



Watuku v Shanghiya Enterprises Limited (t/a Anningtex Diamong) (Civil Application E197 of 2024) [2024] KECA 1615 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1615 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E197 OF 2024
DK MUSINGA, JW LESSIT & A ALI-ARONI, JJA
NOVEMBER 8, 2024**

BETWEEN

ANTHONY KIBANDI WATUKU APPLICANT

AND

**SHANGHIYA ENTERPRISES LIMITED (T/A ANNINGTEX
DIAMONG) RESPONDENT**

*(Being an application for injunction against the entire Ruling
and Order of the High Court of Kenya at Nairobi (Mong'are, J.)
delivered on 15th April 2024 in HC Comm. Misc. No. E186 of 2024)*

RULING

1. This application is dated 22nd April 2024 and has been brought by Anthony Kibandi Watuku, the applicant, pursuant to the provisions of Article 159 (2)(d) of the [Constitution of Kenya](#), 2010, sections 3 and 3A of the [Appellate Jurisdiction Act](#) and Rules 29 (1)(b), (2), (3), (4) and 47 of the [Court of Appeal Rules](#). The applicant seeks the following orders:
 1. ...
 2. That the Court be pleased to set aside the ruling of Hon. Mong'are dated 15th April 2024 which vacated the orders issued on 18th March 2024 and the orders issued on 18th March 2024 be reinstated and substituted with the following orders;
 - a. That the Honorable Court be pleased to suspend and/or declare a nullity the purported termination and/or suspension of the Applicant's Principle-Agency contractual relationship/Agreement with the Respondent given and/or sent to the Applicant through a WhatsApp message on 18th January 2024 as unlawful.



- b. That the Honorable Court be pleased to reinstate the Applicant's Principle- Agency contractual agreement with the Respondent which was purportedly terminated and/ or suspended on 18th January 2024 vide a WhatsApp message by the Respondent and compel the Respondent to resume the supply of fabric textile materials and other materials to the Applicant pending the hearing and determination of the Application at the Superior Court on the last balance as at 18th January 2024 when the contract was suspended by the respondent of Kshs.4094616.10 credit belonging to the appellant.
 - c. That an order of injunction do issue compelling the respondent to pay the applicant for the daily financial losses and specific damages of Kshs.1,877,844.83 per day with effect from 18th January 2024 to date.
 3. That this Honorable Court be pleased to issue an order of permanent injunction against the respondent, its employees, agents, servants or otherwise from discrimination of all forms directed to him including his physical disabilities and also from intimidating, blackmailing and or any form of threat.
 4. That this Honorable Court be pleased to issue an order directed to the respondent to pay him for any damages suffered as a result of discrimination based on physical disabilities that he has already occurred, including but not limited to emotional distress and psychological distress.
 5. That the ruling of this Honorable Court be expedited to allow the applicant travel to India for further treatment.
 6. That this Honorable Court makes any other orders as it may deem necessary.
 7. That costs of this application be provided for.
2. The brief background of this application is that the applicant filed an application before the High Court, to wit, HC Comm. Misc No. E186 of 2024 and sought orders, inter alia, that the court be pleased; to suspend and or declare a nullity the purported termination and or suspension of applicant's Principle-Agency contractual relationship or agreement with the respondent given through a WhatsApp message on 18th January 2024; to reinstate the said purported terminated contract by compelling the respondent to resume the supply of fabric textile materials and other materials to the applicant pending the hearing and determination of the application; and to issue an order of injunction compelling the respondent to compensate the applicant for the daily financial losses and damages of about Kshs.1,200,000/- pending the hearing and determination of the application.
3. Mong'are, J., by a ruling dated 18th March 2024 allowed the said application ex parte, and on a date set for the mention of the matter, granting the applicant the orders as sought. The respondent, aggrieved by the granting of the orders ex parte, filed an application before the same Judge and contested the said ruling. The application was argued in court and Mong'are, J., upon realizing her mistake in allowing the applicant's application without hearing the parties inter-partes and on a mention for direction, by a ruling dated 15th April 2024 vacated the orders issued on 18th March 2024 and directed the parties to prepare for hearing of the main suit, and to appear before the Deputy Registrar for pre-trial conference.
4. The application arises from that ruling and is premised on the grounds as set out on the face of the application, together with the applicant's supporting affidavit sworn on the even date, the amended supplementary affidavit sworn on 3rd July 2024 which seeks to amend the notice of motion in terms of figures as captured in paragraph (c) to Kshs.1,228,384.83 per day and a further supplementary affidavit sworn on 15th July 2024.



5. The respondent did not file any response to the application.
6. When the matter came up for virtual hearing on 22nd July 2024, the applicant appeared in person while Senior Counsel Mr. Ahmednasir Abdullahi appeared for the respondent. Both the applicant and Mr. Abdullahi highlighted their written submissions.
7. The applicant asserted that the relationship he had with the respondent, which begun in 2017, was going well until he fell ill during the Covid-19 pandemic, which rendered him disabled. That consequently the respondent's attitude towards him changed. He avers that the only goods he sells are those delivered to him by the respondent, and contends that the respondent suspended his contract on 18th January 2024, putting his business at high risk of crumbling down and closure.
8. Mr. Abdullahi, highlighting the respondent's written submissions dated 18th July 2024, opposed the applicant's application and submitted that the orders sought by the applicant cannot be granted under a rule 5 (2)(b) application, as the applicant seeks orders which cannot be granted by this Court, and more importantly, that the applicant does not establish the two (2) principles that this Court has pronounced endlessly on rule 5 (2)(b). Counsel emphasized that there is no arguable appeal, and secondly, that the appeal will not be rendered nugatory.
9. We have carefully considered the application together with the supporting affidavit, amended supplementary affidavit, a further supplementary affidavit, written and oral submissions by the parties, the cited authorities as well as the applicable law.
10. The prerequisites to be met before a party can obtain a relief under rule 5 (2)(b) have been settled 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 order sought is not granted, the appeal/intended appeal, as the case may be, will be rendered nugatory (see [Stanley Kangethe Kinyanjui v. Tonny Keter & Others](#) [2013] eKLR). An arguable appeal is not one that 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, a single arguable point suffices. See [Somak Travels Ltd v. Gladys Aganyo](#) [2016] eKLR.
11. 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, where damages will not reasonably compensate the aggrieved party. (See [Stanley Kangethe Kinyanjui v. Tonny Keter & 5 Others](#) (*supra*)).
12. We have considered what the applicant argues is the basis of his application, but before we get there, we must ask ourselves whether we can grant any of the orders sought. We have already set out the orders which the applicant seeks.
13. As is clear from the orders sought, they are in the nature of final orders, yet an application under rule 5 (2)(b) is intended to give temporary relief pending the hearing and determination of an appeal or an intended appeal, whichever is the case. The main purpose is to preserve the substratum of an appeal, in order not to render the appeal an academic exercise, prevent hardship, difficulty or damage that is irreversible and which cannot be compensated by an award of damages. Considering the orders sought, they are the kind that only a trial court can grant after a trial. We agree with Mr. Abdullahi that the orders cannot be issued by this Court under rule 5 (2)(b).
14. This application is bad in law and cannot be entertained under rule 5 (2)(b) of this [Court's Rules](#). We hereby dismiss it with costs to the respondent. It is so ordered.



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

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR.

