payment criterion which consequently subsumed the initial offer by the applicant and the respondent retired on 30th June 2018 and was remunerated pursuant to the terms of the consent order.



12. The respondent then filed a suit at the Chief Magistrate's Court in Eldoret seeking to renege on the terms of the consent order and revert to the initial offer, which claim was dismissed by the trial court which held inter alia that the respondent was bound by the consent order.
13. On appeal to the Employment and Labour Relations Court, M. Onyango J, reversed the finding of the trial court and held that the respondent was not a unionisable employee and was not bound by the consent and awarded her Kshs 1,232,780.12/=. It is this judgment that has now precipitated the filing of the instant motion by the applicant.
14. It was submitted for the applicant that pursuant to the provisions of Section 11 of the Industrial Relations Charter 1984, the respondent was a unionisable employee and was bound by the terms of the consent order and that having retired well aware of the terms of the consent order and having been remunerated, she could not be accommodated to have a second bite at the cherry and was by conduct estopped from rejecting the terms of retirement drawn from the consent. Consequently, it was submitted that the intended appeal was arguable.
15. As to whether the intended appeal would be rendered nugatory if the stay was not granted, it was submitted that the respondent left the employ of the applicant in 2018 and had not demonstrated sufficient means of reimbursing the applicant, should the intended appeal succeed.
16. On the other hand, it was submitted for the respondent that the applicant had not demonstrated that it had an arguable appeal as the learned judge considered, analyzed and appreciated the evidence of both parties before arriving at the impugned decision and that it was therefore not true that that she failed to appreciate the evidence tendered by the parties.
17. As to whether the respondent was a unionisable employee and the import of the consent order dated 8th June 2018, it was submitted that these were issues of fact which this Court could not be called upon to determine in a second appeal. For this proposition, reliance was placed on the case of *Gikonyo & Another V Wambui (Civil Application E019 of 2022)* [KECA 1033 (KLR) September 2022] (Ruling).
18. Regarding the doctrine of estoppel, it was submitted that this issue was not before the Superior Court for consideration and that therefore in the obtaining circumstances, the applicant had not raised any arguable points of law and hence its Draft Memorandum of Appeal had no chances of success.
19. On the nugatory aspect, it was submitted that the applicant was seeking to stay a monetary decree which was reversible and that the respondent had demonstrated in her replying affidavit that she was able and willing to repay the decretal amount in the event of the intended appeal being successful.
20. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival oral and written submissions by the parties, the cited authorities and the law.
21. The applicants' motion is brought inter alia under Rule (5) (2)
 - (b) of this Court's Rules. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution or injunction as the case maybe are now old hat. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.
22. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. An applicant has to satisfy the Court on both limbs. These principles were summarized by this Court (differently constituted), in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR as follows:



- 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.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - 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.
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - 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 will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
23. Turning to the first limb, that an applicant has to satisfy in an application of this nature, we have looked at the annexed Draft Memorandum of Appeal and we are satisfied that the issues raised therein namely; the issue of the doctrine of estoppel and whether the respondent was a unionisable employee are not frivolous and are worthy of full consideration by this Court. We are of course mindful to the fact that an arguable appeal is one that must not necessarily succeed and we will say no more regarding this issue at this stage, lest we embarrass the bench that will eventually be seized of the appeal. Ultimately, therefore we are satisfied that the applicant has an arguable appeal.
24. Turning to the nugatory aspect, it is not lost on us that this is a monetary decree. From the circumstances of this case, we are satisfied that the intended appeal will be rendered nugatory if an order of stay is not granted for the following reasons; save for the respondent generally averring in her replying affidavit sworn on 18th October 2023, that she has worked for the applicant for a period of 30 years where she was serving in one of the highest cadres of employment and that during this time, she had used her salary and other emoluments to venture into commercial maize and wheat farming which has provided her with a stable source of income and would therefore be able to refund the decretal amount in the event the intended appeal is successful, these averments are not supported by any evidence.
25. Ultimately therefore and the applicant having satisfied us on both limbs under Rule 5 (2) (b) of this Court, we find merit in the applicant’s motion dated 18th October 2023, which we accordingly allow.
26. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.



DATED, SIGNED & DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. SICHALE

..... JUDGE OF APPEAL

F. OCHIENG

..... JUDGE OF APPEAL

W. KORIR

..... JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

