



Meta Platforms, Inc & another v Samasource Kenya EPZ Limited t/a Sama & 185 others; Central Organization of Trade Unions Kenya & 8 others (Interested Parties) (Civil Application E178 of 2023) [2023] KECA 999 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 999 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E178 OF 2023
DK MUSINGA, K M'INOTI & 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

MAJOREL KENYA LIMITED 2ND RESPONDENT

KIANA MONIQUE ARENDSE 3RD RESPONDENT

JAMES AGADA MARK 4TH RESPONDENT

MEAZA SHURA 5TH RESPONDENT

MARK AGABA 6TH RESPONDENT

FASICA BERHANE GEBREKIDAN 7TH RESPONDENT

CAMERON ROWAN CORNER 8TH RESPONDENT

ROBEL KHASAY GEBRU 9TH RESPONDENT

ABEL ABRHA ASGEDOM 10TH RESPONDENT

EPHREM KIRUBEL MIHRETEAB 11TH RESPONDENT

DAWIT BIRHANE BERHE 12TH RESPONDENT

TREVIN BROWNIE 13TH RESPONDENT

LUBEGA PACIFIC 14TH RESPONDENT

NAOD AMANUEL GEBREKIDAN 15TH RESPONDENT



TEAMIR DELLELEGN	16 TH RESPONDENT
KAUNA IBRAHIM MALGWI	17 TH RESPONDENT
TSIDENA ABADI ZEMO	18 TH RESPONDENT
MESERET DINKU ABDO	19 TH RESPONDENT
AYANA EPHREM GELETA	20 TH RESPONDENT
ALEWIYA MOHAMMED MUSA	21 ST RESPONDENT
TIKKY OLANG'O	22 ND RESPONDENT
KHOTHAMANI MHLONGO	23 RD RESPONDENT
YONA BEDASA	24 TH RESPONDENT
THRAS GIDEY	25 TH RESPONDENT
SAMRAWIT TEKESTE	26 TH RESPONDENT
ZEGEYE DAWIT GEBREMARIAM	27 TH RESPONDENT
JASON ILOVU	28 TH RESPONDENT
ROSEBELLAH WAKHU	29 TH RESPONDENT
CAROLINE NJERI MUCHANGI	30 TH RESPONDENT
EVELYN NALUWU	31 ST RESPONDENT
HASSAN ALKANO	32 ND RESPONDENT
EDINAH LUMUMBA	33 RD RESPONDENT
PALESA GLORIA KOMETSI	34 TH RESPONDENT
MAHAT ABDULLAHI SHEIKH	35 TH RESPONDENT
MAHLET YILMA	36 TH RESPONDENT
CIELLA IRAMBONA	37 TH RESPONDENT
MUSA ABUBAKAR	38 TH RESPONDENT
ABDIKADIR GUYO	39 TH RESPONDENT
JAMES IRUNGU	40 TH RESPONDENT
HABEN HAILE YOHANES	41 ST RESPONDENT
JUANITA JONES	42 ND RESPONDENT
ODIRILE MOLEBOGE	43 RD RESPONDENT
TESSLINE TONI KIEWIETS	44 TH RESPONDENT
ANTIAN JAY-DEAN MOOSA	45 TH RESPONDENT
SAMUEL EBENIRO	46 TH RESPONDENT
LIELINA ASSEFA	47 TH RESPONDENT



