



**M/S Dambusters East Africa Limited v Mugolio & 3 others & 3 others (Civil Application E368 of 2022) [2023] KECA 1179 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1179 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E368 OF 2022  
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**M/S DAMBUSTERS EAST AFRICA LIMITED ..... APPELLANT**

**AND**

**JACKSON MUGOLIO & 3 OTHERS ..... 1<sup>ST</sup> RESPONDENT**

**SCHOLASTICA WANGARE ..... 2<sup>ND</sup> RESPONDENT**

**JUDITH NTHOKI NDUVA ..... 3<sup>RD</sup> RESPONDENT**

**EVANS MORARA NYANTIKA ..... 4<sup>TH</sup> RESPONDENT**

*(An application for stay of execution pending the lodgement, hearing and determination of an intended appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J.) delivered on 21st June 2019 in ELRC Cause No. 2400 of 2012)*

**RULING**

1. By a Notice of Motion dated August 17, 2022 brought under rule 5(2) (b) of this *Court's Rules*, the applicant sought, pending the hearing and determination of an intended appeal, stay of release of the decretal amount, Kshs.1,041,968.25, to the respondents; stay of execution of auctioneer's fees and costs; and stay of execution of the trial court's judgment dated 21<sup>st</sup> June 2019.
2. The application was supported by an affidavit sworn by Peter Kimani, a Manager of the applicant, which sets out the background to the application. Briefly stated, the respondents filed a claim before the Employment and Labour Relations Court (the ELRC) at Nairobi, seeking damages for unlawful termination of employment by the applicant as well as payment of terminal dues. On June 21, 2019, the trial court (M. Onyango, J.) entered judgment in their favour in the sum of Kshs.1,041,968.25.
3. Aggrieved by the said judgment, the applicant filed a notice of appeal on July 3, 2019, but was not endorsed by the Deputy Registrar until July 16, 2019.



4. Subsequently, the trial court granted the applicant conditional stay of execution of the said judgment in terms that the applicant deposits the decretal sum in a joint interest earning account in the names of the parties' advocates. There was delay in effecting the deposit but, eventually, the applicant was able to deposit the said sum.
5. Due to the applicant's delay in filing the intended appeal, the respondents sought and obtained an order for release of the decretal sum and the accrued interest.
6. The applicant contends that its intended appeal is arguable, and has annexed a draft Memorandum of Appeal to its affidavit that supports the Notice of Motion. The applicant further states that, unless the orders sought are granted, the intended appeal, if successful, shall be rendered nugatory because the respondents are impecunious and will not be able to refund the decretal sum.
7. The respondents opposed the application. In a replying affidavit sworn by the 4<sup>th</sup> respondent, they stated, inter alia, that the application is a gross abuse and misuse of the court process, and that it is based on scandalous falsehoods and material non-disclosure of various facts. They further stated that there was inordinate unexplained delay in filing the intended appeal, as well as deposit of the decretal sum and the taxed costs as ordered by the trial court on May 4, 2022, which directed that the amount be deposited within 14 days failing which the conditional stay would automatically lapse.
8. The respondents thus argued that there is no appeal or intended appeal, and that this court cannot grant orders in limbo.
9. When the application came up for hearing, Mr. Marete, learned counsel for the applicant, highlighted the applicant's written submissions, which we need not rehash.
10. Likewise, Mr. Okemwa, learned counsel for the respondents, highlighted the respondents' written submissions. The gist of the respondents' submissions is that the intended appeal is not arguable because the notice of appeal is not in accordance with the provisions of rule 77(2) of this *Court's Rules* as it was lodged on July 16, 2019, 25 days after the impugned judgment. He stressed that "the filing of a timely notice of appeal is a jurisdictional prerequisite" as held by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, and therefore it can be raised at any time. He urged us to find that we have no jurisdiction to grant the orders and proceed to dismiss the application with costs.
11. We have considered the application, the affidavits, submissions and the authorities cited by both parties. The principles that guide this court in an application such as the one before us are well settled. An applicant must show that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Kenya Airways Limited v Patrick Waweru Mwangi & another* [2016] eKLR.
12. Having raised a jurisdictional issue, the respondents' submission on the same must be considered first because, if we hold that the court has no jurisdiction, we must down our tools.
13. The applicant's second further affidavit filed on August 22, 2022 has an attachment of the notice of appeal dated July 3, 2019 and a letter dated July 2, 2019 addressed to the Registrar of the trial court requesting for typed copies of the proceedings for purposes of lodging an appeal. However, the trial court's Deputy Registrar signed the notice of appeal on July 16, 2019, and that is shown as the date when the notice was lodged. Mr. Marete submitted that the notice was filed within fourteen (14) days from the date of the impugned judgment, and that an intended appellant has no control over the Deputy Registrar and, therefore, cannot be penalized for any delay occasioned by the Deputy Registrar in signing the notice of appeal.



14. Rule 77(1) requires a person who desires to appeal to give a notice in writing, which “shall be lodged in two copies, with the registrar of the superior court.” Prior to commencement of electronic filing, an applicant would submit a notice of appeal to a clerk at the court registry, pay for it, then the clerk would date stamp the notice, issue a stamped copy to the applicant, transmit a copy thereof to the Deputy Registrar, who would then date and sign the notice and send a copy to the appropriate registry. In such an arrangement, once an applicant paid for a notice of appeal and had it date stamped, he had no control of the back-office operations. It was for the clerk and the Deputy Registrar to manage such operations.
15. The respondents’ advocate was served with the notice of appeal on August 22, 2019. Rule 79(1) requires an intended appellant to serve a notice of appeal within seven (7) days after lodging it. If at all the respondents were aggrieved by the late service of the notice of appeal, they ought to have filed, within thirty (30) days after the date of service, an application to strike it out as stipulated under rule 86. They did not do so. The notice of appeal dated July 3, 2019 is therefore validly on record.
16. In the circumstances, we are unable to find that we are bereft of jurisdiction on account of want of an appropriate notice of appeal.
17. We now turn to consider whether the applicant has satisfied the twin principle under rule 5(2) (b) of this *Court’s Rules*. The draft Memorandum of Appeal shows that, among the grounds of appeal which the applicant intends to raise, are that the learned judge erred in law in awarding each respondent 12 months’ salary in compensation without any justification for the maximum gross pay; for failing to take into consideration the circumstances under which the respondents’ employment was terminated; and in awarding compensation for various months in lieu of notice. In our view, these are arguable issues.
18. On the nugatory aspect, it was not denied that the respondents will not be able to refund the decretal sum if the appeal succeeds. In such a scenario, unless the orders sought are granted, the appeal will be rendered nugatory.
19. Consequently, the applicant has satisfied the twin principle under rule 5(2) (b). We therefore grant the orders sought. We further direct that the intended appeal be filed within thirty (30) days from the date hereof and thereafter be set down for hearing on priority basis. The costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 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

