



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Institute of Management v Mwaniki & 10 others (Civil Appeal
E027 of 2023) [2023] KECA 1230 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1230 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E027 OF 2023
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

KENYA INSTITUTE OF MANAGEMENT APPLICANT

AND

JOHN MWANIKI 1ST RESPONDENT
JAMES WAWERU 2ND RESPONDENT
EVANS OMBONGI 3RD RESPONDENT
MOSES BIWOTT 4TH RESPONDENT
PETER KANEGENI 5TH RESPONDENT
JOSEPH DENNIS WAMOTO 6TH RESPONDENT
EMILY WAMOTO 7TH RESPONDENT
LUCY ANN KARANI 8TH RESPONDENT
MARGARET SIELE 9TH RESPONDENT
WILFRED NYAGAKA MBECHÉ 10TH RESPONDENT
JOYCE MUMBI KAMAU 11TH RESPONDENT

*(Being an application for stay of proceedings of the ruling and
decree of the Employment and Labour Relations Court at Nakuru
(H. Wasilwa, J.) dated 31st January 2023 in ELRC No. 14 of 2019)*



RULING

1. The applicant, Kenya Institute of Management, has moved the Court through a notice of motion dated 8th March 2023 brought under rules 5(2)(b), 41 and 42 of the *Court of Appeal Rules*; and, sections 3 and 3A of the *Appellate Jurisdiction Act*. The applicant is seeking orders staying the proceedings in Nakuru ELRC Case No. 14 of 2019 as well as the costs of the application.
2. The application is based on grounds on its face as well as in the supporting affidavit sworn on March 8, 2023 by Raymond Mwangi who is the applicant's Head of Shared Services. The applicant's case is that the learned trial Judge dismissed its preliminary objection and notice of motion for the reason that a judgment had been entered in the matter. The applicant avers that the respondents (John Mwaniki & 10 others) had since made attempts to enforce the impugned ruling and order of the Employment and Labour Relations Court (E&LRC) by filing a party to party bill of costs dated 16th February 2023 which was slated for taxation on 21st March 2023. Further, the applicant contends that its intended appeal is arguable with high chances of success and that unless the orders of stay are granted, it will suffer irreparable damage and injustice. According to the applicant, if stay is not granted, it will be compelled to defend taxation proceedings before the dispute is fully determined and that the said taxation proceedings will be premised on undetermined quantum and that the trial court lacked jurisdiction to entertain the matter.
3. The application is opposed by the affidavit sworn on 3rd May 2023 by Evans Ombogi Nyakang'o on behalf of the respondents. Their position is that the application is fatally defective, bad in law and an abuse of the court process since it is premised on repealed rules of this Court. According to the respondents, the applicant was indolent before the trial Court. In support of this averment, the respondents state that an interlocutory judgment entered by the trial Court in the matter on 13th July 2021 against the applicant was set aside on 18th January 2022 and the applicant allowed to defend the matter but instead only cross-examined the respondents' witnesses without calling its witnesses. The respondents depose that thereafter the trial Court entered judgment in favour of the respondents and the parties were directed to reconcile the figures on the salary arrears payable. According to the respondents, it was during the pendency of the said reconciliation that the applicant lodged a preliminary objection and an application to reopen the case and adduce evidence. The respondents aver that the preliminary objection and the application to reopen the case were dismissed on 31st January 2023 and therefore the orders which the applicant seek to stay are negative orders not capable of being stayed. Further, as there is no memorandum of appeal annexed, the intended appeal is not arguable and neither can it be rendered nugatory.
4. During the hearing, the firm of Rene & Hans LLP had filed submissions dated 14th March 2023 on behalf of the applicant. In support of the application, counsel relied on the case of *UAP Provincial Insurance Co Ltd vs. Michael John Beckett* [2004] eKLR to point out that the applicant only needed to show that they had an arguable appeal and that if stay was not granted, the appeal would be rendered nugatory. Counsel also referred to the Supreme Court decision in *Teachers Service Commission vs. Kenya National Union of Teachers*, SC Application No. 16 of 2015 to highlight the purpose of stay orders.
5. Turning to the question as to whether the applicant's appeal is arguable, counsel submitted that they had filed a record of appeal complete with a memorandum of appeal which contained four grounds of appeal which counsel also reproduced in the submissions. According to counsel, the findings of the trial court were contradictory hence the appeal is arguable. Counsel relied on the case of *Stanley*



Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR to submit that an arguable appeal must not necessarily be one that should eventually succeed. With regard to the issue as to whether the appeal will be rendered nugatory if stay is not granted, counsel submitted that if the orders sought are not granted, the applicant will be compelled to defend taxation proceedings for a matter that is yet to be determined. Counsel also submitted that taxation will proceed on incomplete findings as the quantum of damages is yet to be determined. Further, that the trial Court lacked jurisdiction as the respondents' claim was time-barred. Counsel consequently urged us to allow the application and grant the orders sought.

