



**Unigroup Transporters Limited v Kiteke (Civil Application
E026 of 2024) [2024] KECA 1914 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1914 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E026 OF 2024
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
OCTOBER 11, 2024**

BETWEEN

UNIGROUP TRANSPORTERS LIMITED APPLICANT

AND

JOSEPH KINYAE KITEKE RESPONDENT

(Being an application for stay of execution and proceedings pending appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (A. K. Nzei, J.) delivered on 31st July 2023 in ELRC Appeal No. 64 of 2011)

RULING

1. The applicant, Unigroup Transporters Limited, seeks stay of execution pending determination of its intended appeal from the judgment and decree of the Employment and Labour Relations Court at Mombasa (A. K. Nzei, J.) delivered on 31st July 2023 in ELRC Appeal No. 64 of 2011 in which the ELRC allowed the respondent's appeal and set aside the trial court's ruling dated 26th August 2021, directing that the trial court's judgment scheduled for delivery on 10th June 2021 be rescheduled to another delivery date. In the ruling subject of appeal to the ELRC, the Chief Magistrate's court (M. L. Nabibya, PM.) had essentially allowed the applicant's Motion for review and setting aside of the lower court's ruling and orders dated 18th March 2021 in CMELRC Cause No. 458 of 2018 arresting the writing and delivery of its judgment then scheduled for 10th June 2021.
2. The precis of the appeal as discerned from the scanty record containing the impugned rulings and judgment of the two lower courts, and excluding pleadings in the trial court, is that the respondent, Joseph Kinyae Kiteke, sued the applicant in CMELRC Cause No. 458 of 2018 for unfair termination; that the applicant allegedly filed a memorandum of appearance and a statement of reply, both of which were never placed on the court record; that hearing of the cause proceeded ex parte on 19th January 2021, whereupon the respondent's case was heard and closed; that, the applicant failed to attend



court despite a hearing notice having been duly served, and its case was likewise closed and judgment scheduled for delivery on 10th June 2021.

3. Dissatisfied by the trial court's decision to proceed with the hearing in its absence, the applicant filed a Notice of Motion dated 21st January 2021 seeking orders to set aside the ex parte proceedings; leave to cross-examine the respondent; leave to file its "documents and statements;" and directions that the suit be heard afresh.
4. By a ruling dated 18th March 2021, the trial court (M. L. Nabibya, PM.) dismissed the applicant's Motion with costs, faulting it for indolence.
5. The foregoing outcome prompted the applicant to change its advocates and file a fresh Motion dated 3rd June 2021 seeking, inter alia: review and orders to set aside the trial court's ruling dated 18th March 2021; and arrest of the writing and delivery of the judgment on 10th June 2021. The court allowed the applicant's Motion vide its ruling dated 26th August 2021 in which it observed that the applicant's Motion was unopposed. It is noteworthy that the scanty record as put to us does not contain evidence of any reply or opposition to the applicant's Motion.
6. Dissatisfied with the ruling of the trial court, the respondent moved to the ELRC on appeal in ELRCA No. 64 of 2021 and, in its judgment dated 31st July 2023, the ELRC (A. K. Nzei, J.) allowed the respondent's appeal and set aside the trial court's ruling dated 26th August 2021. In addition, the learned Judge ordered that the judgment of the lower court scheduled for delivery on 10th June 2021 do proceed to delivery; and that costs be borne by the applicant. In the words of the learned Judge:

"18. Since the sole basis of allowing the Respondent's Notice of Motion dated 3/6/2021 was an alleged failure by the Appellant to respond to the said application, and since the record before me is quite dear that the Appellant duly filed a replying affidavit on 15/7/2021, the appeal herein is merited, and must succeed."
7. Aggrieved by the learned Judge's decision, the applicant moved to this Court on appeal on the ground that the impugned judgment essentially locked out the applicant from being heard in the trial court. Pending determination of its appeal, the applicant seeks stay of execution of the judgment and order of the ELRCA (A. K. Nzei, J.) dated 31st July 2023 and/or stay of proceedings in CMELRC Cause No. 458 of 2018, and that costs be awarded to the applicant.
8. The applicant's Motion dated 12th March 2024 praying for the orders aforesaid is supported by the annexed affidavit of Joseph M. Mwainu, the applicant's legal officer, sworn on 12th March 2024 essentially deposing to the grounds on which the Motion is anchored, namely" that the impugned judgment allowing the respondent's appeal locked out the applicant from being heard in the trial court; that the appeal has high chances of success, and that it would be rendered nugatory if stay is not granted; that this application is brought without undue delay; and that it is in the interest of justice that the orders sought are granted.
9. Learned counsel for the applicant, M/s. Munyithya, Mutugi, Umara, Muzna & Company, filed a summary of authorities dated 15th April 2024 in support of the applicant's Motion. Counsel cited the cases of Center Star Limited & Another vs. Halima Mahmood Ali & 2 Others [2018] eKLR; Trustees of the Kenya Assemblies of God vs. Suresh Kumar Sofat & 2 Others [2015] eKLR; and Alfred Mincha Ndubi vs. Standard Limited [2020] eKLR, highlighting the twin principles that must be satisfied to merit grant of orders under rule 5(2) (b) of the Court of Appeal Rules.



