



Uzuri Foods Limited v Ngwenze & 169 others (Civil Application E067 of 2024) [2024] KECA 1226 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1226 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E067 OF 2024
AK MURGOR, S OLE KANTAI & A ALI-ARONI, JJA
SEPTEMBER 20, 2024**

BETWEEN

UZURI FOODS LIMITED APPLICANT

AND

BENARD MUSYOKA NGWENZE & 169 OTHERS & 169 OTHERS & 169 OTHERS & 169 OTHERS RESPONDENT

(An application for stay of execution against the Ruling of the Employment and Labour Relations Court of Kenya at Nairobi (J. N. Abuodha, J.) dated 26th January, 2024 in E.L.R.C Cause No. 1830 of 2015)

RULING

1. The dispute between the applicant Uzuri Foods Limited and the respondents Benard Musyoka Ngwenze & 169 Others arose from a labour matter. The respondents alleged in a Statement of Claim filed at the Employment and Labour Relations Court ('ELRC'), inter alia, that their contracts of employment had been wrongly terminated.
2. Wasilwa, J. heard the parties and in a judgment delivered on 11th November, 2020 the Judge found for the respondents and granted various reliefs including 1 month salary in lieu of notice, 8 months' salary as compensation for unfair termination: -
 - “ 65. Due to large number of Claimants involved, these amounts will be tabulated by the Claimants as per the above direction for each Claimant and be presented to Court in 2 weeks' time for adoption or direction as part of this Court's judgments (sic).
 66. All dues will be subject to statutory deductions.



67. The Respondents (sic) will pay costs of this suit plus interest at Court rates with effect from the date of this judgement. ...”
3. There was a Notice of Appeal against the whole of that entire judgment dated 11th November, 2020. The applicant filed an application in the Employment and Labour Relations Court (ELRC) praying, inter alia, for orders of stay of execution of judgment pending appeal. That application was heard by Mbaru, J. who in a ruling made on 31st May, 2021 allowed the same on condition that the applicant deposits a sum of Kshs.5,000,000 in a joint interest earning account in the names of the advocates for the parties within 30 days in default the stay order would automatically lapse. That order was complied with as an account was opened by both advocates with Stanbic Bank, Upperhill Branch, Nairobi where the said sum was deposited.
 4. By an application dated 26th May, 2023 the respondents moved ELRC for an order to release “...part of the decretal sum of Kshs.5,000,000 (shillings five million) and any interest accruing thereof...”
 5. The main reason given for praying for release of the deposited sum was that the applicant had despite lodging a Notice of Appeal against the judgment of 11th November, 2020 had not filed a record of appeal over 3 years later. The court considered the application. The Judge observed in the ruling:
 15. It is also clear that the Respondent complied with the directions of the court in depositing the security for cost in a joint interest earning account of Kshs.5,000,000/=. The Applicants request the same to be released to their advocates together with any interest earned. This is because the Respondent has failed to lodge any appeal.
 16. The Respondent has also not disputed receiving the notification that the certified typed proceedings were ready as of 29th August, 2022. The Respondent attributes the delay to their advocates moving offices and their file getting misplaced.
 17. The Court notes that the application seeking extension of time to file the appeal is dated 29th August, 2023 the same date the Replying Affidavit to this application was sworn. The same is filed on 4th September, 2023. This is a whole year after the proceedings were ready for collection.
 18. It is the law that an Appeal ought to have been filed 60 days after a notice of appeal is filed or proceedings were ready. In this case one goes by when the proceedings were ready which was 29th August, 2022. Further, a whole year is quite a long time where either the Respondent or its Advocates ought to have followed up this issue. There was further no evidence that the respondent attempted to contact the advocate for the claimant to explain her predicament.
 19. The Court is further inclined to think that the Respondent is taking it for a ride since it makes the application for extension of time the same day they do their response to the present application hence most likely an afterthought.”
 6. Abuodha, J. allowed the application for the sum deposited at Stanbic Bank to be released to the respondents in the ruling dated 26th January, 2024. The applicant filed a Notice of Appeal dated 17th February, 2023.
 7. That is the background to the matter now before us.



