



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Broadcasting Corporation v Kasisi & 11 others (Civil Application
E446 of 2021) [2022] KECA 1066 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1066 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E446 OF 2021
AK MURGOR, S OLE KANTAI & KI LAIBUTA, JJA
OCTOBER 7, 2022**

BETWEEN

KENYA BROADCASTING CORPORATION APPLICANT

AND

CHARLES KASISI 1ST RESPONDENT

BEATRICE MUTHONI 2ND RESPONDENT

ROSELYNE ANINDO 3RD RESPONDENT

JANE WAMBOKA 4TH RESPONDENT

FRANCIS OLE NASIEKU 5TH RESPONDENT

JANEROSE A. ONGORO 6TH RESPONDENT

AGGREY KHANYANJE 7TH RESPONDENT

IBRAHIM S. DAWE 8TH RESPONDENT

ALEX OUMA 9TH RESPONDENT

ZAKARY DINDA 10TH RESPONDENT

**COMMUNICATIONS WORKERS UNION (SUING IN A REPRESENTATIVE
CAPACITY IN RESPECT OF 257 EMPLOYEES OF KENYA BRODCASTING
CORPORATION) 11TH RESPONDENT**

VIEWLINE AUCTIONERS 12TH RESPONDENT

*(Being an application for stay of execution against the Ruling and Orders of the
Employment and Labour Relations Court at Nairobi (Monica Mbaru, J.) delivered on
25th November, 2021 in ELRC Cause No. 845 of 2017 (Formerly HCC No. 719 of 2006)*



RULING

1. The historical background of the application before us is that the respondents had filed against the applicant a claim in Nairobi ELRC Cause No. 845 of 2017 (Formerly HCCC No. 713 of 2006) seeking –
 - (a) a declaration that the applicant was duty bound to discuss with the 11th respondent (Communication Workers Union), and/or with all the respondents, the respondents' termination of service;
 - (b) an order restraining the applicant from terminating the service of the respondents or any other unionisable employees individually or collectively before having their lawful terminal dues and benefits thereby accruing discussed and agreed upon between the 11th respondent and the applicant;
 - (c) damages and any other relief; and
 - (d) costs of the suit with interest.
2. In determination of the respondents' claim, the ELRC (Hellen Wasilwa, J.) delivered judgment on November 11, 2020 in the following terms:

“It is hereby ordered

 1. that the respondent [the applicant herein] do pay each claimant [the respondents herein] his or her salaries as per the attached detailed schedule of payments due against each as adopted on 26th January 2021.
 2. That the respondent [the applicant herein] do pay costs of this suit plus interest at court rates with effect from the date of this judgment.”
3. Subsequently, the court issued a decree on September 17, 2021, which the respondents seek to execute by way of attachment and sale of the applicant's immovable property to recover a total sum of KShs. 46,709,444 comprised of the decretal amount, interest, taxed costs, further costs and court collection fees. To this end, the respondents obtained warrants of attachment dated September 23, 2021 and, thereafter, gave to the applicant the requisite proclamation notices dated September 27, 2021.
4. By a Notice of Motion dated September 29, 2021, the applicant applied to the ELRC seeking orders that –
 - (a) pending hearing and determination of the applicant's application, a temporary injunction do issue prohibiting the respondents, either by themselves, their agents, principals, employees, workers or servants from executing and/or effecting the Proclamation Notices dated 27th September 2021 in execution of the decree issued on 17th September 2021 against the applicant;
 - (b) pending the hearing and determination of the applicant's application, there be a temporary injunction prohibiting the respondents, either by themselves, their agents, principals, employees, workers or servants, from transferring, selling, disposing of, offering for sale by public auction or private treaty, or



alienating in any manner whatsoever, any movable property of the applicant in execution of the decree issued against the applicant on 17th September 2021;

