



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kwale International Sugar Company Ltd v Ashubwe (Civil Application  
80 of 2019) [2021] KECA 31 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 31 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 80 OF 2019  
W KARANJA, DK MUSINGA & S OLE KANTAI, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**KWALE INTERNATIONAL SUGAR COMPANY LTD ..... APPLICANT**

**AND**

**HUMPHREY ASHUBWE ..... RESPONDENT**

*(An application seeking stay of execution from the Judgment and  
Decree of the Employment & Labour Relations Court at Mombasa,  
(Justice Rika, J.) delivered on 31st July, 2019 in ELRC No. 877 of 2017)*

**RULING**

1. A brief background of the case is that Humphrey Ashubwe (the respondent) filed a Statement of Claim before the Employment and Labour Relations Court (ELRC) seeking, *inter alia*, declaratory orders that he was unfairly and unlawfully terminated from his employment and damages for the unfair termination and loss of employment.
2. It was the respondent's case that he was employed by Kwale International Sugar Company Ltd (the applicant) as an Administration Manager on 6th October, 2014 and was on a salary of Kshs. 187,000/= per month as at the time of his termination; that he was sent on compulsory leave by the applicant, on 31st December, 2015; that the accusations against him were imprecise; that he was, on 3rd November, 2015, subjected to unlawful arrest and detention at the behest of employees, acting on instructions from Senior Management and that he was not invited for a disciplinary hearing after the prolonged compulsory leave.
3. He contended that his contract was terminated on 11th April, 2017; that he had left a well-paying job as Regional Manager of a Multinational Security Company before joining the applicant; that he relocated from Mombasa to Ukunda in the South Coast so as to take up the job with the applicant



and that the cost of relocating with his family had been agreed at Kshs. 200,000/= between the parties but was never paid.

4. Ultimately, the learned Judge after considering the evidence before the court entered judgment in favour of the respondent prompting the applicant's intended appeal. In the meantime, the applicant has filed the instant application seeking to stay the impugned decision.
5. The application is predicated on the grounds, inter alia: that a Notice of appeal was lodged on 2nd August, 2019 against the impugned judgment; that the record of appeal has already been filed; that execution of the impugned decision is looming which would render the intended appeal nugatory.
6. On the nugatory aspect, the applicant posits that if stay is not granted, then it will have to pay the decretal sum which would be irrecoverable in the event the intended appeal succeeds hence it will suffer substantial and irreparable loss rendering the intended appeal nugatory.
7. The application is supported by the affidavit of David Kulecho, the applicant's Legal Officer sworn on 19th August, 2019. It is averred in addition to the contents on the face of the application that the decretal sum is colossal as it amounts to Kshs. 1,215,500/= plus costs and interest and the respondent's financial status and assets are unknown.
8. The application has been opposed by the respondent vide a replying affidavit of the respondent's advocate, sworn on 15th October, 2019 where it is averred, inter alia, that neither the Notice of Appeal nor the Record of Appeal was served on the respondent within the statutory timelines; that the notice of appeal and record of appeal were lodged on 2nd August, 2019 and 22nd August, 2019 respectively without leave of court.
9. He depones that the Notice of appeal was never served while the Record of appeal was served on 9th October, 2019 without leave of Court; that the notice of preliminary objection has been brought expeditiously; that without prejudice to the notice, if stay is granted, it will prejudice the respondent as he will be denied his right to enjoy the fruits of a judgment rendered in his favour.
10. He further depones that the argument that the respondent would not be able to reimburse the decretal sum in the event the intended appeal succeeds is unfounded and baseless; the intended appeal has no probability of success and that in the event the court grants stay, it should be on condition that the decretal sum be deposited in a joint account interest earning account in the names of the parties' advocates within 14 days of the order for stay.
11. The respondent has filed a Notice of Preliminary Objection on grounds that this Court lacks jurisdiction to hear the instant application as the Notice and Record of Appeal were served out of time contrary to Rule 77 and Rule 90 of this Court's Rules and that the application is, therefore, an abuse of the Court process, fatally defective and bad in law.
12. We have carefully considered the application, the response, and the Preliminary Objection taken by the respondent. We note that our jurisdiction is challenged by way of the preliminary objection the basis that the Notice of Appeal was not served on him and further that the Record of Appeal was also served late. Rule 5 (2) (b) of the Rules of this Court, on which the present application is premised provides in the relevant part as hereunder:-

5. Suspension of sentence, injunction and stay of execution and stay of further proceedings.

...



- (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may —
- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

On the other hand, Rule 75 provides as follows:-

75. Notice of appeal.

- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
- (3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.
- (4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.
- (5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

13. A cursory look of the above provisions clearly indicates that the validity of a Notice of appeal does not depend on compliance with Rule 77 which provides for service and which Rule the respondent cites to challenge the Court's jurisdiction. As far as this Court is concerned, there is on record a valid Notice of appeal and that gives us jurisdiction to hear and determine this application on its merit. The Preliminary Objection is in our considered view misplaced and does not lie in the circumstances of the application.
14. On the merits of the application, the principles that guide the Court in this area are well settled. Firstly, as restated by this Court in *Stanley Kengethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR, the requirement for grant of relief under Rule 5(2) (b) of the *Court of Appeal Rules* is demonstration, that the intended appeal is arguable and that it will be rendered nugatory if the order of stay sought is not granted. An arguable appeal is not one which must necessarily succeed, but one which ought to be canvassed fully before the Court, one which is not frivolous. (See *Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd & 2 others*, Civil Application No. 124 of 2008 A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. (See *Winnie Mukolwe vs Lucy Wanjiku Muchai* [2021] eKLR).
15. On the principle of arguability, we note that the applicant has actually not even remotely demonstrated why the intended appeal is arguable. There is no point raised on arguability either on the face of the application or in the supporting affidavit. The applicant only seems to concentrate on the nugatory aspect and stresses that the amount claimed is substantial and that it may not be able to recover the amount from the respondent if the same is paid to him.



16. As reiterated in a plethora of cases before this Court, for an application such as the one before us to succeed, an applicant must demonstrate both arguability and the nugatory aspect. Demonstrating only one of the principles will not suffice. Having failed to establish a single even arguable issue, the application falls on its face and it will not be necessary for us to consider the nugatory aspect.
17. Our ultimate finding is that this application fails to meet the threshold set for applications under Rule 5(2)(b) of this Court's Rules. Accordingly, we dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR

