



**Kenyatta University v Mwathi & another (Civil Application
E385 of 2022) [2023] KECA 98 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 98 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E385 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 3, 2023**

BETWEEN

KENYATTA UNIVERSITY APPLICANT

AND

PETER GICHURU MWATHI 1ST RESPONDENT

KEWAL CONTRACTORS LIMITED 2ND RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from part of the Order of the Ruling delivered at the Employment and Labour Relations Court at Nairobi (Kebira, J.) dated 6th October 2022 in E.L.R.C Appeal No.70 of 2018)

RULING

1. The applicant's notice of motion dated October 25, 2022 seeks stay of execution pending hearing and determination of an appeal in respect of some of the orders made on October 6, 2022 by Kebira, J. in Employment and Labour Relations Court (ELRC) Appeal No. 70 of 2018.
2. The background to this application is that the 1st respondent filed a suit, in CMCC No. 439 of 2013, at the Milimani Law Courts against Kewal Contractors Limited, the 2nd respondent, and Kenyatta University (the applicant herein), seeking general and special damages for injuries that he sustained on May 19, 2009 in the course of his employment with the 2nd respondent at the applicant's construction site. The trial court found that the applicant was not vicariously liable for the acts or omissions of the 2nd respondent and dismissed the 1st respondent's case against the applicant, and awarded general and special damages amounting to Kshs.7,450,322.00/ to the 1st respondent as against the 2nd respondent.
3. The 2nd respondent neither entered appearance nor filed any defence and, consequently, interlocutory judgment was entered against it. The 2nd respondent did not also participate in this application.



4. Being aggrieved by the finding that the applicant was not vicariously liable, the 1st respondent preferred an appeal, to wit, No. 70 of 2018, before the ELRC.
5. In the impugned judgment, the learned judge held that the applicant was vicariously liable and proceeded to set aside the trial court's finding on liability. The learned judge held that the trial court ought to have entered judgment for the 1st respondent against the applicant and the 2nd respondent jointly and severally, and proceeded to do so.
6. By a notice of motion dated May 19, 2022 before the ELRC, the applicant sought stay of execution of the judgment pending hearing and determination of an appeal that it had preferred before this Court. In the impugned ruling, the learned judge allowed the application on condition that the applicant pays to the 1st respondent a sum of Kshs.2,500,000/ within 30 days from the date of the ruling, (October 6, 2022), and the balance of the decretal sum be deposited in an interest earning account in the joint names of counsel for the parties within 60 days of the ruling.
7. In its application before this court, the applicant states that it is dissatisfied with the condition imposed by the first appellate court to pay the 1st respondent a sum of Kshs.2,500,000/. The applicant argues that it has an arguable appeal and that, unless the order sought is granted, the appeal, if successful, shall be rendered nugatory because the 1st respondent will not be able to repay the said sum.
8. In its affidavit in support of the application, the applicant states that the 1st respondent, in his opposition to the application for stay of execution of the impugned judgment, told the trial court that "he was financially drained." That is sufficient proof that he is incapable of refunding the sum of Kshs.2,500,000/ if the appeal is successful, the applicant contends.
9. For those reasons, Ms Kabuthi, learned counsel for the applicant, urged this court to grant the order sought. She submitted that the applicant is ready and willing to deposit the balance of the decretal sum payable by the applicant, Kshs.1,225,161/, in an interest earning account in the joint names of counsel for the parties.
10. In a further affidavit sworn on November 4, 2022 by Prof. Paul Okemo, the applicant's Deputy Vice-Chancellor, he stated that the sum due from the applicant is Kshs.3,752,161/ (one half of the decretal sum) and not Kshs.7,440,899.50/.
11. Opposing the application, the 1st respondent through his learned counsel, Mr. Keya, submitted that the applicant in its application for stay of execution before the ELRC stated that it was ready and willing to abide by any condition the court would be inclined to impose for grant of the order sought; that it was on that basis that the learned judge ordered the applicant to pay the sum of Kshs.2,500,000/ to the 1st respondent within 30 days from the date of the ruling; that the applicant had failed to satisfy that condition, and had also failed to deposit the balance of the decretal sum as ordered.
12. The 1st respondent further stated that, although the applicant is apprehensive that he will not be able to repay the sum of Kshs.2,500,000/ should the appeal succeed, "there are many lawful ways of recovering money" in the unlikely event that the appeal succeeds. The 1st respondent therefore urged this Court to dismiss the application.
13. It is trite law that this court's jurisdiction to grant an application for stay of execution or an injunction under rule 5(2)(b) of its Rules is original and discretionary. For an applicant to succeed in such an application, it has to be shown that the appeal or intended appeal is arguable; and that unless the order sought is granted, the appeal, if successful, will be rendered nugatory. See *NIC Bank Limited & 2 others v Mombasa Water Products Limited* [2021] eKLR.



14. The gravamen of the applicant’s appeal is that it was not vicariously liable for the injuries sustained by the 1st respondent as he was employed by the 2nd respondent, an independent contractor, at the applicant’s site. That, in our view, is an arguable ground and, therefore, the applicant has satisfied the first limb of the twin conditions for grant of an order under rule 5(2)(b) of this *Court’s Rules*.
15. On the nugatory aspect, the applicant has stated that it is reasonably apprehensive that the 1st respondent will not be able to refund the sum of Kshs.2,500,000/ if its appeal is successful. The applicant cited the 1st respondent’s averments before the ELRC in opposing the applicant’s application for stay of execution where the 1st respondent stated that he was financially drained.
16. Where it is alleged by an applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, it behooves the respondent to rebut that allegation. See *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR. In this application, the 1st respondent failed to do so. In his replying affidavit to the applicant’s application before this court, the 1st respondent states, inter alia, “I cannot work to earn a living and the Kshs.2,500,000/ was the silver lining after the 13 years of the complete desolation.”
17. While we sympathise with the 1st respondent for his financial situation due to the injuries that he sustained as a result of the accident, we agree with the applicant that, unless we grant the order sought, the intended appeal, which we have already found to be arguable, shall be rendered nugatory if it succeeds.
18. In the circumstances, we allow the application and stay execution of the order by the ELRC requiring the applicant to pay the 1st respondent a sum of Kshs.2,500,000/ within 30 days from the date of the impugned ruling. We direct that the decretal sum be deposited in an interest earning account in the joint names of the advocates for both parties within a period of 14 days from the date hereof, failing which the order of stay shall automatically lapse. Since judgment was entered against the applicant and the 2nd respondent jointly and severally, the decretal sum is Kshs.7,450,322/.
19. The costs of this application shall abide the outcome of the appeal. We further direct that this appeal be heard on priority basis.

Dated and delivered at Nairobi this 3rd day February, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

