



REPUBLIC OF KENYA



**Pest Control Products Board v Pest Control Products Board (Civil Application E475 of 2023) [2024] KECA 1504 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1504 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E475 OF 2023  
DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**PEST CONTROL PRODUCTS BOARD ..... APPLICANT**

**AND**

**D UNION OF NATIONAL RESEARCH INSTITUTE STAFF OF KENYA  
(UNRISK) ..... RESPONDENT**

*(An application for stay of execution of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Ocharo, J.) dated 27th July 2023 in ELRC Cause No. 1812 of 2017)*

**RULING**

1. The notice of motion dated 12<sup>th</sup> October 2023 seeks stay of execution of the judgment delivered by Ocharo, J. on 27<sup>th</sup> July 2023 in Employment and Labour Relations Court (ELRC) Cause No. 812 of 2017 pending hearing and determination of an intended appeal. In the said judgment, the learned judge made various findings and orders among them being the following.
  - i. that the applicant unlawfully refused to effect deductions of the claimants (respondents) check-off dues;
  - ii. with 76% membership, out of 75 employees, the respondent is qualified to be accorded recognition by the applicant;
  - iii. the applicant to effect instant deduction of the respondent's check-off dues;
  - iv. the applicant signs a recognition agreement with the respondent within 30 days from the date of the judgment.



2. Being aggrieved by the said judgment and decree, the applicant has filed a notice of appeal, and has applied for certified copies of the proceedings with a view to lodging an appeal before this Court.
3. In its draft memorandum of appeal, the applicant contends that the trial court erred in law in failing to determine whether the respondent had met the required threshold to enter into a recognition agreement with the applicant in failing to determine whether the Form S submitted by the respondent was in compliance with the law, and in failing to consider the witness statements and written submissions filed by the applicant. On those grounds, among others, the applicant contends that the intended appeal is arguable.
4. On the nugatory aspect, the applicant states that unless the order sought is granted, it will suffer substantial loss in that its right of appeal would have been taken away; that it will be forced to budget for monies to settle the costs payable to the respondent, which would be a loss to taxpayers; and that it risks being cited for contempt of court.
5. Opposing the application, the respondent submits that the intended appeal is not arguable in view of the fact that the applicant had made an equivocal acknowledgment of its willingness to grant recognition to the respondent. In view of that acknowledgement, the trial court was only required to determine whether the applicant should acknowledge the respondent as the recognized representative trade union of its workers, and whether the applicant should make check-off deductions from its employees and remit them to the respondent.
6. On the second limb, that is, the nugatory aspect, the respondent contends that the applicant has failed to substantiate how the intended appeal would be rendered nugatory, but has only alleged that the applicant will suffer substantial loss if the orders sought are not granted. We were therefore urged to dismiss the application with costs to the respondent.
7. It is trite law that in an application of this nature, the applicant must satisfy this Court that the appeal or intended appeal is arguable and that unless the orders sought is granted, the appeal, if successful, shall be rendered nugatory. (See *Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & Anor* [2015] eKLR).
8. An arguable appeal is not necessarily one that must succeed. It is one that is, prima facie, not frivolous, one that should be argued fully. Considering this low threshold on arguability and having perused the impugned judgment, and considered the proposed grounds of appeal, we think that the intended appeal is arguable.
9. Turning to the nugatory aspect of the intended appeal, at paragraph 14 of the applicant's affidavit in support of the application, the deponent states that unless execution of the impugned judgment is stayed pending hearing of the intended appeal, the applicant will suffer substantial loss and at paragraph 16, the applicant further argues that unless the orders sought are granted, the intended appeal will be rendered nugatory. The alleged reasons that will cause the intended appeal to be rendered nugatory are the very same ones that the applicant advances for the argument that it will suffer substantial loss, unless the orders sought are granted.
10. In a 5(2)(b) application, the applicant is not required to show that it will suffer substantial loss if the orders sought are not granted. What must be demonstrated is that the intended appeal shall be rendered nugatory unless the orders sought are granted. In *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR, this Court held that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed is allowed to happen is reversible; or if it not reversible, whether damages will reasonably compensate the parties aggrieved. Looking at the orders that were made by the trial court, we are not satisfied that the applicant has demonstrated that its intended



appeal shall be rendered nugatory unless we grant stay of execution of the impugned judgment. In the event that the applicant succeeds in its intended appeal, the recognition agreement between itself and the respondent can be nullified and any union dues that it had remitted to the respondent can be reimbursed. The applicant has not shown that the respondent is unable to make such reimbursements if the intended appeal succeeds.

11. Since the applicant has not satisfied the twin principles, we are unable to grant the orders sought. Consequently, this application is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER 2024.**

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

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