- (c) a permanent injunction do issue restraining the respondents from doing any of the things specified in (a) above;
 - (d) there be a declaratory order that the Proclamation Notices dated 27th September 2021 in execution of the decree aforesaid are bad in law and of no legal consequence;
 - (e) there be a declaratory order that the Proclamation Notices aforesaid are in blatant breach of section 47(a) of the *Kenya Broadcasting Corporation Act* (Cap. 221 Laws of Kenya); and
 - (f) the costs of this application be provided for.
5. The respondents opposed the applicant’s Motion, which was dismissed vide the Ruling given on November 25, 2021 by the Hon. Justice Monica Mbaru. In her Ruling, the learned Judge ordered: that there be temporary stay of execution of the decree by holding in abeyance the warrants of attachment and proclamation dated September 27, 2021 to allow the applicant 14 days to pay to the respondents a sum of KShs. 39,809,518; that in default, the respondents be at liberty to move the court as appropriate and the amounts owing shall continue to attract interest at court rates from the due date until payment in full; that “... the execution process is valid;” and that the applicant shall pay the respondents costs.
6. Aggrieved by the Ruling of ELRC (Monica Mbaru, J.) in Cause No. 845 of 2017 dated November 25, 2021, the applicant has moved this Court by way of its Notice of Motion dated 9th December 2021 made under Rule 5(2) (b) of the *Court of Appeal Rules*, in which the applicant seeks inter alia orders of stay and injunctive relief substantially similar to those sought in its Motion filed in the ELRC and dated 29th September 2021 in determination of which the impugned Ruling was given – see paragraph 4 above. Specific to Rule 5(2)(b) of this Court’s Rules, the applicant seeks orders that, pending the hearing and determination of the Motion before us and the intended appeal, there be stay of execution of the Ruling and Orders of the ELRC (Monica Mbaru, J.) dated November 25, 2021.
7. The applicant’s Motion is made on 9 grounds set out on the face of the Motion, supported by the affidavit of Mr. Paul Jilani (the applicant’s Corporation Secretary) sworn on 9th December 2021, and in which he merely reiterates the grounds on which the application is made. Briefly stated, the grounds are that section 47 (a) and (b) of the *Kenya Broadcasting Act* (Cap. 221) restricts execution against the applicant’s property; that the inventory comprised in the proclamation is “questionable”; that there is imminent risk of execution by way of attachment and sale of the applicant’s property in contravention of statute law; and that the 14 days allowed by the trial court holding in abeyance the Proclamation Notices and warrants of attachment lapsed on December 9, 2021, which exposes the applicant to harassment by the respondents. It prays that the costs of the application be provided for.
8. In support of the applicant’s Motion, learned counsel for the applicant (M/s.Murugu, Rigoro & Co. Advocates) filed their written submissions and List of Authorities dated December 17, 2021, which they adopted wholly and highlighted at the hearing of the applicant’s Motion.
9. The respondents oppose the application as is evident from the 1st respondent’s (Charles Kasisi) replying affidavit sworn on January 7, 2022. According to him, the respondents’ draft schedule of payments was adopted by the trial court on January 26, 2021 as the decree of the court in light of the applicant’s refusal, failure or neglect to present its proposals thereon or, otherwise, comment thereon or present its own version; that orders sought by the applicant are incapable of being enforced and are intended to



deny the respondents the fruits of justice; that the applicant has not provided security for satisfaction of the decree, and that its application is made in bad faith; that the applicant's intended appeal is neither arguable nor capable of succeeding as it lacks merit and is misconceived; and that the applicant's Motion lacks merit. They pray this Court to dismiss it with costs to the respondents.

