



**DHL Worldwide Express Kenya Ltd v Mutuma (Civil Application E255 of 2022) [2023] KECA 318 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 318 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E255 OF 2022  
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA  
MARCH 17, 2023**

**BETWEEN**

**DHL WORLDWIDE EXPRESS KENYA LTD ..... APPELLANT**

**AND**

**ANDREW MUTUMA ..... RESPONDENT**

*(Application for stay of proceedings pending appeal from the ruling and order of the Employment & Labour Relations Court at Nairobi (Onyango, J.) dated 12th July 2022 in ELRCC No. E1004 of 2021.)*

**RULING**

1. The Applicant, DHL Worldwide Express Kenya Ltd., has moved the Court, primarily under rule 5(2) (b) of the *Court of Appeal Rules*, for an order of stay of proceedings in Employment & Labour Relations Court (ELRC) Case No. E1004 of 2021 pending the hearing and determination of an appeal against the ruling and order of the ELRC (Onyango, J.), dated July 12, 2022. The genesis of the application is that the applicant terminated the respondent's employment on November 12, 2021 after which the respondent lodged a claim for unlawful termination in the ELRC.
2. That suit is currently part-heard before the ELRC. The respondent's case opened on May 17, 2022, but was adjourned to 12<sup>th</sup> July for further cross-examination of the respondent. On June 29, 2022, the applicant filed and served upon the respondent a supplementary list of documents, which it applied orally to be admitted at the resumed hearing of the claim. The application was based on a number of grounds, chief among them being that the respondent had himself filed and served his documents the day before the commencement of the hearing on May 17, 2022, long after the close of pleadings. The respondent's documents were admitted by the ELRC at the commencement of the hearing, and the applicant did not have an opportunity to respond to them. It was also the applicant's contention that the documents produced by the respondent were incomplete and others in draft, which painted a false



- picture of his claim, and that the respondent needed to correct the same by producing the actual and complete documents.
3. The respondent opposed production of the documents, which the ELRC upheld in its ruling dated July 12, 2022, the subject of the intended appeal.
  4. The applicant contends in the application, the supporting affidavit sworn on July 13, 2022 by its director, Paul Clegg, and in its written submissions dated August 22, 2022, that its intended appeal is arguable because, among others, it applied and obtained leave of the ELRC to appeal; that it has already filed a notice of appeal; that the learned judge exercised her discretion erroneously by failing to consider all the circumstances of the application; that the documents are relevant and will assist the court in arriving at a fair and just determination of the claim; that the respondent stands to suffer no prejudice because the documents are not new and are well known to him; that the hearing is at its early stages, and that the cross-examination of the respondent is not yet complete; and that the late filing of the documents was caused by the respondent's late filing of his own documents.
  5. The applicant further contended that its appeal risked being rendered nugatory if the proceedings of the ELRC are not stayed because the court's decision will be based on incomplete and misleading evidence, and will visit upon the applicant great and unnecessary expense and injustice. It is further contended that a party is not merely entitled to a judgment, but to a fair and just determination, which in this case will not be possible if relevant, complete and available evidence is excluded. It is also the applicant's contention that an unjust and unfair determination cannot be adequately wiped away by an award of damages.
  6. The application is opposed by the respondent through his replying affidavit sworn on August 12, 2022 and written submissions dated August 24, 2022. It is the respondent's contention that the intended appeal is not arguable because the learned judge exercised her discretion properly in refusing to admit the late documents; that, in the absence of a draft memorandum of appeal, there are no discernible grounds upon which the ruling of the learned judge can be challenged; and that the intended appeal will not be rendered nugatory because it is the respondent who stands to suffer greater prejudice if determination of his claim is delayed through stay of proceedings.
  7. We have carefully considered the application, the written submissions by both parties, the authorities they relied on, and their urgings during the online hearing when they highlighted their written submissions.
  8. An applicant is entitled to a remedy under rule 5(2) (b) of the rules of the court, if and only if, he or she can satisfy the court that the appeal or intended appeal is arguable and that, if stay of proceedings is not ordered, the appeal will be rendered nugatory if it succeeds (See *Githunguri v. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838). The applicant must satisfy both considerations and it is not enough to satisfy only one. (See *Republic v. Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31. But before that, the applicant must have filed a notice of appeal, which confers jurisdiction on this court for purposes of granting interim relief (See *Safaricom Ltd. v. Ocean View Beach Hotel Ltd. & 3 Others*, [2010] eKLR). We are satisfied that the applicant is properly before us. There is a notice of appeal on record, and the applicant has also obtained leave to appeal from the ELRC.
  9. The respondent argues that the intended appeal is not arguable because the applicant has not presented a memorandum of appeal showing the issues that make the intended appeal arguable. True, there is no draft memorandum of appeal, and it is the normal practice to demonstrate an arguable appeal by the devise of a draft memorandum of appeal. However, that is not the only way of demonstrating that the intended appeal is arguable. In the present application, there are clear and concise grounds set out in paragraphs 12 and 13 of the application detailing the issues that the applicant intends to ask the



court to determine on appeal. Lack of a draft memorandum of appeal per se is not fatal if the court can discern from the Application the issues that the applicant wants to pursue in the appeal.

10. Some of the ground that the applicant intends to argue on appeal include whether the learned judge judiciously exercised her discretion, and whether she failed to take into account relevant considerations thereby occasioned an injustice. Among the relevant considerations that the applicant contends the trial court ignored is that the late filing of the documents was occasioned by the respondent, and that the documents relied upon by the applicant are incomplete and paint a false picture of his claim. We are satisfied that the intended appeal is arguable. This is not the least because an arguable appeal does not have to proffer a multiplicity of grounds. Even one bona fide ground will suffice. (See *Abmed Musa Ismael v. Kumba Ole Ntamorua & 4 others* [2014] eKLR). In addition, an arguable appeal need not succeed at the hearing. It only needs to raise an issue that is worth of consideration by the court (*Co-operative Bank of Kenya Ltd Banking Insurance and Finance Union, Kenya* [2014] eKLR)
11. On whether the intended appeal risks being rendered nugatory if the proceedings are not stayed, we bear in mind that what may render an appeal or intended appeal nugatory depends on the peculiar facts and circumstances of each case. (See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others* [2013] eKLR). We are satisfied that the applicant makes a formidable argument that, in our judicial system, a party is not merely entitled to a determination or decision, but to a fair and just determination based on a correct view of the entire evidence. In this case, it is contended that, as framed, the respondent's case is founded on incomplete and misleading documentation that needs to be responded to. We are equally satisfied that in the circumstances of this application, an order of stay of proceedings is deserved to obviate a full hearing that may ultimately be found to have been unnecessary. Accordingly, the applicant has satisfied both consideration under rule 5(2) (b).
12. However, an order of stay of proceedings implicates a fundamental principle of administration of justice under *the Constitution*, which demands that justice shall not be delayed. An indefinite order of stay of proceedings will adversely affect the hearing and determination of the case before the ELRC, which was certified urgent and has already commenced. In the circumstances, the order that best commends itself is to issue a conditional order of stay of proceedings.
13. Accordingly, there shall be an order of stay of proceedings for a period of sixty (60) days within which the applicant must file and serve the record of appeal for fast tracked hearing of its appeal. In the event that the applicant fails to do so, the order of stay of proceedings shall automatically lapse. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

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

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**DR K. I. LABUTA**

.....

**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

