



Meta Platforms, Inc & another v Motaung & another; Kenya National Humans Rights Equality Commission & 9 others (Interested Parties) (Civil Appeal (Application) E232 of 2023) [2023] KECA 996 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 996 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E232 OF 2023
DK MUSINGA, P, K M'NOTI & JM MATIVO, JJA
JULY 28, 2023**

BETWEEN

META PLATFORMS, INC 1ST APPLICANT

META PLATFORMS IRELAND LIMITED 2ND APPLICANT

AND

SAMASOURCE KENYA EPZ LIMITED T/A SAMA 1ST RESPONDENT

DANIEL MOTAUNG 2ND RESPONDENT

AND

KENYA NATIONAL HUMANS RIGHTS EQUALITY COMMISSION INTERESTED PARTY

CENTRAL ORGANIZATION OF TRADE UNIONS INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY

MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICE INTERESTED PARTY

MINISTRY OF HEALTH INTERESTED PARTY

OFFICE OF THE DATA PROTECTION COMMISSIONER INTERESTED PARTY

EXPORT PROCESSING ZONE AUTHORITY INTERESTED PARTY

MINISTRY OF FOREIGN AFFAIRS INTERESTED PARTY

KENYA REVENUE AUTHORITY INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY



(Being an appeal from the ruling and order of the Employment and Labour Relations Court at Nairobi (Gakeri J.) dated 6th February, 2023 in ELRC Petition No. E071 of 2022)

RULING

1. For a proper appreciation and consideration of the application dated April 27, 2023, the subject of this ruling, it is necessary to highlight, albeit briefly, the background to the said application. Briefly, by a petition dated May 9, 2022, Daniel Motaung (1st respondent) sued Samasource Kenya Epz Limited T/a Sama (the 2nd respondent) and Meta Platforms, Inc and Meta Platforms Ireland Limited (the appellants herein) at the Nairobi Employment and Labour Relations Court (ELRC) in constitutional petition number E071 of 2022, Daniel Motaung v Samasource Kenya EPZ Limited t/a Sama, Meta Platforms Inc and Meta Platforms Ireland & others. In the said petition, the 1st respondent sought 16 reliefs against the appellants herein and the 2nd respondent. Among the reliefs sought are a declaration that the respondents have jointly and severally violated the 1st respondent's constitutional rights under articles 25, 27, 28, 29, 30, 31, 33, 36, 41, 43, 46, 47, 50, 54 and 55 of the Constitution and those of the current and former Face-book content moderators engaged through the 1st respondent.
2. In opposition to the said petition, the 2nd respondent filed grounds of opposition dated May 16, 2022 stating that: (i) the 1st respondent lacks *locus standi* to institute the petition because he is a foreign national not residing in Kenya. (ii) the petition is an abuse of court process. (iii) the 1st respondent's employment was lawfully terminated. (iv) the 1st respondent cannot bring a claim on behalf of un disclosed persons. (v) the petition does not meet the threshold of a representative suit under rule 9 of the Employment and Labour Relations Court Rules. (vi) the ELRC lacks jurisdiction to entertain the matter because the 1st respondent is a foreign corporation that is neither resident, domiciled nor trading in Kenya.
3. The 1st and 2nd applicants filed an application dated May 30, 2022 in the trial court seeking orders that the suit against them be dismissed on grounds that ELRC lacked jurisdiction to entertain the case. They also prayed for an order that the case against them was incompetent, bad in law and unsustainable because the Constitution does not apply to them in the circumstance of the case. Further, without prejudice to the aforesaid prayers, the applicants prayed that their names be struck out from the said proceedings on grounds that they had been improperly joined. Lastly, they prayed for costs of the application and the petition.
4. The 1st respondent opposed the said application vide grounds of opposition dated June 24, 2022 stating that: (a) the application was bad in law because it did not state under what law it was brought. (b) the application was not supported by an affidavit. (c) the applicants were properly joined in the petition and they are necessary parties because they have extensive operations in Kenya, consequently, the trial court had the requisite jurisdiction to entertain the petition. (d) the issues raised by the applicants will be addressed during the substantive hearing of the petition.
5. By a ruling dated February 6, 2023, the trial court dismissed the applicants' aforesaid application stating:

“ 117. The crucial question is whether the petitioner's case against the 2nd and 3rd respondents should be dismissed at this stage for want of proper service. While striking out the petition against the 2nd and 3rd respondents is one of the options available to the court, as part of procedural justice, it would leave certain



questions unanswered, perhaps to the detriment of the petitioner. Moreover, the court is *inter alia* enjoined to administer justice expeditiously and without undue regard to procedural technicalities.