MARION IMUYA MUHANDA	48 TH RESPONDENT
ABDULLATEEF KEHINDE	49 TH RESPONDENT
BELLA NININHAZWE	50 TH RESPONDENT
MAGDALENE SILA	51 ST RESPONDENT
SOPHIA DANIELS	52 ND RESPONDENT
EPHRATA MAMO	53 RD RESPONDENT
AMERTI BAYISA	54 TH RESPONDENT
JEAN DE DIEU UWIDUHAYE	55 TH RESPONDENT
TUYISHIMIRE MARIE IRENE	56 TH RESPONDENT
SIBUSISO DUMA	57 TH RESPONDENT
ARIANE HOGOZA	58 TH RESPONDENT
FAYO HUSSEIN KADIR	59 TH RESPONDENT
NGARAMBE CHRYSOLOGUE	60 TH RESPONDENT
UWAMAHORO STELLA CARINE	61 ST RESPONDENT
ABDIKHES DAAR	62 ND RESPONDENT
ESTHER MUKAMANA	63 RD RESPONDENT
CYLIA SKOSANA	64 TH RESPONDENT
MUGERWA HAMIDAH	65 TH RESPONDENT
ISMAIL ALIYU	66 TH RESPONDENT
LAWAL MOHAMMAD SHUAIBU	67 TH RESPONDENT
SONIA MATETE KGOMO	68 TH RESPONDENT
JODA BASHIR SUNDAY	69 TH RESPONDENT
JODA BASHIR SUNDAY	70 TH RESPONDENT
DAVID NKURUNZIZA	71 ST RESPONDENT
NATHAN NKUNZIMANA	72 ND RESPONDENT
JOHNSON TWAGIRIMANA	73 RD RESPONDENT
NASIRU AMINU MADAKI	74 TH RESPONDENT
STEPHAN VAN DEN BERG	75 TH RESPONDENT
NALEDI MKHIZE	76 TH RESPONDENT
ALINOOR MOHAMED ABDULLAHI	77 TH RESPONDENT
WILBERFORCE APUNGU	78 TH RESPONDENT
NAFTALI ANDATI WAMBALO	79 TH RESPONDENT



RAYWINE MUKONAMBI	80 TH RESPONDENT
IRANYIBUTSE KOFFI	81 ST RESPONDENT
MUSA ALIYU BAFFA	82 ND RESPONDENT
DANIEL ELIAS YADETA	83 RD RESPONDENT
MICHAEL MELAKU WALELIGN	84 TH RESPONDENT
NEO NKWE	85 TH RESPONDENT
BUSISIWE EGNECIOUS NKOSI	86 TH RESPONDENT
PHETHILE BRIDGET DLAMINI	87 TH RESPONDENT
KWENZEKILE NGIDI	88 TH RESPONDENT
PRINCESS NELISIWE MADLEBE	89 TH RESPONDENT
ANTONY AWUOR	90 TH RESPONDENT
KIDIST FANTU BUZUNEH	91 ST RESPONDENT
ASCHALEW SEIFU HUSEN	92 ND RESPONDENT
ABDIHAMID BULLE	93 RD RESPONDENT
NAKATE JANAT	94 TH RESPONDENT
KAME TUYE BADASA	95 TH RESPONDENT
NYANGARESI DANCAN	96 TH RESPONDENT
UMAR KABIR	97 TH RESPONDENT
HIJRA ABDALLAH	98 TH RESPONDENT
HANAN ABDI	99 TH RESPONDENT
BEATRICE ANI	100 TH RESPONDENT
INNOCENTIA NEO MABASO	101 ST RESPONDENT
SAMRAWIT MARKOS WELDESENBET	102 ND RESPONDENT
MINASE SISAY	103 RD RESPONDENT
ESTHER EMOSHOGWE MICHAEL	104 TH RESPONDENT
LAWAL SUWIDI MOHAMMAD	105 TH RESPONDENT
TUMWEBAZE PROSCOVIA	106 TH RESPONDENT
KAME BADASA	107 TH RESPONDENT
NAHOM TEKEST	108 TH RESPONDENT
ABDIAZIZI HUSSEIN ADAN	109 TH RESPONDENT
FREDRICK AMOS OKUMU	110 TH RESPONDENT
ABDULLAHI GULIYA ADAN	111 TH RESPONDENT



