



KCB Bank Kenya Limited v Rang'ang'a & 28 others (Civil Application E459 of 2022) [2023] KECA 1035 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KECA 1035 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E459 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
AUGUST 4, 2023**

BETWEEN

KCB BANK KENYA LIMITED APPLICANT

AND

OMONDI JUSTUS RANG'ANG'A & 28 OTHERS RESPONDENT

(An application for stay of execution pending hearing and determination of the appeal, from the Judgment & Decree of the Employment & Labour Relations Court at Nairobi (M. Mbaru, J.) delivered on 30th November 2022 in ELRC No. E618 OF 2021)

RULING

1. What is before us for determination is an application dated December 8, 2022 brought pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#) and rule 5(2) (b) of the [Court of Appeal Rules, 2022](#).
2. The brief background to the matter is that the respondents filed a memorandum of claim dated July 19, 2021, which was later amended on August 30, 2021, seeking a declaration that the applicant's work practices, policies, guidelines, directions and their implementation have been discriminatory towards contract clerks; a declaration that their right to fair labour practices had been breached; a declaration that the applicant violated the principle of equal pay for equal work; a declaration that they were all unionizable staff and were entitled to CBA benefits; a declaration that the employer willingly exposed contract staff to an unhealthy work environment and was bound to compensate them for injuries; a declaration that the type of contractual relationship was a sham and bogus, and substitutes it for an order confirming their roles as permanent and pensionable; compensation for defamation at the place of work; compensation for retaliation and slavery or servitude; review and proration of their salaries and applicable benefits to match roles and years of experience; tabulation and compensation of lost income to include underpaid salary and backdated meals; underpaid overtime, pension not granted, house allowance and bonuses missed; compensation for medical benefits missed; compensation for pay discrimination for equal work, work with equal value and work with greater value; the applicant be



ordered to align the entire work environment to eliminate any form of direct or indirect discrimination in the workplace; and costs of the suit.

3. The respondents were all former employees of the applicant, having entered into contracts of service on diverse dates as contract clerks, and were deployed to work with permanent clerks; that both set of clerks were issued with similar job descriptions, and the permanent clerks were paid a minimum starting salary of Kshs 67,157/- per month, while the respondents were paid a gross wage of Kshs 32,481; that the permanent clerks were privy to a 5% annual salary increment, annual leave allowance and house allowance; and that the respondents were discriminated against. It was also their contention that the applicant practiced unfair labour practices.
4. In response to the claim, the applicant contended that the respondents were at all material times employed for agreed tenure of 1 year each, which expressly set out the terms agreed upon between the parties; that there was no evidence to support the respondents' claim that their rights were violated; and that the respondents had enjoyed the benefits from their respective contracts.
5. In its judgement, the trial court held that rights of employment are protected, and that the applicant was bound under section 26 of the *Employment Act*, to apply the terms and conditions under the Collective Bargaining Agreement (CBA then in force), or such other terms as were favourable to the respondents. According to the trial court, the basic minimum conditions of employment ought and should have been those under the CBA or such other favourable terms and conditions, and to go below this level was unlawful; and that the redress where an employer engages in unfair labour practices is payment for damages. Accordingly, the court made a declaration that the respondent applied unfair labour practices against the respondents; and that the respondents were discriminated against. The court also directed that each respondent be paid: general damages of Kshs 2 million; pension at Kshs 241,657.20; underpayment at Kshs 1,247,256; untaken leave days at Kshs 30,995; leave allowance at Kshs 31,500; house allowance at Kshs 424,800; meal allowance at Kshs 7,200; and that the applicant do issue the respondents with certificates of service, and bear the costs of the claim.
6. Aggrieved, by the decision of the ELRC, the applicant moved to this Court on appeal and filed the instant application, which is supported by an affidavit sworn by Lillian Sogo, the applicant's Head litigation counsel. She avers that the appeal is arguable; that the respondents shall proceed to execute the judgment; that in the event of execution, the appeal shall be rendered nugatory as the applicant does not know any of the respondents' assets or sources of income from which it could recover the decretal amount of Kshs 115,518,852 should the appeal succeed; and that the applicant is a financial institution that is able to pay the decretal sum in the event the appeal is unsuccessful. We were thus urged to allow the application.
7. The application is opposed vide a replying affidavit sworn on February 2, 2023; by the 1st respondent, who avers that there is no good reason for granting stay of execution. This argument is hinged on the assertion that there is no threat of execution, in view of the fact that a party-to-party bill of costs has neither been filed nor taxed; that the intended appeal is not arguable, lacks merit, and is incapable of succeeding; and that the application should be dismissed.
8. When the matter came up for hearing, learned counsel Ms. Muthee held brief for Mr Munge for the applicant, while learned counsel Ms. Guserwa appeared for the respondents. The parties relied on written submissions with limited oral highlights. Those of the applicant were dated December 19, 2022 while those of the respondents were dated February 20, 2023.
9. Ms. Muthee argued that the appeal is arguable on ground that the Court would need to consider the applicability of the CBA as it related to the employment contracts between the applicant and the respondents. She questioned the learned Judge's finding that, despite the respondents not being



