



REPUBLIC OF KENYA



KENYA LAW
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**DHL Worldwide Express Kenya Ltd (DHL) v Mwita (Civil Application
E048 of 2024) [2024] KECA 838 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 838 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E048 OF 2024
SG KAIRU, JW LESSIT & GWN MACHARIA, JJA
JULY 12, 2024**

BETWEEN

DHL WORLDWIDE EXPRESS KENYA LTD (DHL) APPLICANT

AND

OLIVER MATIKO MWITA RESPONDENT

*(Being an application for stay of execution of part of the judgment of
the Employment and Labour Relations Court dated 27th November
2023 delivered by Ongaya, J. in ELRC Cause No. E1005 of 2021)*

RULING

1. By a Notice of Motion dated 7th February 2024 brought under rule 5 (2)(b) of the Court of Appeal Rules and section 3, 3A & 3B of the *Appellate Jurisdiction Act*, DHL Worldwide Express Kenya Ltd (DHL), the applicant, seeks orders of stay of execution of the judgment of Ongaya, J. delivered on 27th November 2023 and all the consequential orders pending the hearing and determination of the intended appeal.
2. By his judgment delivered on 27th November 2023, Ongaya, J. entered judgment in favour of the respondent for, *inter alia*, Kshs.9,117,785.38/- being damages for unfair and unlawful termination, and directed that the judgment sum be paid by 1st February, 2024 failing which interest is payable at Court rates from the date of the judgment until payment in full.
3. Aggrieved, the applicant lodged its notice of appeal dated 27th November 2023 and filed its appeal, to wit, Civil Appeal No. E106 of 2024, as well as the instant application. The application is supported by the grounds set out on the face thereof and those found in the supporting affidavit sworn by Paul Robert Clegg, a Director of the applicant on 8th February 2024.



4. The applicant, in its affidavit in support of the application has set down thirteen (13) intended grounds of appeal, which, inter alia, faults the learned trial Judge for applying higher standard of proof; misapprehended the facts and evidence adduced therefore failing to evaluate the evidence in its entirety; misapprehended the senior position and role of the respondent as the Chief Finance Officer in the approval of the unauthorized amendments to the 2018 and 2019 employees Handbook; and, in finding that the respondent had no role in obtaining approval for the issuance of the 13th cheque.
5. On the nugatory aspect the applicant is apprehensive that the respondent will undoubtedly move to enforce the impugned orders and in particular payment of the decretal sum ordered of Kshs.9,117,785.38/-. The applicant contends that the execution process has commenced as it has been served with Notice of Taxation dated 5th February 2024, and that the respondent's Party & Party Bill of Costs is set to be taxed on 8th February 2024. In addition, it is apprehensive that it will be unable to recover the said sum of money from the respondent if the colossal decretal sum is paid as per the impugned judgment as the respondent's means are unknown to it.
6. In reply, the respondent has filed his replying affidavit sworn on 27th February 2024 and argues that the applicant has no arguable appeal. Further, he avers that the application for stay has since been overtaken by events and it is therefore futile for the Court to grant an order of stay.
7. At the virtual hearing of the application on the 9th April 2024, learned counsel Ms. Macharia appeared alongside learned counsels Ms. Edel and Mr. Kanja for the applicant, whereas learned counsel Ms. Guserwa was present for the respondent. Ms. Macharia highlighted her client's written submissions dated 7th March 2024 which rehashed the facts contained in the affidavit in support of the application in regard to the arguability of the appeal. As regards the nugatory aspect, counsel submitted that the applicant faces extensive threat of financial instability and inability to sustain operations, of the applicant's business. Further, that if stay is not granted and the respondent proceeds with execution, the applicant might find itself out of business in addition to firing some of its employees. Ms. Macharia argued that allowing the respondent to enforce the impugned judgment would result in his unjust enrichment given that he has already benefited from unauthorized amendments of the applicant's employee Handbooks. In conclusion, Ms. Macharia submitted that her client is willing to provide an insurance bond as security and will be pay the required premium.
8. On her part, Ms. Guserwa while highlighting the respondent's written submissions dated 26th February 2024 contended that contrary to the applicant's submissions that it has an arguable appeal with high chances of success, the appeal was not arguable and its chances of success were nil. Further, the respondent contends that the applicant does not have any appeal to place before the Court as it did not file any draft memorandum of appeal. On nugatory aspect, counsel submitted that her client is a professional financial controller capable of paying back the decretal sum if paid to him if the appeal succeeds.
9. On the issue of insurance bond as security, Ms. Guserwa rejected the proposal and emphasized that her client wanted liquid money in his account as security as there is no guarantee that insurance will be surviving the next day.
10. We have carefully considered the application, the affidavits in support and in response to the application, the parties' respective written submissions, authorities relied on and the applicable law. To succeed, the applicant is required to demonstrate that its appeal or intended appeal is arguable and that unless the orders sought are granted, the appeal or intended appeal, if successful, will be rendered nugatory. There is a plethora of cases, both binding and persuasive, on the twin principles of arguability of the appeal and the nugatory aspect which include Multimedia University & Another v Professor