SHEWIT MULUGETA	112 TH RESPONDENT
MOHAMED DAUD ABDI	113 TH RESPONDENT
RIYAN ISMAEL IBRAHIM	114 TH RESPONDENT
HALIMA JILLO	115 TH RESPONDENT
NAJMA ILYAS HAJI	116 TH RESPONDENT
GLADYS ATYANG	117 TH RESPONDENT
TEDDY ODHIAMBO	118 TH RESPONDENT
SAUSEPETER OJIAMBO	119 TH RESPONDENT
LESEGO MOTLANTHE	120 TH RESPONDENT
PASSY NAMYALO	121 ST RESPONDENT
ADIAM GEBREZGABHER BEYIN	122 ND RESPONDENT
TIRHAS HAILEKIROS HAILESILASSE	123 RD RESPONDENT
BOTLHOKWA NONDALI DITSHEPO RANTA	124 TH RESPONDENT
MOHAMUD AHMED HAJI	125 TH RESPONDENT
HENRY NTEGE	126 TH RESPONDENT
MOIPONE MMUSI	127 TH RESPONDENT
ABDIAZIZ OSMAN ADAN	128 TH RESPONDENT
SANDILE MKHABELA	129 TH RESPONDENT
KELVIN MAGU NGILA	130 TH RESPONDENT
HELLEN NAMUYANJA	131 ST RESPONDENT
MERCY CHIMWANI	132 ND RESPONDENT
ROSS KAGOSHE	133 RD RESPONDENT
AMIR AHMEDMUZ ADEM	134 TH RESPONDENT
SINIDU YOHANNES JOBA	135 TH RESPONDENT
YASMIL DAUD ALI	136 TH RESPONDENT
ADDNA HAJI	137 TH RESPONDENT
LONWABO MTSHENGU	138 TH RESPONDENT
HAMZA DIBA TUBI	139 TH RESPONDENT
FELIX OTIENO MURUKA	140 TH RESPONDENT
IBRAHIM ALIO GALGALLO	141 ST RESPONDENT
LARSON ABEL DOMJUL	142 ND RESPONDENT
BORU HUSSEIN JATTANI	143 RD RESPONDENT



MOHAMED ABDIKADIR IBRAHIM	144 TH RESPONDENT
HUSSEIN KORE WAKO	145 TH RESPONDENT
MOHAMED GURACHA	146 TH RESPONDENT
JATANI HUSSEIN JATANI	147 TH RESPONDENT
MOLU ADAN GOLICHA	148 TH RESPONDENT
FELIX MUNDE ONDIGO	149 TH RESPONDENT
BONGIWE LAMANI	150 TH RESPONDENT
BERISA TESFAYE	151 ST RESPONDENT
SHARMAKE SAID	152 ND RESPONDENT
CARYN PIETERSE	153 RD RESPONDENT
SHUKRIA ALI TIFOW	154 TH RESPONDENT
ASHA ABDULLAHI ABDIRAHIM	155 TH RESPONDENT
OBSITU ALIYI OMER	156 TH RESPONDENT
GEORGE KIPSANG	157 TH RESPONDENT
KEANAN LESLEY JOUSTEN	158 TH RESPONDENT
ELMI OSMAN	159 TH RESPONDENT
ABDIRIZAK MUKTAR AHMED	160 TH RESPONDENT
IBRAHIM ROBA QAMPARE	161 ST RESPONDENT
MARIAM ADHAN HASSAN	162 ND RESPONDENT
BIGOMBA LASTO	163 RD RESPONDENT
KIBIRIGE IVAN GAAYI	164 TH RESPONDENT
MAWERERE ERIC	165 TH RESPONDENT
FRANK MUGISHA	166 TH RESPONDENT
ENDALEW SHIBABAWA	167 TH RESPONDENT
RETINA ASFAW TEGEGN	168 TH RESPONDENT
EUNICE WANJIRU MWAURA	169 TH RESPONDENT
AHMEDNOOR SALAT OSMAN	170 TH RESPONDENT
MUSTAPHA MUKHTAR	171 ST RESPONDENT
SANI MUHAMMAD FAISAL	172 ND RESPONDENT
STEPHEN KOOME	173 RD RESPONDENT
JOSHUA OTIENO OOKO	174 TH RESPONDENT
SSENGOوبا ALLAN OSWALD	175 TH RESPONDENT



ESTHER MAINGI	176 TH RESPONDENT
MARVIN NKOJO	177 TH RESPONDENT
ILIYASU ABBA AHMED	178 TH RESPONDENT
MUHAMMAD ALIYU	179 TH RESPONDENT
EMMANUEL SAMBO	180 TH RESPONDENT
FIYORE NUGUS	181 ST RESPONDENT
ABDI MOHAMED ALI	182 ND RESPONDENT
ROBA DEREJE AMANTE	183 RD RESPONDENT
MICHAEL NKOKO	184 TH RESPONDENT
AYUB HUSSEIN GISHO	185 TH RESPONDENT
AYANDA MASHABA	186 TH RESPONDENT

