



**Kenya Railways Corporation v Youth Limited (Civil Application E019 of 2024) [2024] KECA 853 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 853 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E019 OF 2024  
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA  
JULY 12, 2024**

**BETWEEN**

**KENYA RAILWAYS CORPORATION ..... APPLICANT**

**AND**

**YOUTH LIMITED ..... RESPONDENT**

*(Being an application for stay of proceedings and execution of an Order pending the hearing and determination of an intended appeal from the Ruling and Order of the Environment and Land Court at Nairobi (Lucy N. Mbugua, J.) dated 31st October 2023 in E.L.C. Case No. E392 of 2022.)*

**RULING**

1. The applicant, Kenya Railways Corporation, prays in the main in the Motion on notice brought under rule 5(2)(b) of the *Court of Appeal Rules*, 2022, section 3 of the *Appellate Jurisdiction Act* and all other provisions of law, that pending the hearing inter partes of the application, we be pleased to grant an order staying further proceedings in Nairobi ELC Case No. E392 of 2022, including Notice to Show Cause scheduled for 31<sup>st</sup> January, 2024; that pending hearing and determination of the intended appeal we stay execution of all orders and consequential orders pursuant to a ruling delivered on 31<sup>st</sup> October, 2023 (L.N. Mbugua, J.) in the said case, and costs be provided for. In grounds in support of the Motion and in a supporting affidavit of Stanley Gitari, the applicant's Acting General Manager, Legal Services/ Corporation Secretary, it is stated amongst other things that the intended appeal is arguable with high chances of success because the trial Judge erred in making a finding of contempt against the applicant and its Managing Director without any evidence being adduced before it to prove that the applicant had disobeyed or intended to disobey the said Court orders; that the Judge erred in making a finding of contempt against the applicant's Managing Director without facts offering to the precision required of contempt proceedings, the particulars of the breach of the Court orders issued on 27<sup>th</sup> April, 2023, and in any event, the grounds relied upon in the affidavit in support of the contempt application did not disclose any contempt of the Court orders; that it was readily disclosed by the applicant that any non-



compliance of the orders of the Court was not on the part of the applicant nor with the applicant's connivance but on the part of the third-parties (M/s Alipan Company Limited) who had been removed from the suit property; that notice to terminate a tenancy of Alipan Company Limited was issued on 14<sup>th</sup> July, 2023 while the contempt application by the respondent was filed on 27<sup>th</sup> July, 2023; and that the Judge acted in excess of her jurisdiction. It is said by the applicant that the intended appeal raises issues of public interest relating to law on contempt of court; if the orders prayed for are not granted, the Judge will proceed to mete out her sanction and punishment on the applicant, with the real likelihood that the applicant's Managing Director risks being committed to civil jail, thus lose his liberty and suffer prejudice.

2. There is a replying affidavit of Dr. Samuel Kamau Macharia, a Director of the respondent, Youth Limited, who depones, inter alia, that there has been inordinate delay in bringing the application as the ruling being challenged was delivered on 31<sup>st</sup> October, 2023; that the applicant and its Managing Director are guilty of concealment of material facts in that they have not disclosed that they have rented the entire subject property for commercial and residential purposes, notwithstanding Court orders of 3<sup>rd</sup> May, 2023; they have continued to interfere with the suit property by way of forceful occupation and have refused to vacate the premises; there was a site visit on 30<sup>th</sup> November, 2023 where photographs were taken and filed with an arbitrator; that the Judge made a reasoned ruling in the matter.
3. When the matter came up for hearing before us on 6<sup>th</sup> May, 2024, learned counsel Miss Tusiime appeared for the applicant, while learned counsel Miss Achieng appeared for the respondent. Both sides had filed written submissions and in a highlight counsel for the applicant informed us that sentencing of the applicant by the trial court was to be on 15<sup>th</sup> May, 2024. Counsel submitted that the appeal was arguable, citing the case of *Multimedia University & Another v. Gitile N. Naituli* [2014] eKLR as to what an applicant needs to prove to be entitled to an order for stay by this Court.
4. Counsel cited the case of *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another* [2006] eKLR ; [2006] 1 KLR 77, where this Court held that matters involving penal consequences must be treated differently, since it would be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. Counsel disagreed with the position taken by the respondent that the trial court may impose a fine instead of a custodial sentence. Counsel submitted that the applicant could not take that risk.
5. Counsel for the respondent in opposing the Motion submitted that the contemnor had never responded to the application before the trial court. Counsel wondered by the applicant's Managing Director had not sworn an affidavit, leaving the task to the applicant's Legal Manager. According to counsel we should let the applicant to appear before the trial court on 15<sup>th</sup> May, 2024 (now past) to show cause why he should not be held in contempt of court. "Let him show cause", concluded counsel.
6. When we heard the application on the said date, we issued interim orders staying proceedings in the trial court. This is why we made that order.
7. For an applicant to succeed in an application for stay of execution pending appeal, he must, firstly, show that the appeal or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay- see the case of *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR.
8. It is also true that such an applicant need not show a multiplicity of arguable points as one arguable point will suffice – *Dennis Mugambi Mong'are v. Attorney General & 3 Others* [2012].



- 9. It is proposed to be argued as a ground of appeal that the Judge erred in finding that the applicant was guilty of contempt of court when it had not been proved that the applicant or its Managing Director had committed contempt of court. It is also intended to be argued on appeal that the standard of proof required to find a party in contempt of court was not satisfied in the case before the trial court. We agree that these are arguable points.
- 10. We agree with the applicant that sending a man to prison even for one day and then his appeal succeeds would render the appeal nugatory, it would amount to a pyrrhic victory, worthless to the victor if his appeal succeeded when he had served time in jail.
- 11. The applicant has satisfied both limbs of the principles which apply in an application like this one. We allow the Motion. Costs of the Motion will be in the appeal

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

