



Almasi Beverages Limited v Kenya Union of Commercial Food & Allied Workers (Civil Application E085 of 2021) [2022] KECA 1370 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KECA 1370 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E085 OF 2021
F SICHALE, FA OCHIENG & LA ACHODE, JJA
DECEMBER 8, 2022**

BETWEEN

ALMASI BEVERAGES LIMITED APPLICANT

AND

**KENYA UNION OF COMMERCIAL FOOD & ALLIED
WORKERS RESPONDENT**

*(Being an application for stay of execution pending appeal against the ruling of
(Makau. J) delivered on 9th December, 2021 in Kericho ELRC No. 87 of 2016)*

RULING

Background

1. Almasi Beverages Limited (the applicant herein) moved this court by a motion dated December 28, 2021 under rule 5(2)(b) of this court's Rules and article 159 of the *Constitution of Kenya*, 2010, seeking orders, *inter alia*, that this court be pleased to issue an order of stay of execution of the order of the Employment and Labour Relations Court (ELRC), given on July 27, 2021 in Kericho ELRC No 87 of 2016 pending hearing and determination of the applicant's intended appeal. The respondent is Kenya Union of Commercial Food & Allied Workers.
2. This application is premised on the grounds on its face and the supporting affidavit of Timothy M Muthini and Herbert Nyamurongi (applicant's advocate) sworn on December 29, 2021 and December 28, 2021 respectively. They averred that the ELRC at Kericho issued orders for payment out of court of the sum of Kshs 3,458,508/= pursuant to an application by the respondent dated July 9, 2021. Further that, indeed the applicant's advocate's law firm was served with an application dated July 9, 2021 but the said application did not bear a hearing date.
3. It was averred that the applicant's advocate received an email on September 15, 2021 wherein court orders issued on September 7, 2021 were attached. As a result, he lodged an application dated



September 15, 2021 with a view to having the orders dated July 27, 2021 set aside. The application was heard and subsequently dismissed in a ruling dated December 9, 2021. The applicant being disgruntled by the said ruling, lodged a notice of appeal with the intention of appealing against the said ruling.

4. The applicant asserted that he has an arguable appeal which would be rendered nugatory should execution proceed, as the five claimants whose cases the respondent presented to the ELRC are persons whose abodes and means are unknown to the applicant. Further, that the effect of constraining the applicant to reinstate the grievants who are represented by the respondent into employment with effect from April 27, 2017 as ordered would result in the salaries payable becoming due and payable to them without hope that the same can be recovered. It was also deposed that by the said directions of the ELRC, the applicant is presently exposed to the risk of execution at the hands of the respondent there being no order which restrains the respondent from accessing the funds deposited in court.
5. They urged that the memorandum of appeal demonstrates that the appeal is arguable on the grounds that the trial judge's finding of fact that the respondent was served with the order/directions of the court of July 16, 2021 was unsupported by the evidence adduced before him; that by presuming that the applicant had been served with the court order/direction of the court of July 16, 2021 the trial judge absolved the respondent of the legal burden of proving that it had indeed served the directions which were issued on the July 16, 2021; that the trial judge failed to find and to hold that the application dated July 9, 2021 was *sub judice* the proceedings before this court, *vide* Nairobi Court of Appeal Civil Application No E275 of 2020; and lastly that the trial judge's ruling is a miscarriage of justice as the applicant has been condemned unheard.
6. The gravamen of this matter is that the respondent herein filed a claim against the Kisii Bottlers Limited (KBL) in the ELRC, Case No 87 of 2016 seeking among others, compensation for unlawful termination of its members who were employees of KBL, salaries for days worked, overtime, leave, any other lawful benefit payable to the employees and cost of the suit. Upon hearing the dispute, the learned judge found in favour of the respondent and ordered, *inter alia*, the applicant to reinstate the employees and pay each 2 months' salary as compensation for unlawful termination of employment, as well as cost of the suit. KBL filed a notice of appeal against the judgment on May 10, 2017. However, they failed to file the record of appeal on time. The applicant took over the operations of KBL and subsequently KBL was wound up. By an order of the superior court made on December 11, 2019, the applicant was substituted as the respondent in place of KBL in the ELRC suit.
7. Consequently, the applicant filed a notice of motion seeking extension of time to enable it file a record of appeal out of time. The application was opposed by the respondent. This court, upon considering the said application dismissed it with costs in a ruling dated June 4, 2022.
8. In opposition to the instant application, the respondent filed a replying affidavit sworn by Andrew Kinyua M'mukiiri on June 20, 2022. It was deposed that the respondent's application dated July 9, 2021 and orders of the ELRC issued on the July 15, 2021 were served upon the applicant on July 16, 2021. Further, that the order of the court set down the date of July 27, 2021 for *inter partes* hearing. It was also deposed that the applicant lodged a notice of appeal dated May 10, 2017 but failed to lodge a record of appeal within the specified time. The respondent averred that from the date of termination of service to the date of the judgment on April 26, 2017 and to date is a long period which has disadvantaged the grievants and subjected them to unnecessary hardship and suffering.

Submissions

9. The applicant filed its written submission dated January 7, 2022 wherein they urged this court to find that they had satisfied the principle in the case of [National Police Service Commission, Inspector General](#)



§ 3 Others v Henry Nyakoe Obuba (2016) eKLR. They argued that there are arguable grounds of appeal disclosed in their draft memorandum of appeal and that the applicant's appeal will be rendered nugatory should execution ensue.

10. In opposition, the respondent filed their written submissions dated February 7, 2022 and reiterated what was averred in their replying affidavit. It also submitted that Kshs 3, 450,508/= comprises of the grievants net salaries from which statutory and authorized deductions have been made and already paid to government agencies and to authorized bodies. That the applicant will suffer no financial loss as they are also incapable of recovering statutory and authorized deductions already made. In addition, that there is nothing that this court will be called upon to look at which this court and the court below have not so far done.

Determination

11. We have considered the application, the grounds in support thereof, the submissions on record, the authorities cited and the law. In exercise of jurisdiction under rule 5(2)(b) of this court's Rules, the court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. See this court's decision in Okiya Omtabtab Okoiti § another vs Anne Waiguru, the Cabinet Secretary, Devolution and Planning § 3 Others (2015) e KLR.
12. This court in Eric v J Makokha § 4 others v Lawrence Sagini § 2 others [1994] e KLR observed that:

“An application for injunction under rule 5(2)(b) is an invocation of the equitable jurisdiction of the court. So, its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it.”
13. From the record before this court, it is evident that the appellant filed a notice of motion dated May 29, 2020 seeking orders for extension of time to file record of appeal. The said application was dismissed with costs on the 4th of June, 2021. As such, even if the court was to grant the orders sought here it would be in vain since the application to file the appeal out of time was dismissed. The effect of this is that there is no pending appeal. We accordingly dismiss the application dated December 28, 2021 with costs.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF DECEMBER, 2022

F. SICHALE

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JUDGE OF APPEAL

F. A. OCHIENG

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JUDGE OF APPEAL

L. A. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