AND

CENTRAL ORGANIZATION OF TRADE UNIONS KENYA INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY

MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES ... INTERESTED PARTY

MINISTRY OF HEALTH INTERESTED PARTY

MINISTRY OF FOREIGN AFFAIRS INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

KITUO CHA SHERIA INTERESTED PARTY

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION INTERESTED PARTY

(Being an application for stay of proceedings in and a stay of the order granted ex parte in Nairobi (Nderi, J.) on 20th March 2023 in Nairobi ELRC Petition E052 of 2023)

RULING

1. Before us is an application dated May 5, 2023 brought by Meta Platforms, Inc and Meta Platforms Ireland Limited (the applicants) under Rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#). In the main, the applicants pray for an order of stay of any further proceedings in Nairobi Employment and Labour Relations Court (ELRC) Petition Number E052 of 2023, Kiana Monique Arendse & others v Meta Platforms Inc and Meta Platforms Ireland & others pending the hearing and determination of their intended appeal against the ruling delivered on March 20, 2023 (Nderi, J). They also pray that the said order be stayed pending the hearing and determination of their intended appeal.



2. A brief history of the litigation before the ELRC is necessary in order to put the issues urged before us into a proper context. Briefly, by a petition dated March 17, 2023, the 3rd to 46th respondents sued the 1st and 2nd respondents indicting them for alleged violation of their constitutional rights under Article 27,28, 29 33,36, 41, 43, 47, 50,54 and 55 of the Constitution. Subsequently, 133 petitioners joined the petition pursuant to a joinder order granted on April 13, 2023.
3. In the said petition, the petitioners seek a raft of reliefs against the 1st and 2nd respondents. Among the reliefs sought are several declarations that their constitutional rights have been violated, declarations that the redundancy undertaken by the 1st, 2nd and 3rd respondents is without justification and amounts to unfair discrimination. Further, they seek a declaration that the termination letters issued to them are invalid and that they have been subjected to unfair remuneration. They also seek a declaration that the non- disclosure and non-disparage agreements signed by the moderators are invalid. They also pray for reinstatement and compensation for unfair termination. Lastly, they pray for various heads of damages plus costs of the suit.
4. The gravamen of the petitioners' case is that the 1st respondent embarked on a sham redundancy as a retaliation after the 3rd respondent filed before the ELRC petition number E071 of 2022, Daniel Motaong v Samsasource & Meta citing, inter alia, gross violation of the 3rd to 186th respondents' rights as Facebook content moderators. Concurrent with the petition, the 3rd to 186th respondents filed an application seeking a raft of interim reliefs pending hearing and determination of the application and the petition.
5. On March 20, 2023, Nderi J, upon considering the said application at the *ex parte* stage, granted the following orders:
 - (a) Leave for the 1st and 2nd applicants to be served with the petition and application in their principal office in United States and Ireland respectively.
 - (b) Restraining orders against the 1st and 2nd applicants through the 1st respondent from implementing the redundancy notice issued to the Facebook content moderators on January 10, 2023 pending hearing and determination of the application.
 - (c) Restraining orders against the 1st and 2nd applicant through the 1st respondent from replacing the Facebook content moderators pending hearing and determination of the application.
 - (d) An interim prohibitory order restraining the 1st and 2nd applicants through the 1st respondent from refusing to recruit qualified content moderators on the grounds that they were engaged through the 1st respondent herein.
6. In response to the petition and the application dated March 17, 2023 the applicants filed an application dated March 24, 2023 seeking the following orders:
 - a. That pending hearing and determination of the application herein, this honourable court be pleased to stay the orders made on March 20, 2023.
 - b. That the application herein be heard on priority to any other application and/or proceedings, in this petition, to include the petitioners' application dated March 17, 2023.
 - c. That the petition herein be struck out and/or dismissed as against the 1st and 2nd respondents and the ex-parte orders made and issued as against the 1st and 2nd respondents on March 20, 2023 be set aside and/or discharged ex debito justitiae on the grounds: -