- unionizable members, the court was of the view that the terms of a CBA could be incorporated in their employment contracts. She submitted that the applicant, on appeal, intends to argue that the respondents were not union members and were not paying any agency fees, and as such, the CBA terms could not apply to them.
10. On discrimination, she submitted that the respondents were engaged on fixed term contracts, and that it was therefore wrong for the trial court to equate their terms of employment with those of employees employed under permanent and pensionable terms. She relied on the case of *Obware Georgiadis Ochieng & 61 others vs Kenya Wildlife Service* [2016] eKLR by the ELRC for the proposition that claimants cannot compare themselves with other employees engaged on different contract terms to gauge the standard of discrimination. Counsel also argued that the appeal was arguable on ground that the learned judge erred in ordering that each respondent be paid retirement sums of Kshs 241,657 and yet, they had not attempted to join the applicant's retirement benefit scheme.
 11. On the nugatory aspect, counsel submitted that the decretal amount awarded in the total sum of Kshs 115,518,852/- was colossal and that, from the replying affidavit, it is not evident how the applicant would recover this amount if the appeal succeeds. Furthermore, there was a threat of eminent execution of the judgement, which would render the appeal nugatory if the orders sought were not granted.
 12. On her part, Ms. Guserwa argued that the issue as to the applicability of the CBA is one that will be addressed in the main appeal and not in the application. According to her, the measure for equal work, equal pay and benefits, is a matter of fact for proof of only one thing: that an employee belongs to a union and not that he/she is unionizable. She submitted that the discrimination visited upon the respondents was unfair, unlawful and unconstitutional, which made the appeal arguable. On the nugatory limb, counsel conceded that the decretal sum involved is quite huge, and the respondents might not be able to pay it back. However, she urged us to order the applicant to deposit it as security in a secure account until the determination of the appeal. She also submitted that there was no threat of execution as no bill of costs had been filed, and that until an offer of security is given, the application lacks merit.
 13. On a query from the Court as to why she sought for security, she stated that it was intended to cushion the respondents in the event that the applicant went under, hence the need for the decretal sum to be removed from the applicant's possession and be deposited in a different bank.
 14. In rebuttal, Ms. Muthee submitted that, since nothing prevented the respondents from filing their bill of costs, the risk of execution of the impugned judgment was real. Further, that there was no danger or threat that the applicant would go under as evidenced by their audited financial statements for 2021.
 15. We have considered the Notice of Motion, the supporting and replying affidavits, the submissions of both parties and the law. In our view, this being a rule 5(2) (b) application, it turns on consideration of the issues set out by this Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR, being firstly, an applicant has to satisfy the Court that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous. Secondly, an applicant has to demonstrate that, unless an order of stay of execution is granted, the appeal or intended appeal would be rendered nugatory.
 16. On the first limb, we are satisfied that the applicant has established an arguable appeal. Even though the applicant did not annex a draft memorandum of appeal for our perusal, we gleaned the intended grounds from its application. Among the issues raised and emphasized by the applicant was whether applying different salary and benefits' rates to employees employed under different terms was discriminatory; whether employees who were not members of a union and did not pay union dues could benefit from the terms of a CBA; and whether the respondents were entitled to pension benefits



although they had not joined the retirement scheme. Moreover, the respondents conceded that the intended appeal was arguable. We will not be labour this point, save to say that we find that the issues raised are not frivolous and merit hearing and determination.

17. On whether the appeal will be rendered nugatory should we decline stay of the impugned judgment, we note that factors which can render an appeal nugatory are to be considered within the circumstances of each particular case. In doing so, the Court is bound to consider the conflicting claims of both sides. The applicant contends that the respondents will not be able to pay back the decretal sum of Kshs 115,518,852.00 should the appeal be successful, a point the respondents conceded. On the other hand, the respondents wish to have the amount deposited as security for the apprehension that the applicant might go under.
18. From our perspective, and a perusal of the applicant's exhibited audited financial statement and disclosure for the year ended December 31, 2021, the applicant made a profit of Kshs34.2 billion. We take judicial notice that the applicant is a reputable bank, and that the respondents' fears of it going under are totally unfounded. What this means is that in the event the appeal fails, the applicant is in a sound financial position to pay the decretal amounts.
19. In the case of *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR, this Court held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
20. In the circumstances of the present case, we are persuaded that the respondents will not be in a position to refund the money if they are paid and the intended appeal succeeds. In the event, the appeal will be rendered nugatory.
21. Consequently, we are satisfied that the applicant has satisfied both limbs of the twin principle for grant of relief under rule 5(2)(b) of the Court's *Rules*. Accordingly, we hereby allow the applicant's Motion as prayed and order that the costs thereof be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

D.K MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