8. We are asked by the applicant in the Motion on notice said to be brought under rules 1(2) and 5 (2)(b) of the Court of Appeal Rules, 2020 (since replaced by the 2022 Rules) to grant the applicant stay of execution against the ruling and orders of ELRC made by Abuodha, J. on 26th January, 2024 pending the hearing and determination of this application and an intended appeal against the said ruling. The application is supported by the grounds on its face and by a supporting affidavit of Joy Mboya, the applicant's Human Resource Manager where it is said amongst other things that the applicant is desirous of appealing the ruling of 26th January, 2024; that the respondents are about to execute the judgment of ELRC in the sum of Kshs.22,503,852; that the applicant has an arguable appeal with good chances of success and if an order of stay of execution is not granted the applicant will suffer substantial loss and irreparable damage rendering the intended appeal nugatory.
9. In a replying affidavit by one of the respondents Hudson Kiambi Mwendwa he attacks the motion as being incompetent, defective and an abuse of the process of the Court; at paragraphs 5, 6 and 7 of the said affidavit he says:
 5. That the Applicant's application filed herein is a futile academic exercise since the Kshs.5,000,000/= in which had been deposited in a joint account between the advocates for the parties was released to the Respondent's advocates on 19th February, 2024 pursuant to the ruling and orders of the Court (Abuodha, J.) issued on 26th January, 2024. Attached herewith and marked as exhibit "HMI" are true copies of the ruling delivered on 26th/1/2024.
 6. That the Applicant filed this application on 26/2/2024 long after the Court orders of the trial court had been fully complied with.
 7. That I have been advised by my advocates on record which advice I verily believe to be true that the Applicant is guilty of laches and has approached this Honourable Court with unclean hands and should not therefore be accorded the equitable remedy of stay of execution."
10. It is said that the applicant has filed a multiplicity of applications in different courts seeking the same orders; that the intended appeal has no chance of success and that the applicant has not demonstrated how the intended appeal will be rendered nugatory. It is also said that the decree from the judgment of ELRC is a money decree where the respondent can refund the same if the appeal succeeds; that a ruling of a single Judge of this Court allowing the applicant to appeal out of time has since been challenged "... with a view of setting it aside." It is alleged by the respondent without providing evidence that the applicant:

...is in the process of changing its corporate identity and transferring its assets to its sister company UZURI GOLDEN HARVESTS LIMITED with a view of avoiding payment of the decretal sum herein..."
11. The respondents found it necessary to file a Notice of Preliminary Objection but that was not urged before us. For this reason we will let sleeping dogs lie.
12. Both sides filed written submissions which we have perused and considered.
13. When the Motion came up for hearing before us on 18th April, 2024 the applicant was represented by learned counsel Miss Guserwa while learned counsel Mr. Nyabena appeared for the respondents. In a highlight of written submissions counsel for the applicant informed us that the appeal involved over 170 former employees of the applicant who had engaged in an illegal strike and the trial court had



- awarded them damages. According to counsel it was wrong for Abuodha, J. to order the release of the sum deposited as security pending appeal.
14. In response and in opposition to the Motion, counsel for the respondents thought the application was an academic exercise as the money deposited as a condition for stay pending appeal had already been released to the respondents on 19th February, 2024. He asked us to dismiss the application.
 15. In a rejoinder, counsel for the applicant submitted that there was an appeal against the judgment of Wasilwa, J.; there was an existing order staying execution pending appeal but money deposited in a bank account as ordered by ELRC had since been released to the respondents. She asked us to give an order temporarily staying execution but this request was opposed by the respondent and we did not grant it.
 16. The principles that apply in an application of this nature are well known. For an applicant to succeed it must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, demonstrate that the appeal will be rendered nugatory absent stay. See a good summary of those principles in the case of Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR.
 17. In the Notice of Appeal dated 1st February, 2024 the applicant states that it is dissatisfied with the ruling of Abuodha, J. dated 26th January, 2024 and intends to appeal against the whole ruling. It is to be argued on appeal per the draft Memorandum of Appeal that the Judge erred in law and fact in failing to properly evaluate the evidence produced before him thereby arriving at a wrong decision; that the Judge erred in law and fact in allowing the respondents application despite there being a pending application dated 29th August, 2023 in this Court seeking extension of time within which to file and serve the Record of Appeal out of time; that the Judge erred in law and fact in directing that the security deposit of Kshs.5,000,000 that was deposited in a joint interest earning account in satisfaction of a conditional stay of execution pursuant to the Court Order given on 31st May, 2021 be released to the respondents. These we find not to be idle grounds, they are arguable grounds and as has been held by this Court an arguable ground of appeal is not one that will necessarily succeed, it is one that calls for a full consideration and determination by the Court – Damji Pragji Mandavia vs. Sara Lee Household & Bodycare (K) Ltd, Civil Application No. NAI. 345 of 2004 (UR).
 18. But the applicant must also demonstrate that the appeal will be rendered nugatory if a stay of execution is not granted. The position here is that after the judgment was delivered on 11th November, 2020 in favour of the respondents the applicant successfully applied in ELRC for orders of stay of execution pending appeal. That court considered the application and determined it in favour of the applicant ordering in addition as a condition for granting orders of stay of execution, that a sum of Kshs.5,000,000/= be deposited in a joint interest earning account in the joint names of the advocates of the parties. The said sum was deposited as ordered but with the passage of time the respondents applied successfully that the said sum be released to them as an appeal had not been filed. The parties agree before us that the money deposited at Stanbic Bank, Upperhill Branch, Nairobi was released to the respondents on 19th February, 2024 as ordered by Abuodha, J. This means that there is no money at the said bank belonging to the parties herein for which a “don't release” order can be made, and therefore, we find that the appeal against the order of Abuodha, J. will not be rendered nugatory if we decline to make an order of stay. That is also why we refused to give an order for temporary stay of execution when we heard the motion on 15th April, 2024.
 19. The motion fails and is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR



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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

ALI - ARONI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