6. The firm of Wachira Wanjiru & Co. Advocates appeared for the respondents and filed submissions dated 3rd March 2023 in opposition to the application. Counsel submitted that taxation proceedings are administrative in nature and are thus not prejudicial to the applicant. Counsel argued that the applicant ought to have filed an application for stay of execution as opposed to stay of proceedings because what was pending before the trial Court is execution. Counsel relied on the case of *Kenya Wildlife Service vs. James Mutembei* [2019] eKLR to buttress this argument. Counsel also submitted that the orders which are subject of appeal are negative orders not capable of being stayed. In support of this argument counsel relied on the cases of *Jeremiah M'njogu v District Land Registrar Meru Central & 5 others*; *H. Young (EA) Ltd (Interested Party)* [2021] eKLR and *Katangi Developers Ltd vs. Prafula Enterprises Ltd & Another* [2018] eKLR. Counsel further submitted that the intended appeal was not arguable but was an abuse of the court process as the impugned orders were not only negative but also discretionary. According to counsel, the intended appeal will not be rendered nugatory if the stay orders are not granted. Counsel subsequently urged us to dismiss the application, or alternatively direct the deposit of the decretal sum in Court by the applicant.
7. We have carefully considered the motion, the grounds thereof and the supporting affidavit, the replying affidavit, the rival submissions by the parties and the law. The substantive rule under which the motion is brought is Rule 5(2)(b) of this Court's Rules which provides that:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

- a. ...; or
- b. 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.”

8. Our discretion under rule 5(2)(b) is unfettered and twin principles have been established to guide the exercise of the discretion. First, an applicant has to establish that he has an arguable appeal. An arguable appeal is not one that must necessarily succeed but should not be frivolous. Second, an applicant must also demonstrate that unless the order of stay is granted the intended appeal stands the risk of being rendered nugatory. These principles were expounded in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.
9. In this application, the applicant is seeking stay of proceedings in Nakuru E&LRC Cause No. 14 of 2019. The notice of appeal annexed to the application is against the orders of the trial court issued on 31st January 2013. The ruling by the trial court dismissed the applicant's preliminary objection dated 14th September 2022 and a notice of motion dated 28th October 2022. Essentially, the parties were not ordered to do anything or to refrain from doing anything. It can therefore be said that the ruling of the E&LRC is in the nature of a negative order



incapable of execution and as such there is nothing to stay. In *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR, this Court stated that:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

10. Again, in *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR it was stated that:

“It is settled and we appreciate, on numerous authorities from this Court, some of which we were referred to by learned counsel for the respondent, that where an applicant’s suit has been dismissed, as is the case before us, the court cannot issue an order of stay of execution or proceedings as the dismissal is a negative order incapable of being stayed.”

11. As we have already mention hereinabove, the applicant is seeking orders for stay of proceedings and not execution. From the record, it is apparent, even from the impugned ruling, that what is pending before the trial court is with regard to reconciliation of the pending salary arrears payable. This being an application seeking stay of proceedings, we are alive to the views expressed by this Court in *Katangi Developers Limited v Prafula Enterprises Limited & another* [2018] eKLR thus:

“As noted in *Halsbury’s Laws of England* 4th edition volume 37 at paragraph 330:

“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 Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue”.

12. What we gather from the above cited authority is that the power to stay proceedings is a radical discretionary power to be exercised in rare and exceptional circumstances in the interest of justice.

13. Although the dismissal of the applicant’s preliminary objection and application may be classified as a negative order, the action has repercussions upon the applicant. That act alone gave leeway to the respondents to execute the judgment against the applicant. In such a situation, we must consider the facts of the case in order to arrive at a decision that delivers justice to the parties before us. In *Total Kenya Limited vs. Kenya Revenue Authority* [2013] eKLR, the power of this Court to do justice was expressed thus:

“The inherent powers of this Court, like discretionary powers, are exercised as a means of enabling the court to take any such action and make such orders as to maintain its character as a court of justice; to prevent its process from being misused; to preserve the subject matter of a dispute in an appeal; and to protect a party from suffering injustice...



