



**University of Nairobi v K'Ombut (Civil Application
E071 of 2022) [2023] KECA 243 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 243 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E071 OF 2022
AK MURGOR, J MOHAMMED & HA OMONDI, JJA
MARCH 3, 2023**

BETWEEN

UNIVERSITY OF NAIROBI APPLICANT

AND

FRANCIS X O K'OMBUT RESPONDENT

(Being an application for stay pending the hearing and determination of an appeal from the Ruling and Order of the Employment and Labour Relations Court (Maureen Onyango, J.) at Nairobi delivered on 28th May, 2021 in Nairobi ELRC Civil Cause No 2183 of 2016)

RULING

1. By a notice of motion dated March 10, 2022, brought under rules 1 (2), 5(2) (b) and 42 of the [Court of Appeal Rules 2010](#), the applicant, the University of Nairobi seeks orders of a stay of execution of the ruling delivered in favour of the respondent, Francis XO K'Ombut on May 28, 2021 pending the hearing and determination of the appeal and for costs of the application to be in the appeal.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by David Mukii Mereka, learned counsel for the applicant sworn on June 2, 2022 where it was contended that pursuant to the judgment delivered on May 28, 2021, the Employment and Labour Relations Court awarded the applicant Kshs 5,178,476.04; that being dissatisfied with the decision, the applicant filed an application for review dated February 9, 2021 which was dismissed by a ruling of February 7, 2022; that, again dissatisfied with that decision, the applicant had since preferred an appeal to this court against the ruling.
3. It was the applicant's grievance that in delivering its ruling, the court failed to consider that the applicant had fulfilled the requirements for review of the ruling; that the applicant stands to suffer substantial loss and damages should execution be levied and the orders of May 28, 2021 enforced by the respondent; that were this to happen, the appeal would be rendered nugatory; that the application



has been brought without delay and it is in the interest of justice that the orders of stay be granted, as execution is imminent, and were it to take place, the applicant will suffer irreparable loss.

4. Annexed to the application was a notice of appeal dated February 16, 2022 which provides this court jurisdiction to hear and determine the application under rule 5 (2) (b). Also annexed was a draft memorandum of appeal in which the applicant faulted the learned judge for failing to appreciate that an apparent error existed on the face of the record because the court awarded a sum of Kshs 5,178,476.04, whereas the respondent's claim was for Kshs 3,458,537, and that the amount awarded had not been pleaded or proved; that the respondent had provided a tabulation of his claim for Kshs. 3,458,537.90 through a letter delivered to the applicant on September 27, 2013 and therefore the court ought not to have awarded him an amount different from that claimed.
5. The applicant, filed written submissions which learned counsel Ms Njoroge, holding brief for Mr Mereka informed us that they will be relying upon in their entirety. The submissions reiterated the averments of the applicant's motion, save to emphasise that the appeal is arguable and unless this Court grants orders for stay of execution, the respondent will proceed and execute as against it for a sum of Kshs 5,178,475.04 together with interest from the date the suit was filed amounting to Kshs 12,065,846.84.
6. In a replying affidavit sworn on behalf of the respondent on August 23, 2022 by Mandela K Chege, the applicant's motion was opposed. It was deponed that the application is without merit and should be dismissed, as the applicant merely intended to delay execution of the decree in favour of the respondent; that the applicant has not appealed against the judgment, but instead filed an application for review of the judgment which the court rightly dismissed; that the applicant has not met the threshold requirements for grant of the stay orders sought, and as a consequence this application should be dismissed.
7. Despite having been served with the hearing notice, there was no appearance for the respondent, though the firm of Njoroge O. Kimani Advocates had filed written submissions, where it was submitted that the applicant did not have an arguable appeal; that the trial court awarded the respondent Kshs 5,178,47.04 instead of Kshs 3,458,537 in terms of his pleadings, and that by its own admission, the applicant conceded that the respondent was owed Kshs. 3,458,537; that the total amount together with interest was Kshs 7,608,781 which amount is not disputed in the appeal; that as a consequence, the respondent was entitled to the sums awarded.
8. In so far as applications filed under rule 5 (2) (b) of this court Rules are concerned, the threshold requirement to be satisfied are set out in the case of *Republic v Kenya Anticorruption Commission and 2 others* [2009] eKLR thus;

The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.

See also *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR and *Kieni Plains Co Ltd & 2 others v Ecobank Kenya Ltd* [2018] eKLR.

9. Turning to the first limb of whether the appeal is arguable, the applicant lodged a draft memorandum of appeal where in the main, it faulted the learned judge for failing to consider that an apparent error existed on the face of the record since the court awarded Kshs 5,178,476.04, whereas, the respondent's claim was for Kshs 3,458,537, that the learned judge failed to appreciate that the amount awarded was



neither pleaded nor proved. If indeed there is an error extant on the face of the record arising out of the sums erroneously awarded to the respondent, then we consider this to be a matter worthy of ventilation before this court.

10. On the second limb which is whether the appeal will be rendered nugatory in the event it were to succeed, and the sums ordered by the trial court are paid, the applicant's concern is that the respondent is not entitled to the amount awarded, and that if stay of execution is not granted, the respondent will proceed to execute against it. Having regard to the circumstances of the case, we would agree that if the sums are paid to the respondent before the appeal is heard and determined, there is every likelihood that it will be rendered nugatory, were the appeal to succeed, and the respondent is called upon to refund all or part of the amount awarded. This is particularly so as it is distinctive that the respondent has not provided any assurances that he will be capable of repaying such amounts.
11. Consequently, the applicant having satisfied the threshold requirements necessary for grant of the orders of stay of execution under rule 5 (2) (b), the notice of motion dated March 10, 2022 is merited and is allowed. Costs in the intended appeal.
12. It is so ordered.

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

A.K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