- a. This Honourable Court lacks jurisdiction to entertain, hear and determine the petition herein as against the 1st and 2nd respondents.
 - b. The petition is in any event, unsuitable as against the 1st and 2nd respondents as it “was filed in violation of the mandatory provisions of the [Constitution of Kenya, 2010](#) and the law.
 - c. The *ex parte* orders issued by this Court on March 20, 2023 as against the 1st and 2nd respondents are nullity *ab initio* as the said orders were made in excess of this Court’s Jurisdiction.
 - d. The petitioners herein, at the ex-parte stage of these proceedings, failed to make a full and fair disclosure of material facts within its knowledge germane to the dispute and have deliberately, negligently or recklessly concealed and obfuscated material facts at the hearing of the Petitioners’ application dated March 17, 2023.
 - e. Costs of this application and the petition be awarded to the 1st and 2nd respondents.
7. The trial court treated the applicants’ aforesaid application as a preliminary objection and determined it as such after hearing the parties. In dismissing the preliminary objection, Nderi, J by a ruling delivered on April 20, 2023 stated as follows:
63. The present dispute arises from an employer - employee dispute. The court will consider the nature and extent of liability with regard to the alleged breaches and violations of the [Constitution](#) arising and or related to employment and Labour relations in Kenya. It is in the Court's considered finding that it is immaterial whether the alleged violations occur in a physical or virtual space within the jurisdiction of this Court in Kenya...
 64. The Court has also considered the alleged failure by the petitioners to disclose material facts and have found the said allegations to be without merit. The Court need not emphasize that the dispute of facts alluded to by the 1st and 2nd respondents shall be fully ventilated, considered and determined upon hearing of the suit on the merits.
 65. In the final analysis, this court finds that all the Preliminary Objections raised by the 1st and 2nd respondents, in a Notice of Motion not supported by any affidavit to be without merit. ...
 68. Due to the nature of this matter and the interim orders in place, considering that this Court has just commenced its leave, I refer this matter to the Principal Judge to allocate the matter to another judge within the Judicial Review and Labour Relations Division to hear and determine the pending application and the petition on the merits on a priority basis. The interim orders are extended pending the hearing and determination of the Notice of Motion dated March 17, 2023. (Emphasis added)
8. Aggrieved by the above ruling, the applicants lodged a notice of appeal dated April 25, 2023 and filed the application dated May 5, 2023 the subject of this ruling. They later filed their record of appeal on June 21, 2023.
9. Dr Fred Ojiambo, SC assisted by Miss Onyango represented the applicants. In her oral highlights, Miss Onyango made extensive reference to a ruling delivered by Ongaya, J on June 2, 2023. However, to the extent that the said submissions relate to a different ruling other than the ruling made on March 20, 2023, the subject of the intended appeal, no matter how attractive the said submissions may be, they are irrelevant in so far as the application before us is concerned. This is because the notice of appeal dated April 25, 2023 is specific on the ruling the applicants seek to appeal against. A notice of appeal



is the basis, foundation and backbone of every appeal. There is no appeal before us against the ruling delivered on June 2, 2023. Consequently, we are unable to attach any weight to the said submissions. We shall however consider the submissions relating to the application before us.