118. The court's understanding of the foregoing is that while procedure is an elemental component in the administration of justice, substantive justice is the ultimate goal unless the procedural deficiency is sufficiently grave to render substantial justice unattainable.
119. In the instance case, the court is persuaded that it is only fair that the petitioner be accorded an opportunity to comply with order 5 rule 21 of the [Civil Procedure Rules, 2010](#) as regards service upon the 2nd and 3rd respondents.”
 1. Aggrieved by the above ruling, the applicants lodged a notice of appeal dated February 17, 2023 and lodged their record of appeal on April 13, 2023. Further, the applicants filed the application dated April 27, 2023, the subject of this ruling, urging this court to stay further proceedings in ELRC No E071 of 2022, Daniel Motaung vs. Samasource Kenya EPZ Limited t/a Sama, Meta Platforms Inc and Meta Platforms Ireland & others, pending the hearing and determination of this appeal. They also pray that costs of this application be costs in the appeal. The application is brought under rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#).
 2. The application is supported by the grounds on the face of the application and the supporting affidavit of Joanne Redmond, (the 2nd applicant's Director and Associate General Counsel, Labour & Employment EMEA) sworn on April 26, 2023 together with annexures thereto, and a supplementary affidavit sworn on June 2, 2023. The salient averments are that: (a) there is an imminent risk that the ELRC will issue directions with respect to the hearing of the petition. (b) if the order for stay is not granted, the applicants' appeal will be rendered nugatory, and the applicants will be prejudiced because they will be compelled to participate in proceedings in the petition. (c) the applicants have strong and arguable grounds of appeal that is, whether the trial court has jurisdiction over the applicants. (d) issues relating to jurisdiction must be determined at the earliest opportunity possible. (e) it is in the interests of justice that the order for a stay of further proceedings pending the hearing and determination of the appeal be granted.
 3. In opposition to the appellant's application, the 1st respondent, Daniel Motsung, filed a replying affidavit dated May 4, 2023 stating- (a) the application is a delaying tactic. (b) the record of appeal is incomplete. (c) the applicants' appeal has no arguable grounds. (d) the ELRC prioritized the hearing of the application dated May 30, 2022. (e) the ELRC was guided by case law and that is why it did not assume jurisdiction over the applicants before obtaining leave to serve. (f) the trial court agreed with the applicants on the need to seek and obtain leave and stated that the matter would not proceed until the same had been done. (g) the matter was effectively stayed until the respondent makes the necessary application for leave to serve outside the court's jurisdiction. (h) the respondent has since filed an application seeking leave to serve the respondents outside jurisdiction. (i) the appeal will not be rendered nugatory because if the applicants are ultimately found not to be proper parties in the case they will be struck out. (j) that if the case is dismissed, the applicants can be compensated by way of damages.
9. During the virtual hearing of the applicants' application dated April 27, 2023, Ms Omondi, learned counsel for the 2nd respondent, Ms Akuno, learned counsel for the 6th to 8th respondents, and Ms Gitau, learned counsel for the 9th interested party, informed the court that their clients will not participate in the proceedings. The 1st to 5th interested parties were not represented in the proceedings.



10. In his submissions in the support of the application, Dr Fred Ojiambo, Sc, and Miss Onyango appearing for the applicants, argued that the trial Judge erred in law in declining to dismiss in limine the proceedings against the applicants for want of jurisdiction. Further, instead of downing his tools, the learned judge went on to direct the 1st respondent to file an application to serve the petition outside Kenya. Counsel argued that the foregoing will prejudice the applicants because after the learned judge downed his tools he lacked jurisdiction to entertain any issue pertaining to the dispute.
11. On the nugatory aspect, the applicants' counsel maintained that their appeal would be rendered otiose if the petition before the trial court is allowed to proceed to full determination because the applicants are not the 1st respondent's employers and they are not within the jurisdiction of that court.

