



**Kenya Railways Corporation v Ododa & 217 others (Civil Application  
E312 of 2021) [2022] KECA 662 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 662 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E312 OF 2021  
K M'INOTI, F SICHALE & S OLE KANTAI, JJA  
JULY 8, 2022**

**BETWEEN**

**KENYA RAILWAYS CORPORATION ..... APPLICANT**

**AND**

**GEORGE OCHIENG ODODA & 217 OTHERS ..... RESPONDENT**

*(An application for stay of proceedings and stay of execution pending hearing and determination of an intended appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J.) dated 13th August, 2021 in ELRC Cause No. 1789 of 2015)*

**RULING**

1. In the Motion on notice brought under rule 5(2) (b) of the [Court of Appeal Rules](#), the applicant, Kenya Railways Corporation prays in the main that we grant an order staying the Judgment and decree of Maureen Onyango, J. dated August 13, 2021 and further proceedings in Nairobi ELRC (Employment and Labour Relations Court) Cause No. 1789 of 2015 between [George Ochieng Ododa, Bernard John Ochieng, Njoroge Nganga & 215 Others v the Applicant](#). In grounds in support of the Motion and in a supporting affidavit of Stanley Gitari, a Senior Legal Officer of the applicant, it is said amongst other things that the applicant has an arguable appeal with high chances of success which appeal raises serious issues of great public interest in so far as it relates to settling the law on the jurisdiction of the ELRC in pension matters and the applicability and implementation of an unregistered Collective Bargaining Agreement (CBA) against provisions of a registered CBA. It is also said that if stay of execution is not granted the applicant will suffer irreparable loss and the intended appeal will be rendered nugatory. Further, that the respondents in the claim at ELRC prayed for salary arrears, pension, severance pay, gratuity arrears, monthly salary accruing from the date of registering of CBA and leave allowance.
2. The suit was heard and in the Judgment the ELRC found in favour of the respondents holding that they were owed salary arrears, pension and gratuity and that they were entitled to retain houses they



occupied pending payment of full terminal benefits. It is said that the learned Judge erred in making those findings which findings the applicant is appealing, the issues to be taken on appeal being inter alia whether the Judge erred in failing to take into consideration the applicant's defence and submissions on the issue of validity and applicability of a CBA dated November 10, 1997 to November 14, 1997;

whether the Judge erred in finding that the claim by the 218 respondents was not entirely a pension matter but an issue on whether the pension tabulations took into account salary increment as per a "CJC" Agreement, amongst other grounds. The applicant states that the approximate total of the sum awarded to the respondents is Ksh.115,763,744 which it says is a colossal sum of money which it had not budgeted for; that the respondents are its retired members scattered all over the country, some deceased, no known source of income and that the said sum shall not be recovered if the intended appeal is successful.

3. In a replying affidavit Njoroge Ng'ang'a, one of the respondents, states among other things:

"That the Application to stay the execution of the Judgment is prematurely non-starter, frivolous and prejudicious since the decree has not been issued or is to be issued as per the ruling of the learned Lady Justice Maureen Onyango."
4. Further, that the applicant had been ordered to file a computation tabulating the respondents' dues to enable the Judge make final orders; that the Judge was right in making the findings that she made; that if we order stay we should do so on condition that the sum of Ksh.115,763,744 is deposited in an interest earning account.
5. Both sides filed written submissions which we have considered.
6. When the Motion came up for hearing before us on a virtual platform on April 11, 2022 learned counsel Mr. Chacha Odera appeared for the applicant while learned counsel Mr. Okatch appeared for the 54<sup>th</sup> and 55<sup>th</sup> respondents. The other respondents were represented by learned counsel Mr. Rajaro who appeared with Mr. Ndege. In brief highlights of written submissions Mr. Odera submitted that there was an arguable appeal and that the sum involved was colossal; that there are many respondents some of whose addresses or source of income was unknown. Finally, that there was an issue of jurisdiction of ELRC to be taken on appeal.
7. In opposing the application Mr. Okatch submitted that the applicant's application did not meet the prerequisites for grant of an order for stay of execution pending appeal; that the application was speculative as there was an ongoing process in ELRC.
8. Mr. Ndege agreed with Mr. Okatch and informed us that the suit had been in court for over 2 decades; the respondents were old Kenya citizens.
9. The principles that apply in applications of this nature are well known. For the applicant to succeed it must, firstly, demonstrate that the appeal, or intended appeal, as the case may be is arguable, which is to say that it is not frivolous. Secondly, an applicant who crosses that hurdle must show that the appeal would be rendered nugatory absent stay – See a summation of those principles in the case of [\*Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others\*](#) [2013] eKLR.
10. We have looked at the points or issues set out in the Motion and the affidavit in support which are to be taken in the intended appeal. They range from whether the ELRC had the requisite jurisdiction to entertain the claim and whether the claim related to pension or not. We find these to be arguable points on appeal and as has been held by this Court an arguable point on appeal is not one that must necessarily succeed – *Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited*, Civil Application No. NAI 345 of 2004 (ur).



11. The applicant argues, on the nugatory aspect, that the amount in the Judgment is colossal; that some of the respondents are deceased; others are scattered all over the country with addresses unknown and with no known source of income being retired people. This has not been countered by the respondents.
11. The sum involved is a large sum of money and we find in the circumstances that the applicant may not recover the same if the appeal succeeded.
12. The applicant is entitled to our exercise of discretion in its favour and we allow the Motion and grant stay of execution and proceedings of ELRC pending appeal. Costs of the Motion will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.**

**J. M'INOTI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

