



**Kenya Cultural Centre v Gichangi (Civil Appeal (Application)  
E012 of 2023) [2023] KECA 891 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 891 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E012 OF 2023  
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA  
JULY 24, 2023**

**BETWEEN**

**KENYA CULTURAL CENTRE ..... APPLICANT**

**AND**

**DR. EDWIN GICHANGI ..... RESPONDENT**

*(An appeal against the ruling/order of the Employment and Labour Relations Court at Nairobi (Ndolo, J.) dated 10th November, 2022 in Nairobi ELC No. 998 of 2018)*

**RULING**

1. In order to place the arguments for and against the application dated January 17, 2023, into proper perspective, it is necessary to highlight, albeit briefly, the history of the litigation between the parties which culminated in the ruling dated November 10, 2022, the subject of this appeal.
2. It is common ground that on May 30, 2018, the applicant suspended the respondent from his employment. Aggrieved by the suspension, the respondent filed a statement of claim dated June 19, 2018, against the applicant at the Employment and Labour Relations Court, *inter alia* beseeching the court to lift the suspension. He also prayed for an order restraining the applicant from terminating his employment. In addition, the respondent filed an application seeking temporary lifting of the suspension and for his reinstatement to employment. On July 5, 2018, the trial court (Radido, J.) granted interim orders. Further, on July 8, 2018, the learned judge temporarily lifted both the suspension and the termination.
3. The applicant's defence to the respondent's claim as detailed in its memorandum of response dated July 12, 2018, was that its internal investigations unearthed serious procurement and financial malpractices, operational issues and insubordination on the part of the respondent.
4. In his bid to enforce the orders of the trial court, the respondent applied for the applicant's Chairperson to be committed for contempt for disobeying court orders. However, the application was dismissed



on December 7, 2018, on grounds that the Contempt of Court Act was declared unconstitutional by the High Court (Mwita, J.) in Kenya Human Rights Commission and another v Attorney General and another (2018) eKLR. On December 8, 2018, the respondent filed yet another application seeking to commit the applicant's Chairperson and its Chief Executive Officer for contempt for disobeying court orders. The said application was allowed on March 8, 2019. The applicant applied to review the said ruling. However, the said application was dismissed on July 5, 2019. The applicant filed yet another application inviting the court to clarify whether the reinstatement order would affect the respondent's contract that was due to expire on August 31, 2019, because the order had the effect of unilaterally extending the contract.

5. On August 28, 2019, the respondent filed an application seeking to restrain the applicant from advertising or recruiting a new Chief Executive Officer. He also prayed for an order that the reinstatement would not affect his contract expiry date. In addition, the respondent claimed Ksh.3,713,100/= being salary for the period commencing July, 2018 to August, 2019. Both applications were determined vide a ruling dated September 6, 2019 in which the trial court clarified that the reinstatement order would lapse at the end of the respondent's term. The court also found that having handed over, the respondent was entitled to be paid his dues/salaries but it did not specify the amounts nor did the court address its mind to the alleged financial impropriety alleged against the respondent.
6. Fortified by the above ruling, on December 10, 2019, the respondent wrote to the applicant demanding Kenya Shillings Eight Million Five Hundred and Sixty-Six Thousand Eight Hundred and Twenty-One (Ksh.8,566,821/=) being alleged salary arrears, leave allowance, gratuity, and compensation for 62 days leave. The applicant's position was that the foregoing were all new issues. Further, the applicant contended that while computing his claim, the respondent irregularly increased his salary to Kenya Shillings Three Hundred and Twenty Four Thousand One hundred and Seventy Four (Kshs. 324,174 / =) from August, 2017 as opposed to Kshs.324,174/= provided in the employment contract. Further, the computation was premised on the irregular increased rate of Kshs.327,174/= instead of Kshs.270,000/= as per his employment contract. Conversely, the applicant's tabulation of the respondent's salary arrears was Kenya Shillings Two Million One Hundred and Sixty-Six Four hundred and seventeen (Kshs.2,166,417/=). Also, the applicant disputed the respondent's computation of Kenya Shillings Eight Million Five Hundred and Sixty Six Eight Hundred and Twenty One (Ksh.8,566, 821/=) on the basis that the respondent had un surrendered imprest of Kenya Shillings Nine Million Five Thousand Seven Hundred and Forty Seven and Forty cents (Kshs.9,005,747.40/=) and Kenya Shillings One Million Nine Hundred and Eighty Thousand Six Hundred and Ten (Kshs. 1,980,610/ =) for the years 2018 and 2019 respectively which amounts it sought to recover from the respondent's dues upon proper tabulation under section 19 of the Employment Act, 2007.
7. Following the parties diametrically opposed positions as highlighted above, the respondent moved the trial court vide an application dated September 21, 2019 imploring the court to determine his salary arrears/dues. The applicant opposed the application on grounds *inter alia* that the prayers sought were tantamount to determining the substantive suit. The said application was dismissed and the court directed that the matter to proceed for hearing. During the hearing, the respondent's application for leave to amend his sstatement of claim was allowed with leave to the applicant to file an amended Statement of Response. The respondent filed an amended Statement of Claim withdrawing his plea for reinstatement and substituted it with the following claims: (a) salary arrears- Kshs.3,713,100/=; (b) Leave -Kshs. 324,174/=; (c) Gratuity- Kshs. 3,617,182/=, (d) leave 62 days- Kshs.911, 765/=; (e) Costs and interests.



