



REPUBLIC OF KENYA



KENYA LAW
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**MA Consulting Group Limited v Nirere & another (Civil Application
E236 of 2020) [2023] KECA 198 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 198 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E236 OF 2020
PO KIAGE & AK MURGOR, JJA
FEBRUARY 17, 2023**

BETWEEN

MA CONSULTING GROUP LIMITED APPLICANT

AND

SYLVIE NIRERE 1ST RESPONDENT

ANFIELD AUCTIONEERS 2ND RESPONDENT

*(Being an application for stay of execution of the judgment of the
Employment and Labour Relations Court at Nairobi (Wasilwa, J.)
delivered on 12th June 2019 in Nairobi ELRC No. 2069 of 2014)*

RULING

Ruling of Murgor, JA

1. By a Notice of motion dated August 12, 2020, the applicant, M.A. Consulting Group Limited seeks an order of stay of execution of the judgment of the Employment and Labour Relations Court pending the hearing and determination of the appeal. The application was brought on the grounds that the applicant being aggrieved by the judgment intends to file an appeal. In the draft memorandum of appeal attached to the application, the applicant has set out 6 grounds, where significant among the grounds is that, the learned judge failed to appreciate that a significant portion of Sylvie Nirere, the 1st respondent's claim was premised on a period during which the 1st respondent was prohibited from working as she did not have a valid work permit; that the learned judge failed to appreciate that during this period the 1st respondent was an independent contractor and not the applicant's employee, and was therefore not entitled to the sums awarded for this period; that consequently, the judge misdirected herself in finding that the 1st respondent was employed by the applicant from July 2, 2013 instead of from August 1, 2013; that furthermore, the learned judge fell into error in awarding the 1st respondent



gratuity yet the evidence showed that she was employed for less than 3 years and as such was not contractually entitled to any gratuity payments.

2. It was further stated that the applicant is apprehensive that if the decretal sums is paid to the 1st respondent who is a citizen of Rwanda with no permanent residence in Kenya, there is the likelihood that the applicant will be unable to recover the sums paid in the event the appeal were to succeed, which would render the appeal nugatory. The motion was supported by the applicant's affidavit sworn on August 12, 2020 which to a large extent reiterated the contents of the motion.
3. In an affidavit in reply sworn by the 1st respondent on October 9, 2020, it was deposed that the applicant should be ordered to deposit the sum of Kshs. 4,287,971.80 in Court; that the applicant had not demonstrated that it will suffer irreparable damage that cannot be compensated in monetary terms; that the threshold requirements for grant of the orders sought have not been met.
4. Both parties filed written submissions which reiterated the contents of the motion and the parties' affidavits, which I have carefully considered.
5. 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”.

6. As to whether the appeal is arguable, the applicant contends that the learned judge failed to appreciate that the 1st respondent was not an employee, but an independent contractor during the period when she had yet to acquire a work permit, and as such, was not entitled to the amounts awarded for that period; that further, the learned judge was wrong in awarding the 1st respondent a gratuity payment for which she was not entitled. We find that the issues raised are pertinent and ought to be ventilated before this court. We do not consider them to be whimsical or frivolous.
7. Concerning the nugatory aspect, the applicant's concern is that the 1st respondent is a citizen of Rwanda with no permanent residence in Kenya and there is the likelihood that it will be unable to recover the sums paid in the event the appeal were to succeed, which would render the appeal nugatory. On the other hand, the 1st respondent has urged that this Court do order that the judgment sum be deposited in an interest earning account in the joint names of counsel pending the hearing and determination of the appeal.
8. Having regard to the circumstances of the case, I am satisfied that the threshold requirements for an application of this nature have been met. In the circumstances, I would propose that we make the following orders;
 - a. Stay of execution of the judgment of the Employment and Labour Court in ELRC No. 2069 of 2014 is granted pending the hearing and determination of the appeal.
 - b. The stay of execution is granted on condition that the applicant deposits Kshs. 2,000,000 in an interest earning account in the joint names of counsel for the parties within 45 days from the date hereof failing which the order of stay shall lapse.
 - c. Costs in the appeal.



9. 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 Kiage, JA

10. I agree with the ruling of my learned sister Murgor, JA, which I had the benefit of reading in draft.

11. In the result, the ruling shall be disposed of in terms of the order she proposes.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

A.K. MURGOR

JUDGE OF APPEAL

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P.O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

