



REPUBLIC OF KENYA



**KENYA LAW**  
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**Selecta Kenya GMBH & Co. KG v Gurevich (Civil Application  
E441 of 2021) [2022] KECA 714 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 714 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E441 OF 2021  
AK MURGOR, S OLE KANTAI & KI LAIBUTA, JJA  
MAY 27, 2022**

**BETWEEN**

**SELECTA KENYA GMBH & CO. KG ..... APPLICANT**

**AND**

**YARON GUREVICH ..... RESPONDENT**

*(Being an application for stay of execution of the judgment of the Employment and Labour Relations Court (O. Makau, J.) dated 29th October, 2021) in E LRC Cause No. 255 of 2020)*

**RULING**

1. By a Notice of Motion dated 7<sup>th</sup> December 2021, the applicant, Selecta Kenya GMBH & CO. KG, seeks orders of stay of execution of the judgment of the Employment and Labour Relations Court dated 29<sup>th</sup> October, 2021 pending the hearing and determination of the appeal. The motion is brought on the grounds that the respondent, Yaron Gurevich had filed a claim against the applicant; that after hearing the dispute, the ELRC delivered a judgment where it ordered the applicant to pay the respondent Euros 88,992 and Kshs. 750,000 together with costs.
2. The applicant was dissatisfied and has filed a notice of appeal so as to appeal against the decision. The applicant contends that the appeal is arguable and that the respondent is intent on executing the judgment, which if not stayed, will render the intended appeal nugatory and an academic exercise as the substratum of the appeal will be lost.
3. It was further contended that the appeal has high chances of success for the reason that the learned judge failed to consider the applicant's evidence, and in so doing misdirected himself when he concluded that the applicant and Selecta Klemm Gmbh & Co. KG were liable to the respondent, yet the respondent's contract of employment was made between the respondent and Selecta Klemm Gmbh, who was not a party to the proceedings, and not the applicant, amongst other complaints.



4. That, furthermore, the appeal would be rendered nugatory were the applicant to pay the respondent since he is an Israeli national, who has since indicated that he will relocate to his native country in July, 2020. The applicant is apprehensive that, in the event that the judgment is executed and the sums are paid, it would be incapable of recovering the amounts paid, in the event the appeal were to succeed.
5. In a replying affidavit sworn on 11<sup>th</sup> January, 2022, the respondent deponed that he is entitled to the sums awarded by the trial court and to enjoyment of the fruits of his judgment; that the applicant is a subsidiary branch of Selecta Klemm Gbmh, its parent company based in Stuttgart, Germany and is exclusively owned by Selecta Klemm Gbmh; that during his tenure as General Manager, all funds were received from the parent company for the operations of the applicant company; that the applicant did not control any monies or operate any Bank Accounts; that the applicant is primarily funded by its parent company, which can decide when to fold up the applicant, and leave the jurisdiction of this Court. The respondent asserted that the applicant should be ordered to deposit the decretal sums in an interest bearing account in the names of the parties' advocates as security so that the ends of justice can be met, in and the event that the applicant were to cease operating in the country.
6. During the hearing, learned counsel Mr. S. Khisa appeared for the applicant while, Ms. Ligunya appeared for the respondent. Counsel informed the Court that they had filed written submissions, which they would rely on in their entirety.
7. To a large extent, the applicant's written submissions reiterated the contents of the application, save to add that the respondent has not offered any security or disclosed any fixed assets that it owns which are within the jurisdiction of the Court and, therefore, the respondent had not provided any assurance that he could refund the amounts paid were the appeal to succeed. Conversely, the applicant is a company registered in Kenya holding sufficient fixed assets known to the respondent and was capable of paying the sums ordered.
8. In his written submissions, the respondent submitted that it was in the interest of justice that this Court orders the applicant to deposit the entire decretal sums as he stands to suffer if the appeal did not succeed and he were left in a position where he would be unable to recover his monies because the applicant had ceased to exist. In support, the respondent cited the cases of *Rose Ogendo Nyamunga & 2 others vs Richard B.O. Osogo* [2019] eKLR and *Youth Agenda vs Rita Kijala Shako* [2014] eKLR.
9. In so far as applications filed under rule 5(2)(b) of this Court rules are concerned, the threshold required to be satisfied are amplified in the case of *Republic vs Kenya Anticorruption Commission and 2 others* [2009] eKLR thus:

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.
10. With respect to whether the intended appeal is arguable, the applicant's main complaint is that the learned judge did not analyse its evidence, and went on to hold the applicant liable to the respondent, and yet the respondent's contract of employment was between the applicant's parent company, Selecta Klemm Gbmh, which was not a party to the suit, and not with the applicant. As to which between the two companies ought to have been liable for amounts due (if any) to the respondent is indeed a matter that is arguable.



11. Concerning the nugatory aspect, the applicant is apprehensive that, were the decretal sums to be paid to the respondent, it would not be in a position to recover them for the reasons that the respondent has not demonstrated that it has the ability to refund the amount and, further, since he is an Israeli national there is every possibility that he could leave the jurisdiction of the Court. On the other hand, the respondent contends that the applicant is a wholly owned subsidiary of Selecta Klemm Gbmh, and that there is no certainty that it will continue its operations within the country, which would render it impossible for the respondent to access the amounts owed.
12. When both parties' concerns are taken into consideration, it becomes clear that both being foreign nationals means that either party could leave the jurisdiction of the Court before the appeal is heard and determined so as to render the appeal nugatory were it to succeed, or otherwise place the respondent in a position where he would be unable to access the decretal sums. In the circumstances, much as we are satisfied that the applicant has met the threshold requirements so as to warrant the grant of the orders of stay of execution, we nonetheless order that the applicant deposit 50% of the decretal amount in a joint interest earning account with a reputable bank in the joint names of the parties' advocates within 30 days from the date of this ruling.
13. In sum, the motion dated 7<sup>th</sup> December, 2021 is merited and is allowed. Consequently, an order of stay of execution of the judgment of the Employment and Labour Relations Court of 29<sup>th</sup> October, 2021 is hereby granted on condition that the applicant shall deposit 50% of the decretal amount in a joint interest earning account with a reputable bank in the names of the parties' advocates within 30 days from the date of this ruling. In the event that the applicant fails to comply, this order shall lapse. Costs in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**Dr. K.I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