Gitile N. Naituli [2014] eKLR and also Trust Bank Limited & Another v Investech Bank Limited & 3 Others [2000] eKLR.

11. On the first limb as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See [Joseph Gitahi Gachau & Another v Pioneer Holdings \(A\) Ltd & 2 others](#) [2009] eKLR.
12. In this application, we note that the applicant has not attached a draft memorandum of appeal. However, it has set out 13 grounds of intended grounds of appeal in the affidavit sworn by its Director in support thereof. It invoked this Court's decision in [Mashru v Abdilleh](#) [2022] KEHC (KLR) for the proposition that an applicant need not attach a memorandum of appeal in support of the application so long as there was a demonstration of supportive evidence to establish the presence of an arguable appeal.
13. We have considered the intended grounds of appeal as set out in the supporting affidavit. We are of the view that the issues raised by the applicant are not idle or frivolous. They are arguable issues which merit to be heard and determined on merit. In that regard, see in [Somak Travels Ltd v Gladys Aganyo](#) [2016] eKLR.
14. As to the second limb which is whether the applicant's appeal is likely to be rendered nugatory unless the orders sought are granted. We bear in mind the pronouncement by this Court in [Stanley Kangethe Kinyanjui v Tony Ketter & others](#) [2013] eKLR that:

“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; whether or not an appeal will be rendered nugatory depends on whether 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.”
15. The argument made by the applicant is that allowing the respondent to enforce the impugned judgment would result in the respondent's unjust enrichment given that he has already benefited from unauthorized amendments of the applicant's employee Handbook. The applicant has urged that it is apprehensive that it will not be able to recover the decretal sum if paid to the respondent should its appeal succeed. The respondent, although in his replying affidavit averred that he is currently doing a contract assignment that is not permanent but well-paying, he changed all that in his written submissions when he submitted that he is in gainful employment and so capable of repaying the decretal sum was the applicant's appeal to succeed.
16. Since the applicant has pleaded the impecuniosity of the respondent, it is our view that the onus shifted to the respondent to rebut the allegation. On the material before us, the means or resources of the respondent remains wholly unknown. It is not enough that the respondent averred that he is capable of repaying the decretal sum. He ought to have provided evidence of his means that would enable him repay back the decretal amount. See [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) [2006] eKLR.
17. As we had stated earlier, it is necessary and mandatory that the twin principles for grant of stay of execution pending an appeal are both established. In this case, we are satisfied that the applicant has established to our satisfaction that it has an arguable appeal and that if the decretal sum is paid over to the respondent he might be incapable of paying it back if the appeal succeeded, and that would render the success of its appeal nugatory.



18. In the circumstances we allow the application dated 27th November 2023, and grant a stay of execution of the judgment of the Employment and Labour Relations Court dated 27th November 2023 pending the hearing and determination of Civil Appeal No. E106 of 2024. The costs of the motion shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024.

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