10. It is also necessary to clarify that the assertion by the applicants' counsel that Nderi, J recused himself from the impugned proceedings is incorrect. As the above excerpt from the impugned ruling shows, at paragraph 68 of the ruling, the learned Judge noted that he had just commenced his leave and that is the reason why he referred the matter to the principle Judge for reallocation. Simply put, it is not correct that the learned judge recused himself from the proceedings as alleged. We fail to understand why counsel made such factually wrong allegations.
11. The applicants' counsel cited *Housing Finance Company of Kenya Ltd v Sharok Kher Mohamed Ali Hirji & another* (2015) eKLR in support of the position that an applicant under Rule 5 (2) (b) must satisfy the twin principles, namely, that the appeal is arguable, and that if the stay is not granted, the appeal will be rendered nugatory.
12. The applicants' counsel maintained that they have an arguable appeal centered on the question whether the ELRC has jurisdiction to entertain the case against the applicants. The applicant relied on *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others* (2019) eKLR, where this Court held that the question whether a court has jurisdiction is not frivolous, that it is a strong argument and a ground to merit stay of proceedings pending appeal.
13. Counsel submitted that the learned judge erred in failing to find that the applicants ought to have been afforded an opportunity to object to the court's jurisdiction. To support this position, they relied on *Raytheon Aircraft Credit Corporation & another v Air Al-Faraji Limited* (2005) eKLR. Further, counsel faulted the learned judge for making findings on factual issues, which were not before him and relied on Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule and 3 others (2014) eKLR. It was also submitted that the trial court erred by extending interim orders beyond the period permitted by the law.
14. In the oral highlights, the applicants' counsel submitted that the impugned order requires them to pay the 3rd to 186th respondents substantial amounts of money, and that the applicants risk being found guilty of contempt of court. Further, the applicants are foreign companies with no operations in Kenya, yet they are now being subjected to contempt of court proceedings and they are at risk of paying Kshs 10,000,000/= to the 3rd to 186 respondents who are not their employees.
15. As to whether the applicants' appeal will be rendered nugatory unless the stay sought is granted, the applicants maintained that it is likely that the ELRC will proceed to hear and determine the petition, which would render their appeal otiose. Conversely, in the event that this Court allows the appeal, the entire proceedings before the ELRC would amount to a nullity.
16. The applicants' counsel also submitted that if the stay is refused, they will be prejudiced and if the suit proceeds, in the event the appeal succeeds, it would be uneconomical use of judicial time. They argued that the balance of convenience tilts in favor of allowing the orders sought.
17. In opposition to the application, the 3rd to 186th respondents, through their learned counsel, Ms Mutemi, argued that the applicants and the 1st respondent have orchestrated redundancy to get rid of them in retaliation because one of their former colleagues filed ELRC petition number E071 of 2022, Daniel Motaong v Samsasource & Meta, citing violation of human rights. Furthermore, the 3rd to 186th respondents claim that the applicants have now engaged the 2nd respondent to recruit Facebook



- Content Moderators to replace them and they have been blacklisted from gaining employment with the 2nd respondent on grounds that they were engaged through the 1st respondent.
18. It is also the 3rd to 186th respondents' case that the affidavit sworn by Ms. Redmon lacks the required authentication. Consequently, the 3rd to 186th respondent beseeched this Court to strike out the said affidavit and the application for being supported by an inadmissible affidavit.
 19. The 3rd to 186th respondents maintained that no appeal has been lodged against the ex parte order issued on 20th March, 2023 in respect of which the applicants seek a stay of execution. Therefore, there is no arguable appeal to sustain that specific prayer. They argued that since the said order is valid and unchallenged, the applicants must comply with it. Further, it is failure to comply with the said order that necessitated the contempt of court proceedings. Additionally, they argued that the stay sought is speculative because no one knows whether the applicants will be found guilty of contempt.
 20. It is also the 3rd to 186th respondents' case that the ex-parte orders do not in any way prejudice the applicants because the order does not stop the applicants from engaging content moderators to serve the Eastern and South African market. It stops them from proceeding with the redundancy process in order to preserve the 3rd to 186th respondents' work. They argued that the applicants' application is an attempt to avoid the consequences of being in contempt of court. They submitted that the moderators will be prejudiced if the stay orders are granted, since three months without work and pay, and without treatment for their ailing mental health is a violation of their rights to life, dignity, health, work and fair labour relations. Further, the moderators who are migrant workers will be forced to leave Kenya, at which point they will lose all meaningful access to justice owing to difficulty in accessing the court but also their counsel. It is their case that an award of damages cannot adequately compensate violations of human rights. Furthermore, the stay orders if granted will render the petition nugatory.
 21. They maintained that the applicants have not raised a single bona fide ground of appeal meriting consideration by this Court. Further, whether the applicants are employers of the 3rd to 186th respondents is a matter of fact to be determined at the hearing of the petition. Similarly, the trial court will determine the question whether it has jurisdiction to entertain the petition. In summation, the 3rd to 186th respondents maintained that there is no sufficient cause for this Court to stay the proceedings before the ELRC.
 22. Mr. Omino, learned counsel for the 1st respondent, in support of the applicants' motion, orally submitted that there was no single medical report to back the serious allegations that the 3rd to 186th respondent suffer from mental illness. It was also his submission that most of the 3rd to 186th respondents are foreigners; therefore, unless the orders sought are granted, it will be impossible for the applicants to recover any damages that may have been paid to them.
 23. Mr. Ochiel, learned counsel for the 2nd Interested Party, opposed the application. He submitted that although the applicants' appeal might be arguable, the same cannot not be rendered nugatory because the ELRC is yet to find the applicants guilty of contempt of court, and the applicants retain the right to appeal against the ruling on the contempt application. He submitted that if the proceedings before the ELRC are stayed, the 3rd to 186th respondents stand to suffer irreversible harm since the applicants through the 1st respondent will quickly implement the redundancy notices and recruit new Facebook content moderators to the detriment of the 3rd to 186th respondents.
 24. Mr. Ochiel submitted that stay of proceedings is a grave judicial action, which would impede the 3rd to 186th respondents' right to be heard without delay, access to justice, right to litigate and the right to a fair trial. Consequently, he maintained that it is in public interest that the instant application be