Furthermore, in the event this court agrees with the applicants, then the proceedings before the trial court would amount to a nullity.
12. In opposition to the application, the 1st respondent argued that the applicants have not raised a single bona fide arguable point worth considering before this court, because at the time of issuing the impugned ruling, the court downed its tools until the 1st respondent properly sought leave to serve the applicants. Counsel submitted that the trial court agreed with the applicants on the need to seek and obtain leave to serve outside the court's jurisdiction and ordered that the matter will not proceed until the service was effected as ordered.
13. Regarding the question whether the appeal is arguable, the 1st respondent argued that he has since filed an application before the ELRC dated February 6, 2023 seeking leave to serve the applicants under order 5 rule 21 of the [Civil Procedure Rules](#). Further, the applicants herein have responded to the said application and therefore, the issue of jurisdiction, which is the crux of the appeal, is now moot.
14. On the nugatory aspect, the 1st respondent's counsel submitted that stay of proceedings will detrimentally impact on his ability to prosecute his petition. Further, the delay in prosecuting the appeal may compromise the ability of his already vulnerable witnesses to testify, that it is in the public domain that the applicants and 2nd respondent are in the process of laying off content moderators and as such the 1st respondent will lose all his witnesses. Furthermore, his application for preservation of his witnesses and evidence in the applicants' custody is yet to be heard a year since it was filed because of delays occasioned by the applicants herein.
15. In summary, the 1st respondent's case is that the applicants have failed to demonstrate that they have an arguable appeal, and that it would be in the interest of justice and fairness to grant a stay of the proceedings.
16. Mr Ochiel, learned counsel for the 10th interested party, in opposition to the application submitted that stay of proceedings is a grave judicial action, which ought to be granted sparingly and only in exceptional circumstances. Mr Ochiel relied on this court's finding in Dennis Njue Itumbi v Eliud Karanja Matindi & 50 others civil application E126 of 2023 and a High Court decision in [Kenya Wildlife service v Mutembei](#) (2019) eKLR.
17. The application before us is brought under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#). The principles for granting a stay of execution, injunction or stay of proceedings under rule 5(2) of this [Court's Rules](#) are well settled. This court in [Trust Bank Limited and another v Investech Bank Limited and 3 others](#) [2000] e KLR delineated the jurisdiction of this court in such an application as follows:

“The jurisdiction of the court under rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal



or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

18. To benefit from the discretion of this court in an application under rule 5 (2) (b), the twin principles settled in decided cases by this court must be demonstrated to the court’s satisfaction. On the first precept, that is, whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this court. In *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR this court described an arguable appeal in the following terms:

- “vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
- viii). In considering an application brought under Rule 5
- (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

19. The Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers*, [2015] eKLR considered the nature and scope of the jurisdiction of this court under rule 5(2) (b) as follows:

“It is clear to us that rule 5(2) (b) is essentially a tool of preservation. it safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that court over the years...rule 5(2) (b) of the Court of Appeal Rules, 2010 is derived from article 164(3) of the *Constitution*. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”

20. In satisfaction of the first prerequisite, the applicants have annexed a memorandum of appeal raising 8 grounds of appeal. We are alive to the fact that an arguable point is not necessarily one that must succeed, but merely one that deserves consideration by this court. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the appeal is arguable. For example, whether or not the learned judge erred in directing the 1st respondent to file an application to serve the petition against the applicants outside Kenya is an arguable ground. Whether the trial court has jurisdiction over the applicants who are foreign entities incorporated outside Kenya, though appealing is not an arguable ground. This is because the jurisdictional question urged here is not the power of the court to determine a dispute submitted to it by contending parties in any proceeding. The nature of a court’s jurisdiction was aptly discussed by this court in a recent decision in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others*, (civil appeal 656 of 2022) [2023] KECA 80 (KLR) (February 3, 2023) where it stated:

- “...A court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another;
- b. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and,
- c. the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The above three ingredients must co-exist in order to infuse jurisdiction in a court. Where a court is drained of the jurisdiction to entertain a matter, the proceedings



flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.”

21. It is in that light that jurisdiction is understood to encompass three concepts. The first is jurisdiction *rationae materiae*, meaning the power of the court to entertain and decide the subject matter of the dispute. In that sense, there is no dispute that the petition before the ELRC is a labour dispute. The second is jurisdiction *rationae personae*. This refers to the right of parties to appear before the court either as applicants or respondents. Subject to what we shall say shortly, there is no suggestion that the applicants are not subject to the court’s jurisdiction, for example due to immunity. The last is jurisdiction *rationae temporis*, which refers to temporal parameters such as limitation of time. Again, there is no suggestion in this case that the petitions are time-barred.
22. The applicants’ argument is that they are foreign entities. This line of argument is very different from the absence of jurisdiction where a court is divested of the power to hear a case. The argument that the applicants are raising requires evidence to be tested during the trial. We say no more lest we delve into merits of the appeal
23. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable because of the grounds highlighted earlier. This is because even one ground suffices.
24. Turning to the second prerequisite, that is, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (supra) this court stated that:
 - “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
25. The intended appeal is against an interlocutory ruling. Admittedly, a party to any proceedings who is dissatisfied with the decision of the court on an interlocutory point may appeal against that decision and then apply for stay of proceedings pending the determination of the appeal. As the phrase suggests, “a stay of proceedings” is the stoppage of an entire case or a specific proceeding within a case. Such a disruption of judicial proceedings has been described in case law as a drastic order to be deployed in extremely rare cases and with immense circumspection.
26. The nature of an order of stay of proceedings and the principles which should guide a court in exercising its discretion to grant or refuse an application for stay were satisfactorily detailed by the Court of Appeal of Nigeria, *Abuja Division in the case of NNPC & Anor v Odidere Enterprises Nigeria Ltd* [2008] 8 NWLR (Pt. 1090) 583 at 616-618, per Aboki, JCA. as follows:

