



**County Government of Kisii & 2 others v Kenya County Government Workers Union
(Civil Application E064 of 2024) [2024] KECA 1810 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1810 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E064 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
DECEMBER 20, 2024**

BETWEEN

**THE COUNTY GOVERNMENT OF KISII 1ST APPLICANT
KISII COUNTY PUBLIC SERVICE BOARD 2ND APPLICANT
COUNTY SECRETARY, KISII COUNTY 3RD APPLICANT**

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

(Being an application for stay of execution and implementation of the judgment by the Employment and Labour Relations Court at Kisumu (Christine N. Baari, J.) dated 24th November 2022 and the accompanying ruling dated 18th April 2024 in Kisumu ELRC No. E007 of 2021)

RULING

1. The applicants, the County Government of Kisii, Kisii County Public Service Board, and County Secretary, Kisii County, have filed this application dated 24th May 2024 under rule 5(2)(b) of this Court's Rules. They seek a stay of execution of the judgment and decree of the Employment and Labour Relations Court ("ELRC") in Cause No. E007 of 2021 delivered on 24th November 2022. By that judgment and decree, the trial court directed the applicants to pay the respondent, Kenya County Government Workers Union a sum of Kshs. 217,317,562.00 being unpaid staff emoluments owed by the defunct local authorities within the then Kisii District. Those local authorities comprise Town Council of Nyamache, Town Council of Tabaka, County Council of Gucha, Suneka Town Council, Town Council of Nyamarambe, Town Council of Masimba, Town Council of Ogembo, Municipal Council of Kisii, Town Council of Keroka and Gusii County Council.



2. The genesis of the dispute was that the respondent, representing its members who were employees of the aforesaid defunct local authorities filed a claim seeking payment of salary arrears amounting to Kshs. 220,430,159.30. The ELRC found in favour of the respondent and directed the applicants to provide accurate records of outstanding employee emoluments and subsequently pay the verified amount. The applicants complied with the order and furnished the ELRC with a list and a summation of the amount owed amounting to Kshs. 35,645,062.00. However, in its ruling rendered on 18th April 2024, the ELRC disregarded the said list and instead awarded the respondent a whopping Kshs. 217,317,562.00.
3. The applicants, aggrieved by the judgment and decree, and the subsequent ruling and order, filed a notice of appeal and simultaneously filed the instant application. They aver that their application meets the threshold for the grant of the orders sought, that is, that the intended appeal is arguable and that should a stay not be granted and the intended appeal succeeds, it would have been rendered nugatory.
4. The applicants argue that the intended appeal is arguable because the trial court disregarded the evidence and materials presented by the applicants in awarding Kshs 217,317,562.00. That the court expressed doubts about the respondent's case but still ruled in its favour, compelling the applicants to submit evidence post- judgment, which was unprocedural as the court was then functus officio.
5. On the second limb, the applicants are of the view that the execution of the judgment and decree and subsequent ruling and order would jeopardize the discharge of their services and functions to the populace. The settlement of the decretal amount cannot be reversed as the respondent does not have the means to repay the same should the intended appeal succeed. That absence of stay would render the appeal a mere academic exercise as what is sought to be stayed shall materialize and the appeal shall become moot, thereby rendering the intended appeal nugatory.
6. The application was opposed by the respondent through the replying affidavit of Roba S. Duba, the General Secretary, dated 15th July 2024. He deposed that the application lacks merit, is incompetent, and an abuse of the court process. He claimed that the applicants had not demonstrated the two limbs required for an application of this nature. That the respondent had filed a claim in the ELRC in Kisumu, seeking payment of Kshs. 217,317,562.00 owed to its members. This amount had been verified by various authorities and their committees. That the applicants participated fully in the process and are now estopped from challenging the calculations. That the applicants are attempting to re-litigate the dispute by introducing new evidence. That the court's decision was well- reasoned, and therefore the intended appeal is not arguable at all considering that the debt of Kshs. 217,317,562.00 was verified and thus, incontestable. That issuing a stay order would prolong the suffering of the respondent's members, who have been deprived of their dues for over a decade. That some had even passed on while waiting for the payments.
7. The application was canvassed by way of written submissions with limited oral highlights. During the plenary hearing of the application on 16th September 2024, Mr. Ochieng Oginga and Mr. Felix Mutua, learned counsel appeared for the applicants and respondent respectively.
8. Mr. Ochieng in his submissions merely reiterated and expounded on the grounds on the face of the application as well as the supporting affidavit. We need not therefore rehash the same. Suffice to add that counsel pointed out the principles that guide this Court in applications under rule 5 (2) (b) of this *Court's Rules* were succinctly set out in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR. That in his view, the application had met the threshold. He therefore urged us to allow the application.



9. On his part, Mr. Mutua also reiterated and expounded on what the respondent had deposed to in the replying affidavit. Again, there is no need for us to rehash.
10. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited, and the law. The jurisdiction of this Court under rule 5(2) (b) of this Court's Rules is discretionary. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
11. In the case of Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others [2000] eKLR, for instance, this Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

12. In considering the twin principles set out above, we are cognizant that for the application to succeed, both limbs must be demonstrated to the Court's satisfaction.
13. On the first limb, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (*supra*) where this Court described an arguable appeal in the following terms:

“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”

We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, the appeal is arguable, in particular with regard to the computation of the emoluments.

14. On the second limb, the applicant contends that the execution of the judgment and ruling would cause financial hardship and disrupt the operations of the 1st respondent. That the payment of the decretal amount cannot be reversed. That the respondent in any event does not have the means to repay the same should the intended appeal succeed.
15. We note that this is a money decree. In the case of Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410, this Court held that execution of money decrees is rarely stayed; and should there be such need, the applicant must show that the respondent would be unable to refund the decretal amount if the appeal succeeds. In the present case, the applicants have not provided any evidence to suggest that the respondent would be unable to refund the decretal amount if the appeal is successful. The respondent is a union representing a huge number of members who remit their monthly subscriptions and therefore have the financial muscle to refund the amount. In our view, the applicant has not shown that if what it fears upon execution of the decree comes to pass, it cannot be undone or adequately



compensated by an award of damages. In Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (*supra*), the Court expressed itself thus, on such an issue:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

While the appeal is arguable, the applicant has failed to demonstrate that the appeal would be rendered nugatory if the stay is not granted.

16. The upshot then is that the application dated 24th May 2024 is dismissed. Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

