



**AVC Management Company Limited t/a Mnarani Club & another
v Mwangero & another (Civil Application E015 & E016 of 2024
(Consolidated)) [2024] KECA 1574 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1574 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E015 & E016 OF 2024 (CONSOLIDATED)
AK MURGOR, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 8, 2024**

BETWEEN

**AVC MANAGEMENT COMPANY LIMITED T/A MNARANI
CLUB APPLICANT**

AND

FREDRICK KAZUNGU MWANGERO RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPLICATION E016 OF 2024**

BETWEEN

**AVC MANAGEMENT COMPANY LIMITED T/A MNARANI
CLUB APPELLANT**

AND

JILANI MWAMUNYE EMMANUEL RESPONDENT

(Being an application for stay of execution of the judgments of the Employment and Labour Relations Court at Malindi (Agnes M.K Nzei, J) delivered on 23rd May, 2024 in ELRC No. E007 of 2023 and ELRC No. E006 of 2023 respectively)

RULING

1. The applicant herein, AVC Management Company Limited t/a Mnarani Club is dissatisfied with the judgment of Nzei, J dated 23rd May, 2024 in Employment and Labour Relations Court (ELRC) Appeal Nos. E007 of 2023 and E006 of 2023. The appeals arose from the judgment of Hon. J.B Kituku



(SPM) delivered on 17th March 2023 at Kilifi Chief Magistrate's Court in ELRC Cause No. E026 of 2022 wherein, while dismissing the respondents' claim with costs, the learned magistrate made a finding that the respondent had been retired pursuant to the Collective Bargaining Agreement and that the dues payable to them had been paid.

2. In her judgment, the learned Judge reversed the decision dismissing the respondent's claims and directed that they be paid Kshs 527, 328 and Kshs 953, 318 respectively.
3. Aggrieved by the decision, the applicant lodged Notices of Appeal dated 23rd May 2024 and filed its Memorandum of Appeal dated 30th May 2024 in this Court.
4. Through its twin Notices of Motion dated 30th May 2024, the applicant seeks stay of execution of the impugned judgments pending the hearing and determination of the appeal. The application is premised on grounds that it has already exercised its rights to appeal by the lodging the said Notice of Appeal and the Memorandum of Appeal and unless the orders sought are granted, its appeal will be rendered nugatory; that unless this Court grants the orders sought, its appeal will be rendered nugatory as the ensuing decree which the respondent seeks to enforce involves a colossal sum of money; and that it is apprehensive as to whether the respondent would be able to repay the decretal sum should the instant appeal succeed.
5. In support of the application, the applicant's Resort Manager, Hendrik Venter, averred that the award of terminal benefits were deposited into the respondents' bank account through which the respondents used to earn their salaries; that the appeal raises arguable grounds of appeal with high chances of success touching on the manifest error by the trial court in failing to address itself to the weight of the evidence; that unless the orders sought are granted, the appeals will be rendered nugatory because should the intended execution ensue, the applicant is apprehensive that the respondents would not be able to repay the decretal sum should the appeals succeed; that the appeals are arguable and raise fundamental questions of law touching on legitimacy and regularity of the proceedings of the court below adopted an Arbitral Award in which the Arbitrator had made a finding that an employer-employee did not subsist thus ousting the jurisdiction of the ELRC.
6. The applicant, in support of the application relied on the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR where this court enunciated the principles for granting stay of execution, injunction or stay of proceedings under rule 5(2) (b) of this Court's Rules; and the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, on the proposition that the existence of a single bona fide arguable ground suffices for the purposes of an arguable appeal and that whether the intended appeal will succeed, should be left to the bench that will hear and determine the appeal; and that the respondents were procedurally and lawfully declared redundant and their terminal dues computed and deposited into their bank accounts and unless stay is granted, the respondents may proceed with execution which will subject the applicant to double payment.
7. In opposing the application, the respondents averred that there is no imminent danger of execution since they have not commenced execution against the applicant; that the applicant can be granted a stay of execution of the judgment pending the hearing and determination of the impugned judgment on condition that it deposits the decretal sum as security for the appeal in a joint interest earning account held by both advocates for the parties herein.
8. When the matter was called out for virtual hearing before us on 2nd July 2024, learned counsel, Mr. Khalwale, appeared for the applicant, while learned counsel, Ms. Munene, appeared for the respondents.



9. While Ms. Munene informed the Court that she was not opposed to the grant of the stay conditionally on the deposit of the decretal sum in a joint interest earning account in the names of the advocates for the parties, Mr. Khalwale's position was that since the money was computed and paid to the respondents before the judgment, to direct the applicant to deposit the decretal sum will amount to double payment to the detriment of the applicant.
10. We have considered the application, the supporting affidavits filed and the submissions made on behalf of the parties.
11. The prerequisites to be met before a party can obtain a relief under rule 5(2)(b) have also been crystallized by case law. These are that the applicant has to demonstrate that the appeal is arguable on the one hand and on the other hand that if the stay sought is not granted, the appeal/intended appeal, as the case may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2) (supra)*). By arguable is not meant an appeal or an intended appeal which must succeed but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR*). An appeal need not raise a multiplicity or any number of such points and a single arguable point is sufficient to earn an applicant such a relief (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)*). It is therefore trite that demonstration of one arguable point will suffice (see *Kenya Railways Corporation v Ederman Properties Ltd Civil Appeal No. Nai. 176 of 2012* and *Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others Civil Appeal No. Nai. 256 of 2013.*)
12. As for the second prerequisite, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others Civil Appeal No. 31 of 2012*). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited v Kenya Revenue Authority Civil Application No. 135 of 2012*).
13. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2)(b) (see *Republic v Kenya Anti-Corruption Commission & 2 others (2009) KLR 31*, *Reliance Bank Ltd v Norlake Investments Ltd (2012) IEA 22*) and *Githunguri v Jimba Credit Corporation (supra)*.
14. In this case, the respondents have not contested, and in our respectful view rightly so, the existence of an arguable appeal. We agree that the issue of the respondents' employment by the applicant in light of the alleged arbitral award is clearly arguable. Regarding the issue whether the intended appeal will be rendered nugatory absent orders of stay, it is the applicant's position that the respondents may not be in a position to refund the decretal sum if paid over to them. Although the respondents have not controverted this averment, impecuniosity of a party, it has been held, is not necessarily a ground for denying a party the fruits of his successful litigation. However, where the amount involved is, on the face of it colossal, the successful party ought to show some evidence of financial ability to refund the sum in question. The respondents, who are the successful parties in this matter, do not insist on the payment of the decretal sum at this stage but propose that the same be deposited in a joint interest earning account in the names of the advocates for the parties.
15. We have considered the submissions made in light of the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of



proportionality be taken into account. This Court in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR appreciated that:

“...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly... to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

16. In the premises the order that commends itself to us and which we hereby make is that there be a stay of execution of the judgements in Malindi ELRC Appeal Nos. E006 of 2023 and E007 of 2023 entered on 23rd May 2024 pending the hearing and determination of the appeals against the said judgements on condition that the applicant deposits half of the respective principal sums in a joint interest earning account in the names of the advocates for the parties within 30 days from today’s date. In default of compliance the stay will automatically lapse.
17. The costs will be in the intended appeals.
18. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A.K. MURGOR

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

