



REPUBLIC OF KENYA



**KENYA LAW**  
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**Multiscope Consulting Engineers Lt v Omwena (Civil Application  
E476 of 2021) [2022] KECA 760 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 760 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E476 OF 2021  
DK MUSINGA, P, AK MURGOR & S OLE KANTAI, JJA  
JUNE 24, 2022**

**BETWEEN**

**MULTISCOPE CONSULTING ENGINEERS LTD ..... APPLICANT**

**AND**

**JOSEPH AYORA OMWENA ..... RESPONDENT**

*(Being an application under rule 5(2) (b) of the Court of Appeal Rules 2010 for stay of execution of the Judgment and decree of the Employment & Labour Relations Court of Nairobi ( H. Wasilwa, J.) dated 26th January, 2021) in ELRC Cause No. 498 of 2016)*

**RULING**

1. By a Notice of Motion dated 23<sup>rd</sup> December, 2021, the applicant, (Multiscope Consulting Engineers Limited) seeks an order of stay of execution against the judgment of the Employment and Labour Relations Court of 26<sup>th</sup> January, 2021 pending the hearing and determination of the appeal. The application was brought on grounds that; following a memorandum of claim filed by the respondent against the applicant, the Employment and Labour Relations Court rendered a judgment in favour of the respondent where the applicant was ordered to, i) refund Kshs. 161,734 for a medical cover which was not indicated in his contract of employment; ii) to pay 10 months' salary as compensation for unfair redundancy totaling Kshs. 1.9 million; iii) to pay salary for May, June, July and 15 days of August 2015 of Kshs. 655,000; and iv) to pay out of pocket allowance for 75 days at the rate of Kshs. 3,500 per day totaling Kshs. 262,500.
2. The applicant was aggrieved by the decision of the Employment and Labour Relations Court and intends to appeal against that decision; that in the meantime, the applicant applied for a stay of execution of the decision, and by a ruling dated 8<sup>th</sup> July, 2021, the trial court granted a conditional stay of execution of the judgment, on condition that firstly, the applicant pays the respondent 50% of the decretal amount within 30 days of the ruling and secondly, deposit the 50% balance of the decretal sum



into a joint interest earning account in the names of the parties' advocates within 30 days; that in the event of failure to comply, the stay of execution orders would automatically lapse.

3. Thereafter, the applicant filed an application seeking to have the conditional stay of execution orders clarified, for the reasons that it is a medium size engineering firm that was adversely affected by the harsh economic conditions caused by the Covid- 19 pandemic that had led to a reduction in professional work in the construction sector; that as a result, the applicant is unable to pay the amounts owed to the applicant or to deposit sums into a joint interest bearing account, which application for review was dismissed.
4. The applicant contended that the appeal was arguable for the reasons that, the learned judge wrongly concluded that the termination of the respondent's employment was on account of his having been declared redundant, yet this issue was not pleaded; that the result of this decision was to grant relief to the respondent outside the purview of his pleadings and without the applicant being given an opportunity to be heard on the issue of redundancy or on the award of compensation of 10 months' salary for redundancy; that the trial judge wrongly awarded the respondent Kshs. 161,734.00 for refund of medical insurance cover, yet the quantum pleaded by the respondent was for a lesser amount of Kshs. 101,734.00; that the judge was wrong in awarding the respondent Kshs. 655,000, which amount was not due to the respondent, as he was granted 15 days leave in May, 2015, but after expiry of his leave, he did not return to work for the months of May, June, July and August 2015, among other grounds.
5. It was further contended that the appeal would be rendered nugatory if the stay of execution orders were not granted, as it would be difficult to recover the money paid from the respondent and other authorities including Kenya Revenue Authority (KRA); that no prejudice would be occasioned to him if the application is allowed.
6. The motion was supported by the affidavit of Engineer Samwel N. Mugo sworn on 23<sup>rd</sup> December, 2021, a further affidavit sworn on 10<sup>th</sup> February, 2022 and written submissions which to a large extent reiterated the grounds of appeal.
7. The respondent did not file a replying affidavit. But both parties filed written submissions.
8. During the hearing, learned counsel Mr. Wekesa appeared for the applicant while learned counsel Mr. W. Babu appeared for the respondent. In highlighting the applicant's written submissions, Mr. Wekesa largely reiterated the averments of the applicant's pleadings.
9. In his oral submissions, Mr. Babu asserted that the applicant did not have an arguable appeal; that it is in contempt of court for failing to obey the court orders to make payment of the decretal sums; that the applicant should first purge the contempt of the honourable court before proceeding with this application.
10. In so far as applications filed under rule 5 (2) (b) of this Court rules are concerned, the threshold requirement 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”.



11. Turning to whether the appeal is arguable, the applicant's complaint is that the trial court found that the respondent was declared redundant, and proceeded to award him 10 months compensation on this account, yet, the respondent had neither pleaded that he was declared redundant nor demonstrated that he had been declared redundant; that as a consequence, the applicant claims that it did not have any opportunity to be heard on the question of whether or not the respondent was declared redundant. We are satisfied that this is an arguable issue.
12. On the question of whether the appeal would be rendered nugatory if the respondent was to be paid the decretal sums and the appeal were to succeed, we think so. The applicant has not provided any assurances of his ability to refund the amounts paid, or demonstrated that he has the means to do so. Given these circumstances, we are satisfied that the second limb has been met.
13. Be that as it may, much as the applicant has satisfied the threshold requirements for grant of the order of stay of execution, it has repeatedly stated that it is not in any position to pay the decretal sums owing to its precarious financial position arising from the Covid-19 pandemic. It therefore becomes apparent that both parties appear to be in a financial quagmire. With this in mind, we consider it prudent to order a conditional stay of execution on condition that the applicant deposits Kshs. 500,000 in a joint interest bearing account in the names of the parties' advocates within 45 days from the date hereof. That order will lapse in the event of failure by the applicant to comply.
14. In sum, the motion dated 23<sup>rd</sup> December, 2021 is allowed. An order of stay of execution of the judgment of the Employment and Labour Relations Court dated 26<sup>th</sup> January 2021 is granted on condition that the applicant deposit Kshs. 500,000 in a joint interest earning account in the names of the parties' advocates within 45 days from the date of this ruling; the order will lapse in the event of failure by the applicant to comply.
15. Costs in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**D.K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. OLE KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

