



REPUBLIC OF KENYA



**Great Rift Express Shuttle v Transport Workers Union (Civil Application E226 of 2020) [2023] KECA 138 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 138 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E226 OF 2020  
MK KOOME, PO KIAGE & AK MURGOR, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**GREAT RIFT EXPRESS SHUTTLE ..... APPLICANT**

**AND**

**TRANSPORT WORKERS UNION ..... RESPONDENT**

*(Being an application for stay of execution of the judgment of the Employment and Labour Relations Court at Nairobi (O. Makau, J.) delivered on the 26th June 2020 in Nairobi ELRC Cause No. 2369 of 2016)*

**RULING**

**RULING OF AK MURGOR, JA**

1. By a Notice of motion dated July 28, 2020, the applicant, Great Rift Express Shuttle, seeks a temporary stay of execution of the judgment of the Employment and Labour Relations Court dated June 26, 2020 to restrain the respondent, Transport Workers Union, their agents or servants from executing, enforcing, selling, alienating, disposing, interfering charging moveable or immovable property, arresting the officials of the applicant pending the hearing and determination of the appeal. The application was brought on the grounds that the applicant was dissatisfied with the decision of the Employment and Labour Relations Court that had condemned it to pay Kshs 3,815,197.76 together with costs; that the appeal which was arguable raised serious legal and constitutional questions, and would be rendered nugatory if the orders sought were not granted, and the issues to be raised in the appeal were not fully ventilated. It was further contended that the appeal had high chances of success for the reasons that the learned judge wrongly exercised his discretion which had occasioned a miscarriage of justice; that the judge misdirected himself on crucial matters and fell into error in awarding the respondent's members amounts for a period in which they had not worked.



2. The motion was supported by an affidavit of James Mwaura Nderitu sworn on July 28, 2020 where it was deposed that the award arose out of a dispute that concerned 3 members of the respondent who, on November 9, 2016 were alleged to have been arrested on suspicion of adulterating fuel; that the arrest lead to a mass strike by other drivers; that the drivers were later released, but another strike ensued when it was reported that some of the drivers had been dismissed for having supported the strike. The applicant complained that on account of the strike, it had incurred losses of Kshs 4,000,000.
3. It was averred that upon hearing the dispute, the trial court wrongly ordered that 3 of the respondent's members be paid their employment dues, yet the judge failed to appreciate that the applicant did not have a recognition agreement with the respondent; that further, the amounts paid to the respondents' members were not due to them, as they had not worked for the period for which the sums were awarded.
4. The respondent did not file a reply, but both parties filed written submissions. In its written submissions, the applicant to a large extent reiterated the contents of the motion and affidavit in support.
5. On its part the respondent asserted that the applicant had not discharged the threshold requirements necessary for the grant of the orders sought, but did not specify how the threshold requirements were not met.
6. In so far as applications filed under rule 5 (2) (b) of this *Court rules* are concerned, the threshold requirement to be satisfied are set out in the case of *Republic vs Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
7. Turning to the first limb on whether the appeal is arguable, the applicant's complaint is that the court awarded Kshs 3,815,197.76 to the respondent's members, but in so doing, failed to appreciate that they had not worked for the entire period for which the amounts were awarded. For its part the respondent argued that the learned judge rightly awarded the amounts ordered to its members. Given that a question has arisen as to whether or not the respondents' members were entitled to the amounts awarded, we are satisfied that the appeal is arguable.
8. On whether the appeal will be rendered nugatory, the applicant has stated that were the amounts to be paid and the appeal were to succeed, there is every possibility that it will be rendered nugatory as, the substratum of the appeal will have been lost.
9. I agree, and would add that since the respondent did not file any affidavit in reply, there was no indication whether either the respondent, or its members would be in any position to refund the sums paid.
10. Consequently, the applicant having satisfied the requirements for a rule 5 (2) (b) application, the Notice of motion dated July 28, 2020 is merited and I would allow it with costs in the intended appeal.
11. The ruling is issued and signed under Rule 32(3) of the *Court of Appeal Rules* (CAR), since the Hon Justice Martha Koome, JA ceased to hold office of Judge of Appeal upon being appointed as the Hon Chief Justice of the Republic of Kenya.



**RULING OF P O KIAGE, JA**

12. I have had the benefit of reading in a draft ruling of my learned sister Murgor, JA, with which I am in full agreement.
13. In the result, the Motion is disposed of in the terms proposed by Murgor, JA.
14. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

