



**Mount Kenya University v Thuita (Civil Application E446 of 2023)
[2023] KECA 1653 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1653 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E446 OF 2023
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA
DECEMBER 15, 2023**

BETWEEN

MOUNT KENYA UNIVERSITY APPELLANT

AND

DR CATHERINE WANGECI THUITA RESPONDENT

(Being an application for stay of execution of the ex-parte Judgment delivered on 16th December 2021 and subsequent orders of 19th May 2022 of the ELRC (Mwaure, J.) in ELRC Cause No. E6519 of 2020)

RULING

1. The application before us is a Notice of Motion dated 22nd June 2023, seeking stay of execution of the ex-parte judgment in Employment and Labour Relations Court (ELRC) Cause No. E6519 of 2020 delivered on 16th December 2021 and subsequent orders of 19th May 2022, both made by Mwaure, J.
2. The Employment and Labour Relations Court (ELRC) delivered its judgment on 16th December 2021 in favor of the respondent, who was the claimant. Aggrieved by the judgment, the applicant filed an application for stay of that judgment in an application dated 13th January 2022, which application was dismissed on the 19th May 2022. The applicant thereafter filed a similar application dated 16th June 2022, and by its ruling dated 2nd February 2023, the trial court held that the application was not tenable, as it had already pronounced itself on the same issue vide a ruling delivered on 19th May 2022, which dismissed the application dated 13th January 2022. It also found the application to be an abuse of the court process.
3. The applicant being aggrieved, moved this Court vide Civil Application No. E036 of 2023 dated 2nd February 2023, seeking stay of execution of the trial court's ruling delivered on 16th December 2021 and subsequent orders made on 19th May 2022. The said application was struck out. The applicant again filed a similar application dated 6th April 2023 in Civil Application No. E115 of 2023. The latter



application was found to be incompetent on grounds that the judgment of the trial court was spent; that there was nothing to stay; and that the application had sought stay of execution in respect of orders made in ELRC Cause No. 290 of 2022, which had nothing to do with the appeal before this Court.

4. The instant application is supported by the grounds on its face and an affidavit sworn on 22nd June 2023 by Janet Kajwang', the Human Resource Officer of the applicant. She states that the application for stay of execution has never been determined on its merits despite the Court finding in Civil Application No. E115 of 2023 that it had met all the conditions for stay; that there is a real risk that the respondent will execute the decree, thus rendering the intended appeal nugatory; that the appeal is arguable and has an overwhelming chance of success; that it would be prejudicial to the applicant to pay the colossal judgment sum of Ksh.4,283,000.00, as it would negatively affect its cash flow and operations; that as a result, the applicant will suffer substantial loss; that the respondent has no source of income; and that she is unlikely to refund the decretal amount in the event that the appeal is successful. Accordingly, we were urged to allow the application.
5. The respondent opposed the application vide a replying affidavit sworn on 6th July 2023. She deposed that the appeal is incompetent as it was filed outside the stipulated timelines, and that there is no valid notice of appeal on record; that the delay is inordinate and has not been explained; and that the numerous applications which the applicant has been filing are intended to frustrate her and deny her the fruits of the judgement. She also contends that the application is frivolous, vexatious and an abuse of the court process; and that if the Court is inclined to issue orders in favour of the applicant, it should order that the decretal amount be deposited as security in an interest earning account in a reputable bank in the joint names of the advocates on record for the parties, with a further order that half the amount be released to her.
6. When the matter came up for hearing before us, learned counsel Mr. Lawrence Karanja appeared together with Mr. Kenyatta for the applicant while Mr. Kamuiro holding brief for Ms. Wanjera appeared for the respondent. All counsel relied on written submissions with limited oral highlights. The applicant's submissions are dated 7th July 2023 and those of respondent are dated 15th July 2023.
7. Mr. Karanja submitted that the applicant is not appealing against the judgment of the trial court, but rather, the decision of the trial court declining to set aside the ex-parte judgment. On arguability of the appeal, counsel submitted that the applicant was denied an opportunity to be heard. To buttress this submission, counsel noted that the applicant was never served with the statement of claim by the respondent, yet it was squarely the responsibility of the respondent to effect service, and not the applicant to go looking for suit pleadings. As to whether the appeal would be rendered nugatory if the orders sought are not granted, it was argued that if the judgment is executed, it (the applicant) stands to suffer substantial loss as the judgment sum is colossal, and if paid, it shall definitely impair the cash flow of the applicant. Further, that the respondent has already admitted that she has no job or means from which the applicant could recover the decretal sum should it be successful in the appeal. Finally, while urging that the application is merited, it was posited that the applicant had filed a similar application before this Court, differently constituted, which application was found to have met the threshold for grant of stay of execution, but was struck out on the ground that the applicant had quoted a wrong case number.
8. On his part, Mr. Kamuiro submitted that the decision being sought to be appealed was dismissed on 19th May 2022, and no appeal had been preferred since then. It was submitted that the applicant is just but seeking to escape from satisfying the decretal amount; that it is trite that a successful litigant should not be barred from enjoying the fruits of his or her judgment; and that it is for this reason, that the applicant should be ordered to deposit the decretal sum in a joint account in the event that the application is allowed. In further submitting that the appeal is not arguable, counsel argued that the