8. In its amended Memorandum of Response, the applicant cited the earlier highlighted payments (overpayments) allegedly irregularly made to the respondent and the alleged malpractices and claimed from the respondent the following:
  - a. Kshs.541,740/= in respect of salary overpayments;
  - (b) Kshs.27,087/= in respect of leave over payments;
  - (c) Kshs. 10,986,357/= being un-surrendered interests;
  - (d) costs and interests.
9. In the meantime, the appellant had requested the Inspectorate of State Corporations to undertake investigations against the respondent and present to it a report of the investigations. The appellant received the investigation report on July 1, 2022, which was after two years. The report detailed the following malpractices on the part of the respondent: (a) that he irregularly reviewed his salary. (b) he was irregularly paid leave allowance. (c) that he surrendered imprest without supporting documents occasioning a loss of Kshs.10,090,459/=:, and (d) that he refused to appear before the Inspectorate of State Corporations.
10. The applicant sought to introduce the said report in support of its case vide an application dated August 30, 2022. The respondent opposed its introduction arguing *inter alia* that it was *res judicata* because the court had already ordered the appellant to pay the respondent his dues. By a ruling dated November 10, 2022, (the subject of this appeal) the trial court (Ndolo, J.) dismissed the said application *inter alia* because Radido, J. had already ordered the arrears to be paid. The appellant maintains that the said ruling ignored the fact that the issue of the applicant's dues was pending determination and that was the reason why Makau, J. had directed the matter to proceed for hearing. Aggrieved by the above ruling, the applicant lodged a notice of appeal dated November 17, 2022, signalling its desire to challenge the ruling before this court. It also filed the instant appeal seeking to upset the said ruling.
11. Contemporaneous with the appeal, the applicant filed the application dated January 17, 2023, the subject of this ruling. The application is premised on sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 5(2) (b) and 41 of the [Court of Appeal Rules](#), 2010. The applicant prays for an order that pending the hearing and determination of the application, this court stays the proceedings in Nairobi Employment and Labour Relations Court Case No. 998 of 2018, Dr Edwin Gichangi v Kenya Cultural Centre and issue such other orders as are fit and just in the circumstances. Prayers (a) and (b) of the application are spent.
12. The core grounds in support of the application are:
  - (a) the learned judge dismissed the applicant's application to adduce additional evidence in support of its counter-claim.
  - (b) the applicant's appeal is arguable because the impugned ruling limited the applicant's right to be heard contrary to article 50 (2) (i) of the [Constitution](#).
  - (c) the introduction of the report will not prejudice the respondent since the trial had just began.
  - (e) the trial court exhibited bias against the applicant by concluding that the appellant was out to violate court orders.
  - (f) the learned judge misconstrued the application dated August 30, 2022 as *res judicata*.



