



**Hi-Tech Opticians Limited v Matunda (Civil Application
E022 of 2022) [2023] KECA 393 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 393 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E022 OF 2022
HM OKWENGU, S OLE KANTAI & HA OMONDI, JJA
MARCH 31, 2023**

BETWEEN

HI-TECH OPTICIANS LIMITED APPLICANT

AND

ROSE NYABOKE MATUNDA RESPONDENT

(An application against the Judgment of the Employment and Labour Relations Court of Kenya at Nakuru (Wasilwa, J.) dated 2nd November, 2021 in ELRC Cause No. 470 of 2017)

RULING

1. We are asked in the Motion brought under rule 5(2) (b) of the [Court of Appeal Rules](#) and all enabling provisions of law to issue orders to stay execution of the decree arising from the Judgment of Wasilwa, J. delivered on November 2, 2022 (this should be November 2, 2021) pending hearing and determination of an intended appeal. In grounds in support of the application and in a supporting affidavit of Jayaram Ankala, a director of the applicant Hi- Tech Opticians Limited it is said inter alia that the intended appeal will be rendered nugatory if we do not grant stay; that the suit at the Employment and Labour Relations Court (ELRC) proceeded undefended as the applicant was not heard; that the applicant's property has been proclaimed; an application for stay in that court was unsuccessful; that the applicant had issued 2 cheques to settle a debt owed to the respondent Rose Nyaboke Matunda and that the applicant will suffer substantial loss if proclaimed goods are sold in satisfaction of the Judgment and decree.
2. We note that the matter before ELRC was founded on an employment contract. That court found that the respondent had been unfairly dismissed and awarded her a sum of money.
3. In a replying affidavit the respondent says that the application is defective and an abuse of the process of the Court; that the application is brought with inordinate delay; that the applicant has partly satisfied the decree and we should not allow the Motion.



- 4. We have seen and considered the submissions made by the parties.
- 5. The principles that govern grant of an application to this Court for stay of execution pending appeal are well known and have been captured by various judicial pronouncements in such cases as *Charter House Bank Limited v Central Bank of Kenya & 2 Others* [2007] eKLR. For an applicant to succeed he must firstly demonstrate that the appeal, or intended appeal, as the case may be is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay.
- 6. We have considered submissions made when the application came up for hearing on July 20, 2022.
- 7. The learned Judge of ELRC noted at paragraph 10 of the Judgment that the applicant had entered appearance to the suit but had failed to file a response. The suit proceeded in the absence of the applicant. We doubt, in those circumstances that there can be any arguable appeal. The applicant was not heard by ELRC because it failed to file a response or defence to the suit. The suit proceeded undefended and there cannot be an arguable appeal. Having so found we need not examine the other limb on whether the intended appeal would be rendered nugatory if we don't grant stay. The application has no merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

HANNAH OKWENGU

JUDGE OF APPEAL

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S. ole KANTAI

JUDGE OF APPEAL

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H.A. OMONDI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