10. Finally, counsel cited *JMK vs. MWM & Another* [2015] eKLR, highlighting the importance of observing the rules of natural justice and, in particular, hearing a person who is likely to be adversely affected by a decision before the decision is made.
11. In reply, the respondent filed his affidavit sworn on 11th April 2024 stating that, following delivery of the impugned judgment, the trial court directed the parties to file their submissions, which they did, and whereupon the court gave a date for judgment; that, through a different firm of advocates, the applicant reverted to the ELRC vide an application dated 21st December 2023 seeking stay of execution of the impugned judgment, and that the ruling on that application was scheduled for delivery on 16th May 2024; that the Motion herein amounts to sub judice, forum shopping and an abuse of the court process, considering that the applicant's Motion for stay of execution and proceedings is still pending determination at the ELRC; and that the applicant's Motion is frivolous. He urges us to dismiss it with costs.
12. On their part, learned counsel for the respondent, M/s. Otieno Asewe & Company, filed written submissions dated 19th April 2024 citing the case of *County Director of Planning and Architecture, County Government of Mombasa v Makupa Transit Shade Limited* [2017] eKLR, highlighting the twin principles that must be satisfied for grant of orders under rule 5(2) (b). Counsel urged us to dismiss the applicant's Motion with costs to the respondent.
13. We take to mind the single ground of appeal disclosed on the face of the Motion to wit that "... this judgment essentially locked out the applicant from being heard in the trial court/lower court" It is also noteworthy that the scanty record before us does not contain a copy (if any) of a memorandum of appeal. Be that as it may, the single ground aforesaid suffices to guide our determination of the applicant's Motion weighed against the pre-requisites of rule 5(2) (b) of the Rules of this Court.
14. Whether or not to grant the orders sought by the applicant pursuant to rule 5(2) (b) of the Rules of this court pending appeal, the Court must be satisfied that the applicant has an arguable appeal and that the intended appeal, if successful, would be rendered nugatory if orders to stay execution of the judgment and orders of the ELRC dated 31st July 2023; and to stay proceedings in CMELRC No. 458 of 2018, are not granted as prayed.
15. The principles that apply in applications under Rule 5(2)(b) of this Court's Rules for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings, decree or order were not stayed.
16. These principles were enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties, and to which we now turn. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another vs. Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Ahmed Musa Ismail vs. Kumba Ole Ntamorua and 4 Others* [2014] eKLR).
17. It is instructive that what is sought to be stayed has already taken place. The proceedings in the Chief Magistrate's Court proceeded to conclusion and a date set for judgment. In this regard, there is nothing in the nature of proceedings in the trial court capable of being stayed. In effect, the impugned judgment



and orders of the ELRC dated 31st July 2023 have been implemented by the trial court leaving nothing to be stayed. Simply put, the applicant's Motion has been overtaken by events and the intended appeal would be merely academic and not arguable.

18. In any event, the single ground advanced for the intended appeal is essentially a matter of procedure, which falls within the scope of the discretionary powers of the trial court, and which is far from the threshold for appeal to this Court as a point of law (see section 72(1) of the Civil Procedure Act, Cap. 21; and Stanley N. Muriithi & another vs. Bernard Munene Ithiga [2016] eKLR).
19. Having found that the applicant's intended appeal is not arguable, we need not pronounce ourselves on the second limb of the twin principles, namely whether the intended appeal, if successful, would be rendered nugatory absent stay. Having failed to satisfy the conjunctive conditions for grant of orders under rule 5(2) (b) of the Rules of this Court, the applicant's Motion fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