- (g) the learned judge failed to appreciate the provisions of section 19 of the [Employment Act](#) which permits an employer to deduct money entrusted to an employee if its lost as a result of negligence or dishonesty of the employee.
- (h) the court failed to appreciate that money irregularly paid to an employee or misappropriated by an employee was crucial in determining the employees dues. (i) the impugned order contradicted an earlier order issued by Makau, J. issued on April 21, 2022.
13. In opposition to the application, the respondent filed a replying affidavit dated January 25, 2023. The salient averments relevant to the instant application are: (a) the applicant has been frustrating the proceedings before the Employment and Labour Relations Court (ELRC) by refusing to pay the respondent's dues. (b) the respondent's employment was terminated contrary to a court order directing that he be reinstated. (c) at the time of the suspension, the applicant had commenced investigations that ought to have unearthed the alleged impropriety but the evidence was not there. (d) Radido, J. had ruled that the respondent was entitled to his dues, so Ndolo, J. took cue from the history of the file. (e) the invitation to the Inspectorate of State Corporations to undertake the investigations was malicious. (f) the report sought to be introduced will be prejudicial to the respondent. (e) the memorandum of appeal does not disclose a prima facie case.
14. In support of the application, the applicant's counsel submitted that Rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) confers jurisdiction to this court to stay proceedings. Counsel submitted that the appellant lodged a Notice of Appeal thereby triggering this court's jurisdiction and relied on [Stanbic Bank Limited v Kenya Revenue Authority](#) Civil Application No. 294 of 2007. He also cited [Oliver Collins Wanyama v Engineers Board of Kenya](#), [2019] eKLR which stated that to succeed in an application under rule 5 (2) (b) an applicant must demonstrate the existence of an arguable appeal, and, that if the stay is refused, the appeal if successful will be rendered nugatory. Counsel also cited [Stanley Kangethe Kinyanjui v Toney Keter and 5 others](#) [2013] eKLR. Further, counsel submitted that the appeal is arguable as demonstrated by the grounds in the memorandum of appeal.
15. On the nugatory aspect, the applicant's counsel cited [Attorney General v Okiya Omtatah Okoiti and another](#) [2019] eKLR in support of the proposition that should the proceedings in the ELRC proceed to conclusion, then the intended appeal will be rendered nugatory.
16. The respondent's counsel did not attend the hearing despite being served. However, we have considered his written submissions dated February 12, 2023 and the authorities cited. The bulk of the respondent's submissions have nothing to do with a rule 5 (2) (b) application. The only relevant submissions as far as the instant application is concerned are in paragraphs 12 & 13 in which counsel submitted that the appeal is not arguable and that it shall not be rendered nugatory if the proceedings before the ELRC are not stayed because the appellant will have the opportunity to appeal against the judgment. Counsel relied on [Eric Limited v Velji](#) [2021] KECA 306 (KLR).
17. We have carefully considered the applications, the affidavits in opposition to the application, the submissions made by both parties and the authorities cited. The principles upon which an application under rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#) may be granted have been reiterated in several decisions. (See [Stanley Kangethe Kinyanjui v Tony Keter & 5 others](#) [2013] eKLR). In summary, the jurisdiction is discretionary. Even though the discretion is wide, it must be exercised judicially depending on the circumstances of a particular case. In exercising the discretion, the court must be satisfied that two elements are established. One, an applicant must demonstrate he has an arguable appeal. Two, he must demonstrate that unless the stay is granted, the appeal will be rendered nugatory.



18. On the first prerequisite, 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* (*supra*), 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. We have within the confines of our mandate in an application of this nature evaluated the proposed grounds of appeal conscious that we are not required to make definitive findings while determining an application under rule 5 (2) (b). It will suffice for us to mention that the applicant applied to adduce new and or additional evidence. The applicant had just received a report, which it felt was crucial to support its counter-claim. The court (Makau, J.) had directed that the matter to proceed for hearing for the court to determine the quantum payable. Despite the said order, the learned judge held that the issue was *res judicata*. In determining whether an issue is arguable, it does not matter whether the ground will succeed. What matters is whether the ground(s) cited merits interrogation by the Appellate Court. Without saying more lest we embarrass the court which will hear the main appeal, it will suffice for us to state that the applicant's appeal is arguable. Whether or not the applicant will be prejudiced if the evidence is locked out is an arguable ground.

20. 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.”

21. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

22. We are alive to the fact that staying court proceedings is a drastic step, which must only be resorted to in exceptional and well deserving cases. In *Halsbury's Law of England*, 4<sup>th</sup> Edition. Vol. 37 page 330 and 332 provides some principles to bring to bear while considering whether a court should stay proceedings. It states:

- “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”



“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

23. The issue before us is whether the intended appeal will be rendered nugatory or a mere academic exercise if the proceedings before the ELRC proceed to hearing and determination in the event the appeal succeeds. Our answer is in the affirmative. Should the case before the ELRC proceed to completion, and ultimately the appeal succeeds, then the matter will have been determined without considering the evidence sought to be introduced. In our view, the appeal will be rendered a mere academic exercise.
24. We are persuaded that the applicant before us has satisfied the two prerequisites under rule 5 (2) (b). Accordingly, we allow the application and stay any other or further proceedings in Nairobi Employment and Labour Relations Court Case No. 998 of 2018, Dr. Edwin Gichangi v Kenya Cultural Centre pending the hearing and final determination of the applicant’s appeal to this court being Civil Appeal No. E012 of 2023. The costs of this application shall abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY, 2023.**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL ALI-ARONI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

