



**Kenya National Union of Nurses v Biiy (Civil Application
E052 of 2022) [2023] KECA 216 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 216 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E052 OF 2022
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 3, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT

AND

JOHN KIPYEGO BIIY RESPONDENT

(Being an application for stay of execution of orders, decree and any other subsequent orders arising from the judgment of the Employment and Labour Relations Court at Kericho (O. N. Makau, J.) dated 22nd April, 2022 In ELRC Cause No. 13 of 2020)

RULING

1. The application by way of notice of motion dated August 23, 2022 is brought by the applicant, Kenya National Union of Nurses, pursuant to sections 3, 3A & 3B of the [Appellate Jurisdiction Act](#), rules 1(2), 5(2)(b), 41, 42, and 43(1) of the [Court of Appeal Rules](#), and section 66 of the [Civil Procedure Act](#). The application is supported by the grounds on its face and the affidavit of Seth Ambusini Panyako who introduces himself as the General Secretary of the applicant.
2. Through the Notice of Motion, the applicant prays for an unconditional stay of execution of the judgment delivered on April 22, 2022. It is also the applicant's prayer that part of the ruling dated July 27, 2022 directing the applicant to deposit the entire decretal sum in an interest earning account jointly operated by the parties within 30 days be stayed. Lastly, the applicant prays that the costs of the application abide the determination of the intended appeal.
3. This application arises from the ruling delivered by the Employment & Labour Relations Court (ELRC) at Kericho on July 27, 2022 subsequent to the judgment of the same court dated April 22, 2022. The applicant is aggrieved with the part of the ruling directing the deposit of the judgment sum in a joint interest earning bank account in the names of the advocates for the parties within 30 days from date of the ruling. The applicant has been unable to comply with the said order and has approached



this court for relief. It is the applicant's case that its application seeking an unconditional order of stay of execution anchored on the unique circumstances of this matter was declined by the learned Judge who instead issued a conditional stay. According to the applicant, the judgment sum is quite colossal and it is apprehensive that if execution is allowed to proceed, it shall suffer substantial loss and the appeal will be rendered nugatory.

4. According to the applicant, the unique circumstances of this case are that the respondent, John Kipyego Biiy, has been found to have criminally and fraudulently diverted the applicant's funds which together with costs amount to Kshs 10,159,670.00. Further, that the ELRC has directed the respondent together with others to refund the said amount to the applicant which order has not been appealed against. According to the applicant, the sum owed to it by the respondent should be adopted as its surety in respect of the judgment against it in this matter. The applicant finally avers that it has an arguable appeal with overwhelming chances of success.
5. In his reply, the respondent avers that this application has not met the threshold for varying the stay orders issued by the ELRC. He also deposes that the applicant has not established the substantial loss to be suffered if orders are not issued and that the failure to disclose the loss to be suffered warrants the dismissal of this application. The respondent contends that the applicant declined to comply with conditional orders of stay issued in its favour by the trial court. He denies owing any money to the applicant as alleged. He avers that the decree and certificate of costs annexed to the applicant's supporting affidavit extracted in ELRC Claim No 50 of 2018 were not addressed to him and neither do they disclose the figures allegedly owed. The respondent also avers that the applicant attempted to execute the judgment in ELRC No 50 of 2018 vide an application dated August 27, 2022 but the application was dismissed. Finally, the respondent urges this Court to find that this application is frivolous, brought in bad faith and an afterthought aimed at frustrating due process and subverting justice.
6. The applicant filed a further replying affidavit in response to the respondent's affidavit. The applicant reiterates that the taxation and decree emanating from ELRC No 50 of 2018 ordered the respondent to account for funds but the respondent had declined to do so despite numerous demands. The applicant avers that it has also failed to trace any known assets of the respondent in its bid to execute the said orders. The applicant reiterates that there is a possibility that the appeal will be rendered nugatory since the applicant will not be able to recover the decretal sum as the respondent has no known assets.
7. Through its written submissions, the applicant urged that the application has merit based on the unique circumstances of the matter. The applicant reiterated that its main grievance is against the order requiring it to deposit the decretal amount in a joint interest earning account in the names of the advocates for the parties within 30 days.
8. The applicant insists that there are unique circumstances in this case to warrant an order of unconditional stay as it holds a decree against the respondent in ELRC No 50 of 2018, *Kenya National Union of Nurses v John Biiy & others*. The applicant contends that the execution of the decree has been impossible because the respondent's physical address and assets are unknown. According to the applicant, the respondent's indebtedness is sufficient security in this case. The applicant's argument is supported by reference to the decision in *Bernard Mbalu Nzvuko v Joseph Mwangi Kimani & another* [2021] eKLR where an unconditional order for stay was granted on the ground that the judgment debtor's Motor Vehicle was in the custody of the decree holder. The case of *Stanley Mugweru Muchira & 2 others v John Muthike Muchira* [2020] eKLR is cited as requiring the court to consider any special circumstances when determining an application for stay of execution. According to the applicant, an order of stay is deserved as the intended appeal has overwhelming chances of success.