dismissed. He relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* SC Application No 5 of 2014, (2014) eKLR, at para 88 and 89.

25. We have considered the application, the grounds in support thereof and the responses filed in opposition to the application. We have taken into account the rival submissions by counsel for the parties as well as the authorities cited. Our invitation to this Court to intervene on behalf of the applicants has been invoked under Rule 5(2) (b) of the *Court of Appeal Rules, 2022* empowers the Court:

In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

26. In *Trust Bank Limited and Another v Investech Bank Limited and 3 others* [2000] eKLR, this Court delineated its jurisdiction under Rule 5 (2) (b) of the *Court of Appeal Rules* 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..., 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...”

27. In *Hon Peter Anyang Nyongo & 2 others v The Minister for Finance & another*, Civil Application No Nai 273 of 2007 (unreported) this Court stated:

“It is trite law that this Court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5 (2) (b). It is apparent that under Rule 5 (2) (b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction, and a stay of further proceedings. This Court has consistently construed Rule 5 (2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Two principles emerge from a consideration of Rule 5 (2) (b) and the two authorities to wit, that, the jurisdiction of the court under Rule 5 (2) (b) is restricted to decisions made in Civil Proceedings and that the reliefs sought must relate to the decision of the superior court in its original or appellate jurisdiction.”

28. We are cognizant that in an application under Rule 5 (2) (b), to benefit from the discretion of this Court, an applicant must satisfy the twin principles laid down in decided cases to the Court’s satisfaction. On the first principle, that is whether or not the intended appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants 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 as follows:

- “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.”



29. In other words, the intended appeal must not be frivolous; and must raise at least one bona fide (ie, genuine) issue that can be argued before the court.
30. We have carefully perused the applicants’ memorandum of appeal. We are alive to the fact that we are not required at this stage to determine the merits of the appeal, nor are we required to make decisive findings of fact. With the foregoing in mind, we make the following observations. We agree that whether the applicants’ application dated March 24, 2023 raises a point of law is an arguable point. Whether the trial court failed to appreciate the legal tests for determining what constitutes a preliminary objection is an arguable ground. Whether the trial court misapplied extra territorial jurisdiction is a debatable ground. Further, whether the court erred in extending the *ex parte* orders is also arguable.
31. The other ground cited by the applicant is whether the court had jurisdiction over the applicants, who are foreign entities incorporated outside Kenya, who they claim have no business operations in Kenya. This ground is attractive because jurisdiction, a mantra in adjudication, connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. As was stated by this Court 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):
- “...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.”
32. 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.
33. However, the jurisdictional question urged by the applicants before us is very different from the jurisdiction defined in the above passage, which connotes the court’s power to entertain a matter. The applicants’ case is that they are foreign entities incorporated outside Kenya, and therefore the trial court has no jurisdiction over them. They also argue that being foreigners, the *Constitution* of Kenya does not apply to them. We are extremely conscious not to delve into the merits of that argument, which will be addressed by the bench hearing the appeal. It will, however, suffice for us to mention that whether or not the applicants are foreign companies incorporated outside Kenya is a matter of



evidence. This is different from the concept of jurisdiction described in the above-cited excerpt. In any event, and without delving into the merits of the appeal, under the *Companies Act*, a foreign company incorporated outside Kenya can be registered or do business in Kenya. Whether or not the applicants were operating in Kenya is a matter of evidence. Further, whether or not the 3rd to 186th respondents were employees of the applicants is also a matter of evidence. The trial court, citing decided cases, ruled that the preliminary objection did not qualify to be a preliminary objection. Whether or not the trial court was right in so finding will be addressed in the main appeal.