“Stay of proceedings is a serious, grave and fundamental interruption on the right of a party to conduct his litigation towards the trial on the basis of the substantive merit of his case, and therefore the general practice of the courts is that a stay of proceedings should not be granted, unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”



27. Where an interlocutory order does not finally dispose of the case, the court should be slow to stay proceedings because of an aggrieved party. This is so because such an order could be made the subject of an appeal if it ultimately becomes necessary following the final judgment. It is the duty of every court to eliminate situations, which may unnecessarily cause delay in the administration of justice. However, if a successful appeal will put an end to the proceeding in the trial court, prudence dictates that a stay of proceedings be granted.
28. A balance must be maintained between the right of a party to have the substantive suit heard timeously and the desire of his opponent to be given adequate time to prosecute his appeal. In granting an order of stay of proceedings, the court should be guided primarily by the necessity to be fair to both parties. In our view, the following considerations, though not exhaustive, are relevant, bearing in mind the fact that the peculiar facts and circumstances of the case must always be considered.
- a. A stay of proceedings can be granted only if there is a pending appeal, which is, *prima facie*, valid in law.
 - b. The appeal, which forms the basis of an application for stay of proceeding, must be competent and arguable on its merits. Where an appeal is frivolous, vexatious or an abuse of court process, an appellate court will decline jurisdiction to entertain the application.
 - c. Where the interlocutory appeal following an application for stay of proceedings will finally dispose of the case or put an end to the proceedings in the lower court, stay of proceedings would be granted.
 - d. Where the res will be destroyed, damaged or annihilated before the matter is disposed of, an appellate court will grant stay.
 - e. The Court of Appeal would be reluctant to grant an application for stay of proceedings if it would cause greater hardship than if the application were refused.
 - f. A stay of proceedings will be granted where to do otherwise will tend to render any order of the appellate court nugatory.
29. The question before us is whether the intended appeal will be rendered futile or a mere academic exercise if the order of stay of further proceedings is not granted. In resolving this issue, we ask ourselves what legal ramifications will result if the orders are not granted. It is evident that if an order of stay of further proceedings is not granted, the trial court will proceed to determine the 1st respondent's application dated February 6, 2023 seeking leave to serve the applicant under order 5 rule 21 on merit and render itself on the issue of leave. Either way, if the applicants will not be satisfied, they shall be at liberty to prefer an appeal to this court. It is also possible that the 1st respondent's application for leave may not succeed. further if the application for leave under order 5 rule 21 of the [Civil Procedure Rules](#) proceeds and equally the appeal is heard and determined, if successful, the ruling by the trial court will be rendered otiose. Given the foregoing scenarios, we do not find any plausible reason that the applicants have advanced that will render the appeal nugatory.
30. Stay of court proceedings pending hearing and determination of an appeal against an interlocutory ruling should only be allowed if the circumstances are such that the impugned order will significantly prejudice the applicant if the matter proceeds. This court must ensure that justice is done to both parties. Granting the stay sought will to stand on the way of the final determination, on merits, of the application dated February 6, 2023, and the petition before the ELRC.



31. Upon analyzing the reasons cited by the applicants, we are not persuaded that the applicants have demonstrated any basis to merit the order of stay of further proceedings as prayed. As the law stands, an applicant under rule 5 (2) (b) must as on necessity surmount both the arguability test and the nugatory test. Accordingly, having failed to satisfy the twin principles to qualify for an order of stay of the proceedings, the application dated April 27, 2023 is dismissed with costs to the 1st respondent and the 10th interested party.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

D.K. MUSINGA, (P)

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