applicant did not seek a prayer of stay of the trial court proceedings, nor of the judgment, thus it is introducing new issues in the application, which the Court should not entertain.

9. In rebuttal, Mr. Karanja stated that the applicant, in addition to seeking stay of execution of the orders dated 19th May 2022, is also seeking a stay of the judgment dated 16th December 2021. He also stated that the applicant filed a notice of appeal and served it on 30th May 2022, which was well within the time limits.
10. We have considered the application, the supporting affidavit, the replying affidavit as well as the submissions by both parties. In our view, this being a rule 5(2)(b) application, the application will turn upon a consideration of the issues as established by this Court in the case of Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR. These are firstly, an applicant has to satisfy that he or 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 is granted, the appeal or intended appeal would be rendered nugatory.
11. The applicant argues that it was condemned unheard, having never been served with the statement of claim, and that the trial court erred in holding that it had the duty to get the statement of claim as it was served with summons to enter appearance.
12. The procedural rules applicable in the ELRC are the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Rules). In this regard, a claimant is required to file suit pursuant to the provisions of rule 4, and to serve summons in accordance with rule 11.
13. Rule 11 (1) and (2) provide that:
 11.
 - (1) The Court shall issue summons in Form 2 set out in the First Schedule.
 - (2) A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim.
 - (3)
14. From the above provisions, it is clear that summons and a statement of claim go hand in hand and ought to be served together. Further, from our brief perusal of the annexed draft memorandum of appeal in the record of appeal, all the ten grounds of appeal raised revolve around the issue of service. This would mean that if service of the claim was not effected upon the applicant, it would require the Court on appeal to determine whether the right of access to justice and to a fair hearing, as guaranteed by Articles 48 and 50 of *the Constitution* were subverted. To our mind, this is a substantive issue of both law and fact deserving of the Court's inquiry on appeal. Moreover, and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principle.
15. As was held by this Court in Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others [2014] eKLR that:

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication”
16. On the second limb, as to whether the intended appeal will be rendered nugatory, the applicant submitted that the decretal sum is colossal, and if the appeal is successful, it might not be able to recover



the said sums from the respondent. The respondent on her part did not rebut this, having admitted to have lost her job, and suffering tremendous hardship and substantial loss. She instead urged the Court to order that the applicant deposits the decretal amount in a joint account.

17. We find that the applicant is an institution of repute. Therefore, we are persuaded that even if the appeal were unsuccessful, it would be capable of paying the decretal sum to the respondent. We are thus disinclined to grant her request.
18. Having satisfied the two limbs, we find the Application dated June 22, 2023 to be meritorious and we allow it as prayed. Costs shall however be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

