



**Total Kenya PLC v Ngure (Civil Appeal (Application)
E071 of 2022) [2023] KECA 1034 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1034 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E071 OF 2022
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
AUGUST 4, 2023**

BETWEEN

TOTAL KENYA PLC APPLICANT

AND

DAVID KAMAU NGURE RESPONDENT

*(Being an appeal from the Ruling of the Employment and Labour Relations Court at Nairobi
(M. Onyango, J.) delivered on 19th November 2021 in E.L.R.C CAUSE NO. E6462 OF 2020)*

RULING

1. By way of a notice of motion dated October 11, 2022, the Total Kenya PLC, the appellant/applicant herein seeks an order of stay of proceedings in ELRC Cause No E6462 of 2021, David Kamau Ngure v Total Kenya, PLC, pending the hearing and determination of this appeal.
2. The background of the said application is that by a Plaintiff dated November 16, 2021, the respondent commenced proceedings against the appellant in the Employment and Labour Relations Court (ELRC) citing, inter alia unfair termination of employment. The appellant/applicant filed an application dated January 29, 2021 seeking to have the proceedings stayed and the matter referred to arbitration,

citing the provisions of section 6 of the *Arbitration Act* as read together with the dispute resolution clause VIII of the Young Dealer Marketing Licence Agreement dated February 23, 2018 as read with the respondent's letter of appointment dated 15th June 2017.
3. On November 19, 2021, the trial court dismissed the said application with costs. Being aggrieved by that ruling, the appellant instituted an appeal to this Court.
4. In an affidavit sworn by Rosemary Wakaba, the appellant/applicant's legal officer, the appellant/applicant believes that its appeal is arguable and has cited various grounds among them being that:



the learned judge erred in law in failing to determine whether the issues in dispute are subject to the arbitration clause; that the learned judge erred in law in holding that the parties had not defined the questions to be referred to arbitration, and that the learned judge erred in law in dismissing the application seeking to refer the matter to arbitration.

5. The appellant/applicant further stated that unless this Court stays the proceedings as sought, the appeal if successful, could be rendered nugatory because the ruling from which the appellant/applicant appeals from touches on the jurisdiction of the trial court to hear and determine the claim before it and that unless the orders sought are granted, the proceedings before the trial court will go on and the appellant/applicant shall be compelled to file a defence contrary to the provisions of section 6 of the Arbitration Act, thus subjecting itself to the jurisdiction of the trial court.
6. When the application came up for hearing on December 14, 2022, there was no appearance for the appellant/applicant despite service of a hearing notice on 11th December 2022 by way of an email. The appellant/applicant have however filed submissions dated October 26, 2022 and a digest of authorities.
7. Mr Maina, appeared for the respondents and sought to rely on his client's replying affidavit and submissions dated October 31, 2022 without any oral highlights.
8. We have considered the application and submissions filed by both parties as well as the digest of authorities on record. In an application of this nature, it is trite law that an appellant/ applicant has to satisfy the court that the appeal is arguable and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Safaricom PLC vs Multi Choice Kenya Limited & 3 Others*, [2021] eKLR.
9. Looking at the opposed grounds of appeal, we are satisfied that the appeal is arguable.
10. On the nugatory aspect, it is not in dispute that the appeal touches on the jurisdiction of the trial court to hear and determine the claim before it. It has been held, time and again, that jurisdiction is everything, without it a court ought not to conduct any proceedings before it. See the *locus classicus* on the issue of jurisdiction in the celebrated case of *Owners of Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Limited* [1989] KLR 1.
11. If we do not grant the order for stay of proceedings, and the appeal succeeds, the proceedings before the trial court shall be in vain and that will amount to waste of precious judicial time. The proceedings may even have been finalized by the time the appeal is heard and determined. That, in our view, will render the appeal nugatory.
12. For that reason, we are inclined to allow this application which we hereby do. We however, direct that this appeal be heard and finalized on priority basis and in any event within the next six (6) months from the date of delivery of this ruling. The costs of the application shall be in the appeal.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