10. In support of the respondents' case, learned counsel for the respondents (M/s.J. A. Guserwa & Co. Advocates) filed their written submissions dated January 7, 2022, which they adopted wholly and highlighted orally at the hearing of the Motion.
11. Having considered the Applicant's Notice of Motion dated December 9, 2021, the affidavit in support thereof, the 1st respondent's replying affidavit, the written and oral submissions of the learned counsel for the Applicant and those of the learned counsel for the Respondents, we form the view that the Applicant's Motion stands or falls on two main grounds:
 - (a) whether the appeal is arguable, which is to say, it is not frivolous; and
 - (b) whether the appeal, if successful, would be rendered nugatory if stay was not granted.
12. The principles that apply in applications under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of further proceedings pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties, and to which we now turn.
13. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
14. With regard to the first limb of this twin principle, the applicant's draft Memorandum of Appeal dated 9th December 2021 sets out the following grounds on which the intended appeal is founded, namely that the learned Judge erred in law and in fact –
 - (a) by failing to find that the execution process initiated by the respondents was erroneous, illegal and not supported in law pursuant to section 47 (a) and (b) of the *Kenya Broadcasting Corporation Act* (Cap. 221);
 - (b) by finding on the one hand that the warrants of attachment were not proper and that the respondents had not complied pursuant to section 47 (a) of the Act, and the Honourable court further finding in its Ruling that as much as the respondents have a valid judgment, the execution is lawful save with regard to execution against the applicant corporation while on the other hand finding in its orders that the execution process was valid;
 - (c) by holding that the warrants of attachment and proclamation notices dated 27th September 2021 in abeyance for 14 days which notices were illegal and void pursuant to section 47 (a) and (b) of the Act;
 - (d) by issuing orders which were outside the pleadings as filed by the applicant; and



- (e) by not taking into consideration section 47 (b) of the Act to the effect that no property of the applicant shall be ceased or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director.
15. On our reading of the grounds on which the Applicant’s Motion is founded, the affidavit in support thereof, the applicant’s draft memorandum of appeal, the respondents’ replying affidavit, and from the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicant’s grievance revolves around (a) the validity of the imminent execution of the decree issued on September 17, 2021; (b) the legality of the procedure for the execution of the said decree in light of the provisions of section 47 (a) and (b) of the *Kenya Broadcasting Corporation Act* (Cap. 221); and (c) the propriety of the impugned Ruling and orders made in the proceedings upholding the warrants of attachment and proclamation notices contrary to statute. In our considered view, the grounds advanced in the applicant’s draft Memorandum of Appeal are not idle. They are by all means arguable.
16. With regard to the adequacy of the grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
17. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. It would. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
18. In view of the legal issues in contention, the nature of the applicant’s statutory functions, and the substantial sums of money decreed, we are persuaded that the circumstances of the case before us calls for stay of further proceedings in execution of the decree in issue. To our mind, absence of stay pending appeal would pave way to execution and sale of the applicant’s immovable assets, which would render the intended appeal worthless or futile. In addition, attachment and sale of the applicant’s immovable assets would irreversibly cripple the day-to-day operations of the applicant, whose broadcasting operations is a matter of profound public interest that begs our consideration. On the other hand, payment to, or recovery by, the amorphous body of 267 decree holders before the intended appeal is heard and determined would render it difficult, if not impossible, to recover such moneys from each and every respondent in the event that the appeal succeeds. In effect, the intended appeal would be rendered nugatory.
19. Having considered the Applicant’s Notice of Motion dated December 9, 2021 and the grounds on which it is made, the affidavit in support thereof, the 1st Respondent’s replying affidavit, the respective written and oral submissions of the learned counsel for the applicant and for the Respondents, we find that the Applicant has satisfied the two limbs of the twin principle for grant of the application for stay of execution and further proceedings in the ELRC pending hearing and determination of the intended appeal. Accordingly –
- (a) the applicant’s Notice of motion dated 9th December 2021 is hereby allowed;
- (b) the execution proceedings arising from the Ruling and Orders of the ELRC Cause No. 845 of 2017 (Monica Mbaru, J.) together with all consequential orders are hereby stayed; and



(c) costs of this application be in the intended appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 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

