



REPUBLIC OF KENYA



KENYA LAW
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**Lorenzo Dry Cleaners Ltd v Ombisa & 2 others (Civil Application
E281 of 2022) [2023] KECA 61 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 61 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E281 OF 2022
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

LORENZO DRY CLEANERS LTD APPLICANT

AND

GERISHOM ODARI OMBISA 1ST RESPONDENT

MARY NYAMBURA 2ND RESPONDENT

ANN WANGECHI MWANGI 3RD RESPONDENT

*(Being an application for stay of execution pending appeal from the Judgment
and Decree of the Employment and Labour Relations Court of Kenya at Nairobi
(M. N. Nduma, J.) delivered on 9th June 2022 in ELRC Cause No. 193 of 2018)*

RULING

1. Before us is the applicant's Notice of Motion dated July 22, 2022 made under rules 5(2) (b) and 20(2) in which it seeks, *inter alia*, stay of execution of the judgment and decree of the Employment and Labour Relations Court (ELRC) (MN Nduma, J) dated June 9, 2022 in Nairobi ELRC Cause No 193 of 2018 pending hearing and determination of its appeal.
2. The Motion is supported by the annexed affidavit of Lawrence Njiru, a Director of the applicant, and is made on 8 grounds set out on the face of the Motion, namely: that judgment was entered against the applicant on June 9, 2022; that the applicant, being dissatisfied by the said judgment, lodged a notice of appeal and immediately applied for copies of the proceedings and decree; that the intended appeal raises triable issues with high chances of success; that the appeal will be rendered nugatory if the orders of stay sought are not granted; that the applicant is ready to provide security for the due performance of the decree; that the respondents are not persons of means, and may not be able to refund the applicant in the event that the appeal succeeds; and that it is in the interest of justice and fairness that the applicant be granted leave to file an appeal out of time.



3. In his supporting affidavit, Lawrence Njiru essentially restates the grounds on which the applicant's Motion is anchored and adds that the respondents commenced taxation of their costs with intent to execute the decree; and that if stay is not granted, the applicant will suffer irreparable loss since it might not recover the money if the appeal succeeds.
4. Apart from the applicant's written submissions, there is nothing on the record before us to suggest that the respondents oppose the applicant's Motion. Be that as it may, we are mandated to consider the applicant's Motion and test it on the twin principle for grant of orders pursuant to Rule 5(2) (b) of this Court's *Rules*, namely: whether the applicant has an arguable appeal with the probability of success; and whether the appeal, if successful, would be rendered nugatory if execution is not stayed pending determination of the intended appeal.
5. The applicant's intended appeal is based on 7 grounds, to wit, that the learned Judge erred in law and in fact by: failing to find that the purported representative suit was incompetent in so far as there was privity of contract between the applicant and each of the respondents; failing to find that the respondents failed to prove their case as they did not testify and produce their separate contracts; failing to consider the applicant's submissions; allowing oral evidence to replace written contracts between the applicant and the respondents; giving undue weight to the respondents' and completely ignoring the applicant's submissions; allowing the 1st respondent to testify on behalf of the 2nd and 3rd respondents even though the parties had different contracts with different terms and conditions; and giving an award to the respondents while they had not proved their claims against the applicant.
6. On the first limb of the twin principle for grant of stay under Rule 5(2) (b) of this Court's *Rules*, the Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue, the applicants must first demonstrate that the appeal or intended appeal is arguable, ie, not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
7. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v AA Kawir Transporters & 4 others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
8. We are satisfied that the grounds on which the applicant's intended appeal is founded demonstrate that it has an arguable appeal with the probability of success. Simply put, it is not frivolous. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted.
9. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227 at p 232 thus:

“it does not only mean worthless, futile or invalid. It also means trifling.”

The court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
10. The applicant contends that the respondents are not persons of means, and that they might not be able to refund the decretal amount should execution proceed pending determination of its appeal, and the appeal succeeds. The respondents have not filed any reply or submissions to rebut this contention. We must nonetheless consider the applicant's Motion on its merits. Having carefully considered the record as put to us, we find nothing to negate the contention that the appeal, if successful, would be



rendered nugatory absent stay. On the other hand, it is noteworthy that the applicant has offered to provide security for the due performance of the decree. Accordingly, we hereby order and direct that:

- a. Execution of the judgment and decree of the ELRC (MN Nduma, J) dated June 9, 2022 in Nairobi ELRC Cause No 193 of 2018 be and is hereby stayed pending hearing and determination of the applicant's intended appeal;
- b. The applicant do, within thirty (30) days from the date of this order, provide security by way of a bank guarantee for the due performance of the impugned decree in the sum of Kshs. 1,250,000;
- c. In default of (b) above, the stay orders herein shall automatically lapse; and
- d. The costs of this application do abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