34. Also not arguable is the ground that the *Constitution* does not apply to the applicants because they are foreigners. To our mind, the *Constitution* binds every person within the Republic and obligates every person to observe and respect it.
35. We are alive to the fact that an arguable ground is not necessarily one that must succeed, but merely one that deserves consideration by this Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that some of the grounds highlighted above are arguable and therefore the application meets the first precept.
36. Turning to the second prerequisite, whether the appeal, if successful, will 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 defined the term nugatory as follows:
 - “ 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.”
37. The issue before us is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay of further proceedings is refused. The key question here is what legal ramifications will ensue in absence of the stay sought. The orders complained of were issued ex parte on March 20, 2023 after the trial court considered the 3rd to 186th respondents’ application dated March 17, 2023. The said application is still pending before the trial court. It will be heard on merits. Both parties will be afforded a hearing. Any party aggrieved by the outcome will have the right to appeal against the decision.
38. It has been argued that the applicants risk being cited for contempt if the stay orders are refused. However, the contempt application is pending hearing before the trial court. It is yet to be determined. The parties will be heard on merit and if a party is aggrieved by the outcome, the right of appeal exists. In any event, there is no notice of appeal in respect of the trial court’s finding that the applicants are in contempt of its orders.
39. More importantly, the main petition is still pending hearing before the trial court. There is nothing to show that in the absence of stay, the applicants’ ability to defend the said petition will be hindered.
40. There was an attempt to persuade this Court that the trial court was biased against the applicants because the trial judge recused himself after pronouncing the impugned order. However, as earlier stated, Nderi, J never recused himself from the case as alleged, but the learned judge is on record stating that he was proceeding on leave and therefore he passed the file to the Presiding Judge of the Court for re- allocation to another judge.



41. As was held in *Trust Bank Limited and another v Investech Bank Limited and 3 others* (*supra*), the guiding principles for determining an application under Rule 5 (2) (b) must be considered against facts and circumstances of each case. In this regard, it is important to bear in mind the fact that before us is an appeal against interlocutory orders.
42. 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 adequately stated 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.”
43. 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 appeal if it ultimately becomes necessary following the final judgment. It saves time and expense to proceed with the case. 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.
44. In an application for stay of proceedings, 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 the exercise of its discretion to grant or refuse an application for stay of proceedings pending the determination of an appeal, the court is to be guided by the following principles which are not exhaustive, but are to be applied after a careful consideration of the peculiar facts and circumstances of the case at hand:
- a. There must be a pending appeal. A stay of proceedings can be granted only if there is a pending appeal, which is valid in law.
 - b. There must be an arguable appeal. 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. An example is where an appeal raises a pure issue of jurisdiction of the lower court. An appellate court will grant an application for stay of proceedings if on the face of the appeal the court is satisfied that there is a real issue of jurisdiction to be tried as the decision on appeal will dispose of the proceedings in the lower court. We have already addressed the nature of jurisdiction urged before us. We need not rehash it here.
 - 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.
44. Stay of 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. Examples of such exceptional circumstances include, but not limited to-
- (a) if the impugned order has conclusively determined disputed questions of fact,
 - (b) if the impugned order has resolved important questions separate from the merits of the action, and,
 - (c) if the impugned order is effectively unreviewable on appeal from the final judgment in the underlying application or proceeding.
45. In light of our reasoning herein above, we find and hold that the applicants have failed to satisfy the nugatory test. Because it is a prerequisite for an applicant to satisfy both tests, the inevitable conclusion is that the applicants' application dated May 5, 2023 falls for dismissal. Accordingly, we dismiss the said application with costs to the 3rd to 186th respondents and the 2nd interested party.

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

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J MATIVO

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

