



REPUBLIC OF KENYA



KENYA LAW
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**Mount Kenya University v Thuita (Civil Application
E115 of 2023) [2023] KECA 530 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 530 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E115 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 12, 2023**

BETWEEN

MOUNT KENYA UNIVERSITY APPLICANT

AND

DR CATHERINE WANGECI THUITA RESPONDENT

((Being an application for stay of further proceedings pending appeal against the Ruling and Orders of the Employment and Labour Relations Court of Kenya at Nairobi (A. N. Mwaure, J.) dated 19th May 2022 vg in E.L.R.C Cause No. E290 of 2022))

RULING

1. The respondent, Dr Catherine Wangeci Thuita, sued the applicant, Mt Kenya University, in the Employment and Labour Relations Court at Nairobi in ELRC Cause No E6519 of 2020 seeking, inter alia: a declaration that the applicant had breached her legitimate expectations and constitutional right to fair labour practices; compensation for breach of her contract of employment; reinstatement; gratuity; special damages; costs and interest.
2. The respondent applied for and obtained *ex parte* judgment on December 16, 2021 for Kshs 4,283,000, whereupon the applicant applied to set aside the *ex parte* judgment vide its Notice of Motion dated January 13, 2022 on the grounds that, though admittedly served with summons to enter appearance, it was not served with the statement of claim.
3. In response to the applicant's Motion, the respondent contended that her suit was filed in the height of the COVID-19 pandemic when different modes of service were acceptable, including service via email; that the ELRC acknowledged the claim as filed showing a hyperlink for the documents filed; that learned counsel for the respondent forwarded the acknowledgment to the applicant via email on December 14, 2020; that the court issued summons, which were served on the applicant on February 9, 2021; and that counsel kept the applicant informed of all proceedings every step of the way.



4. By its ruling dated May 19, 2022, the ELRC (A N Mwaure, J) dismissed the applicant's Motion. In her view, the applicant had not given reasonable grounds to justify setting aside the court's judgment delivered on December 16, 2021.
5. Dissatisfied with the impugned ruling, the applicant moved to this Court on appeal on 10 grounds, all of which essentially fault the learned Judge for failing to find that the respondent had not served the applicant with the pleadings in her claim in the ELRC.
6. Pending hearing and determination of its intended appeal, the applicant has moved this Court under rule 5(2) (b) of the Court of Appeal Rules vide its Notice of Motion dated March 28, 2023 seeking stay of further proceedings in ELRC Cause No E290 of 2022 and costs of the application. The Motion is supported by the annexed affidavit of Janet Kajwang, the applicant's Human Resource Officer, sworn on March 28, 2023, and is made on 9 grounds, including: that the decretal sum is colossal (Kshs 4,238,000) and payment to the respondent would severely compromise its cash flow and operations; that the respondent having lost her employment with the applicant, has no known source of income and is unlikely to refund the decretal amount should the applicant prevail in the intended appeal; that the applicant has an arguable appeal with overwhelming chances of success; and that the applicant stands to suffer substantial loss should the orders sought not be granted.
7. In her replying affidavit sworn on April 6, 2023, the respondent depones that the application is intended to frustrate her to submission and deny her the fruits of her judgment; that the notice of appeal was served outside the stipulated period of seven (7) days after filing; that she has suffered tremendous hardship and substantial loss; and that the application has no merit. She urged the Court to direct that the applicant deposits the entire decretal amount as security in an interest earning account with a reputable bank in the joint names of the two advocates on record, and that half of the amount be released to her forthwith.
8. Learned counsel for the applicant, M/s Adera & Kenyatta, filed written submissions and case digest dated April 6, 2023 citing 6 judicial authorities, including: [David Morton Silverstein vs Atsango Chesoni](#) [2002] eKLR highlighting the twin principles for grant of orders under rule 5(2) (b) of this Court's Rules; and [Stanley Kang'ethe Kinyanjui vs Tony Ketter & 4 Others](#) [2013] eKLR where the Court explained what constitutes an arguable appeal.
9. In their written submissions and case digest dated April 11, 2023, learned counsel for the respondent, M/s Wanjira & Company, cited the cases of [Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another](#) [2015] eKLR and [Jamii Bora Bank Limited & another vs Samuel Wambugu Ndirangu](#) [2021] eKLR highlighting the twin principles for granting stay of execution and security deposit.
10. This Court has pronounced itself time and again holding that, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#) pending appeal, he or she must demonstrate to the satisfaction of the Court that they have an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see [Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC](#) [2020] eKLR; and [Yellow Horse Inns Limited vs A A Kawir Transporters & 4 Others](#) [2014] eKLR).
11. A cursory look at the applicant draft memorandum of appeal in the backdrop of the record as put to us reveals a weighty issue of service of the court process on which the right of access to justice and the right to fair hearing as guaranteed by Articles 48 and 50 of the [Constitution](#) are premised. To our mind, that is a substantive issue of both law and fact deserving of the Court's inquiry on appeal. Moreover,



and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principle. *University of Nairobi vs Ricatti Business of East Africa* [2020] eKLR is a case in point.

12. Regarding the second limb of the twin principle, the term “nugatory” was defined in *Reliance Bank Ltd vs Norlake Investments Ltd* [2002] 1 EA p 227 at p.232 as “worthless, futile or invalid”. It also means “trifling”.

Having concluded that the applicant’s intended appeal is arguable, the remaining question is whether the intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted.

13. According to the applicant, if the decretal amount were paid out to the respondent, she would not be able to reimburse the applicant in the event that the intended appeal were successful. The respondent confirmed as much by stating that since she lost her job with the applicant, she has suffered tremendous hardship, and continues to suffer financial loss. With regard to her request that the applicant do deposit the entire decretal amount as security, we think it unnecessary in view of the fact that the applicant is a reputable institution capable of satisfying the decree in the event that its intended appeal were unsuccessful.

14. Be that as it may, we must address ourselves to three glaring discrepancies in the applicant’s Motion. Firstly, while the record appears to satisfy the twin principles for grant of orders under rule 5(2) (b) of this Court’s Rules, the applicant has not sought stay of execution of the ex parte judgment and decree issued in ELRC Cause No E6519 of 2020 to which the impugned ruling relates. Secondly, it prays for stay of proceedings in ELRC Cause No E290 of 2022, which has nothing to do with the impugned ruling. Thirdly, in so far as the notice of appeal relates to ELRC Cause No E6519 of 2020, we are at a loss as to what purpose would be served by orders staying proceedings in a cause that has no relation to the impugned ruling or the decree whose execution may be stayed in proper cases.

15. It would be remiss of us to overlook such inconsistencies, much as the Court is obligated to advance the course of justice. The very fact that the notice of appeal on the record as put to us relates to an intended appeal against a ruling given in ELRC Cause No E6519 of 2020, we cannot order stay of proceedings in a totally unrelated cause in the absence of cogent reason to do so. Moreover, even if the applicant’s intention was to seek stay of proceedings in Cause No E6519 of 2020, but had erroneously made reference to Cause No E290 of 2022, nothing would change our view that its Motion is incompetent. The proceedings in ELRC Cause No E6519 of 2020 came to an end upon entry of ex parte judgment and issuance of a decree leaving nothing to be stayed other than execution, which the applicant has not sought stay herein. In view of the foregoing, we find that the applicant’s Motion fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

NG’ENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