9. On his part, the respondent contends that the application contains issues and facts which were not pleaded before the trial court. Specifically, the respondent takes issue with the allegation that he is indebted to the applicant by virtue of the decree in Nairobi ELRC Cause No 50 of 2018. The respondent argues that the issue was not pleaded or canvassed in Kericho ELRC No 13 of 2020 which is the subject of this application. According to him, the allegation of an outstanding decretal amount cannot therefore be admitted in this application. The respondent also submits that there is no evidence of any substantial loss to be suffered by the applicant if an order of stay is not granted. The respondent backed his submissions with numerous decided cases.
10. This application is brought pursuant to rule 5(2)(b) of the [Court of Appeal Rules](#), and there is no doubt that this Court has jurisdiction to entertain this matter. The principles for grant of stay are well settled, namely, the applicant is required to establish the existence of an arguable appeal and additionally demonstrate that the appeal will be rendered nugatory if an order of stay is not granted. This requirement was expressed in the case of [Attorney General & another v Eunice Makori & another](#) [2021] eKLR as follows:

“Undoubtedly, this court has unfettered discretion under rule 5(2)(b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. (See: [Multimedia University & another v Professor Gitile N Naituli](#) (2014) eKLR).”
11. The parameters of the jurisdiction of the Court in dealing with an application for stay pending appeal were enumerated in [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR and need no restatement. The Court also defined an arguable appeal as one that need not necessarily succeed and that it is sufficient that a single bona fide arguable ground of appeal is raised. We have read the draft memorandum of appeal exhibited by the applicant and so as not to embarrass the panel that will hear the substantive appeal, we only need to point out that one of the arguable elements of the applicant’s appeal lies in its assertion that the trial court determined issues that were not pleaded.
12. The next question is whether the proposed appeal will be rendered nugatory if an order of stay is not granted. It is observed that pursuant to the applicant’s application, the trial court granted a conditional order of stay requiring the applicant to deposit the decretal sum in a joint interest earning account in the names of the parties. Before us, the applicant, however, argues that it is not capable of complying with the condition due to financial difficulties. In the alternative, the applicant suggests that the monies owed to them by the respondent in another case should be used to secure the respondent’s interests pending the hearing and determination of the intended appeal.
13. In our view, the issue for our determination is whether the failure to stay the impugned orders may render the appeal nugatory. In determining whether an appeal may be rendered nugatory, this Court will consider, among other factors, whether the act sought to be stayed is reversible. If what is sought to be stayed is irreversible, the Court will then consider whether damages can compensate the party seeking stay. If the thing sought to be stayed is irreversible and damages cannot reasonably compensate the applicant, then it is highly likely that the appeal may be rendered nugatory. In [Permanent Secretary](#)



Ministry of Roads & another v Fleur Investments Limited [2014] eKLR this Court observed that an appeal that has been rendered nugatory is

“one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

14. The conditional orders set by the trial court were to the effect that the decretal sum was to be deposited in a joint interest earning account. We do not see how complying with the directive to deposit the decretal amount in a joint interest earning account will render the appeal nugatory considering that the money will not be accessible to either of the parties without the consent of the other party. It therefore follows that the applicant will not suffer any irreparable loss by complying with the orders of the ELRC. The case of Bernard Mbalu Nzyuko v Joseph Mwangi Kimani & another [2021] eKLR cited by the applicant is distinguishable for the reason that in that case the key determinant was the respondent’s ability to refund the decretal sum which is not the case in this matter. The money that the applicant is required to deposit in the joint interest earning account is not passing to the respondent until the appeal is heard and determined.
15. Without delving much into the peripheral issues of the alleged debt owed to the applicant by the respondent in another suit, we note that these are facts that were not canvassed before the trial court. Our take on this is that even if the respondent does indeed owe the applicant money by way of a decree, such indebtedness is not clear from the pleadings before us. We also note that the two matters are not related and the applicant can use other legal means to recover such money, if any.
16. In the circumstances, we find that the applicant has failed to meet the requirements for grant of an order of stay to warrant this court’s intervention. The application is therefore without merit and is dismissed. It is only proper that the costs of this application abide the final determination of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF MARCH, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