In the *Law Society of Kenya v Commissioner of Lands, and 2 others*, Civil Application No. Nai 181 of 2002, after the High Court (Ombija, J) allowed a preliminary objection to the suit and declared that the Law Society of Kenya which had brought a suit to challenge the allocation to the 2nd respondent of the land on which the High Court at Eldoret stands had no locus standi to bring the action, the Law Society of Kenya moved to this Court for orders to stay Ombija J’s dismissal. The Court ordered that:-

“Considering all the circumstances of the matter before us we order that the status quo now obtaining do remain in force pending the hearing and determination of the intended appeal.

This was so despite the society’s application being made under Rule 5 (2) (b) for orders of stay.

Rule 5 (2) (b) emphasizes the centrality of loss to the parties on both sides of the appeal. That is what the court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory. So that, although under Rule (2) (b) only three orders are recognized, that does not preclude the Court, in specific circumstances, from making any other conservatory orders under its inherent jurisdiction.”

14. The question then is whether the applicant has established the twin principles for grant of stay of proceedings. With regard to whether the appeal is arguable, we note that the applicant did not annex the memorandum of appeal. It was, however, averred that a record of appeal had been filed in the main appeal file. In the submissions, counsel for the applicant reproduced 4 grounds upon which the appeal was premised. The grounds included a challenge on the trial court’s jurisdiction to hear the matter and that the impugned ruling was contradictory. Upon considering the 4 grounds as alluded to, we find that the intended appeal is arguable. We need not say more in order not to embarrass the bench that will hear the intended appeal. As was held by this Court in *Transouth Conveyors Limited vs. Kenya Revenue Authority & Another* [2007] eKLR, even a “solitary issue, if it is arguable on appeal, is of course sufficient to warrant favourable treatment of an application” for stay.
15. The second principle requires the applicant to demonstrate that the appeal will be rendered nugatory if stay is not granted. On this issue, the applicant states that the appeal will be rendered nugatory if an order for stay is not granted as the taxation of the party to party bill of costs will render the intended appeal an academic exercise. The gist of the pending appeal is whether the learned Judge erred in dismissing the applicant’s preliminary objection and the application to re-open the case to adduce new evidence. The taxation of the party to party bill of costs is premised on the findings of the Judgment of the learned Judge based on the evidence on record. If the appeal were to succeed on the question of the preliminary objection, the whole Judgment of the trial Court would be set aside. If, however, it was to fail, the Judgment of the trial Court would be sustained. The sum with respect to the taxation in this matter is Kshs. 5, 020, 348.
16. It is our view that this is a perfect fit for a case where the interest of justice demands that the status quo be maintained. If the taxation process is allowed to continue based on the figure of Kshs. 5, 020, 348, the pending appeal, were it to succeed, stands a chance of being rendered nugatory. On the other hand, if the intended appeal fails, the respondents herein will still have an opportunity to proceed with



taxation based on the same figure. We therefore deem it fit to grant stay of further proceedings in the circumstances of this case. Our rationale herein is fortified in the case of *Nairobi City Council vs. Tom Ojienda & Associates* [2022] KECA 1326 (KLR) where the Court in allowing an application for stay of proceedings adopted the reasoning that:

“If a stay is not granted and the re-taxation is done on the subject matter of Kshs 5,444,697,804/= as directed by the learned judge, the pending appeal will be rendered an academic exercise if this court was to disagree with the holding of the high court. On the other hand, if the applicant is unsuccessful in the intended appeal, the re-taxation will be done afresh taking into account the holdings of the high court. In the circumstances of this case, a stay of proceedings is necessary pending the hearing and determination of the intended appeal.”

17. Lastly, as pointed out by the Supreme Court in *Board of Governors, Moi High School, Kabarak & another vs. Malcolm Bell* [2013] eKLR, the orders for stay that we issue herein are meant to ensure that the decision of this Court upon determination of the main appeal is realizable and not an academic exercise. In that case the Supreme Court pointed out the purpose of interlocutory reliefs on appeal to be:

“Interlocutory reliefs, in this respect, may be apposite by ensuring that the appeal is not rendered nugatory: and this not only serves the cause of fairness in dispute settlement, but also ensures that the ultimate decision of the Court bears the intended constitutional authority.”

18. The upshot of the foregoing is that the application for stay of proceedings is merited. An order of stay of proceedings (as of the date of this ruling) in Nakuru E&LRC Cause No. 14 of 2019 is hereby issued.
19. With regard to the costs of this application, there being a pending appeal, we order that the costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

