



REPUBLIC OF KENYA



KENYA LAW
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**Gitonga & 5 others v Mary & 7 others (Civil Appeal (Application)
E096 of 2023) [2023] KECA 1492 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1492 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E096 OF 2023
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
DECEMBER 8, 2023**

BETWEEN

**BENJAMIN GITONGA 1ST APPLICANT
FEISAL ABEID 2ND APPLICANT
P. MUNYAO 3RD APPLICANT
MICHAEL WANGAMATI 4TH APPLICANT
KHADIJA KHALID 5TH APPLICANT
JOSEPH WELOBA 6TH APPLICANT**

AND

**DR. KERICH MARY 1ST RESPONDENT
DR. MICHAEL MBINDYO MUNYWOKI 2ND RESPONDENT
AHMED ALI TWAHIR 3RD RESPONDENT
DR. JEAN UZEI 4TH RESPONDENT
DOMNIC MUANGE 5TH RESPONDENT
JOE MUTHUI 6TH RESPONDENT
ALI ABDULSWAMAD 7TH RESPONDENT
MRS. MARYAM FAROUQ 8TH RESPONDENT**

(An application for stay of proceedings pending hearing and determination of an appeal against the ruling of the High Court of Kenya at Mombasa (Wangari, J.) delivered on 2nd June 2023 in High Court Civil Case No. E047 of 2022)



RULING

1. By their application dated 3rd July 2023, the appellants/applicants seek an order under Rule 5(2)(b) of the Court of Appeal Rules, 2022 for stay of proceedings before the High Court in High Court Civil Case No. E047 of 2022, pending the hearing of their appeal. They also pray for an order “to vary and set aside the ruling dated 2nd June 2023” pending determination of the application.
2. The respondents filed suit against the applicants before the High Court alongside which they filed a chamber summons application seeking an order of interim measure of protection staying “the ongoing recruitment exercise” for the position of School Principal, Nyali School, pending the hearing and determination of arbitration proceedings between the parties. In the same application, the respondents also sought, among other prayers, an order to restrain the applicants “from spending an amount in excess of Kshs. 500,000.00” unless approved by the special general meeting of the Mombasa Parents in accordance with the Club’s constitution.
3. In response to that application, the applicants filed a notice of preliminary objection asserting that the High Court lacked jurisdiction to entertain the matter on the grounds that the constitution of Mombasa Parents Club stipulated that any differences or disputes between the Club and the members shall be referred to arbitration.
4. In dismissing the applicants’ preliminary objection, the High Court at Mombasa (F. Wangari, J.) in its impugned ruling delivered on 2nd June 2023 expressed that the respondents in filing suit and the accompanying application “were alive to the provisions of article 49 of the Club’s Constitution”, which is the dispute resolution provision. The Judge also referred to Section 7 of the Arbitration Act before expressing that “the fact that there is an arbitration agreement does not of itself strip the court of the jurisdiction to issue interim measures.” The learned Judge concluded:

“I have no doubt in my mind that the application is properly before court as it is accompanied by a suit thus compliant with Rule 2 of the Arbitration Rules, 1997.”
5. Aggrieved, the applicants filed a notice of appeal dated 16th June 2023 based on which the present application is hinged.
6. We have considered the application and the supporting affidavit sworn by Benjamin Gitonga, a member and chairperson of the Management Board of the Mombasa Parents Club; the replying affidavit, the submissions by Mr. Wangila learned counsel for the applicants and the submissions by Mr. Sitonik, learned counsel for the respondents.
7. The respondents have taken issue with the competence of the application before us on the basis that leave was not obtained to challenge the decision of the High Court. However, we are not presently dealing with an application to strike out the notice of appeal. At this stage the standard applicable in the present application is whether the intended appeal is arguable, and whether, should we decline the prayers sought, the appeal will be rendered nugatory. See Stanley Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR.
8. Considering the low threshold for determining whether an intended appeal is arguable, namely, that an arguable appeal is not one that must necessarily succeed (See University of Nairobi vs. Ricatti Business of East Africa [2020] eKLR.) it is rare for this Court to conclude that an arguable appeal is not demonstrated. This is one such rare case. Whereas we are not at this stage determining decisively



the merits of the intended appeal, we are not, on the face of the express provisions of Section 7 of the *Arbitration Act*, persuaded that it is arguable that the High Court does not have jurisdiction to entertain applications for interim measure of protection. Section 7(1) provides that:

“it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

9. Moreover, considering that what the respondents sought before the High Court were prayers for interim measure of protection pending determination of the dispute by arbitration, we discern no attempt by the respondent to circumvent the dispute resolution mechanism under article 49 of the Club’s Constitution.
10. Furthermore, it is not shown how the intended appeal will be rendered nugatory by our declining to grant the orders sought.
11. The applicants’ application dated dated 3rd July 2023 fails and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

