



**Butali Sugar Mills Limited v Kenya Union of Sugar Plantation & Allied Workers
(Civil Application 32 of 2021) [2021] KECA 207 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 207 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 32 OF 2021
RN NAMBUYE, AK MURGOR & F SICHALE, JJA
NOVEMBER 5, 2021**

BETWEEN

BUTALI SUGAR MILLS LIMITED APPLICANT

AND

**KENYA UNION OF SUGAR PLANTATION & ALLIED
WORKERS RESPONDENT**

*(Being an Application for Stay of Execution of the Judgment of the
Employment and Labour Relations Court of Kenya at Kisumu Radido
J dated 10th March 2021 in Kisumu ELRC Cause No. 18 of 2020)*

RULING

1. Butali Sugar Mills Limited (the applicant herein), has by a motion dated 18th March 2021 and brought pursuant to the provisions of Rule 5 (2) (b) of the [Court of Appeal Rules](#), sought the following orders:
 1. Spent.
 2. THAT pending the lodging, hearing and determination of the applicant's appeal, the execution of the decision of the Honourable Justice Stephen Radido in Kisumu Employment and Labour Relations Court Cause No. 18 of 2020 Kenya Union of Sugar Plantation & Allied Workers versus Butali Sugar Mills Limited be stayed.
 3. THAT the court be pleased to grant the orders sought subject to any condition the court may deem just.
 3. THAT costs of this application do abide the outcome of the applicant's appeal."



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Daniel Kiyondi (the Finance Manager of the applicant) who deposed *inter alia* that on 10th March 2021, the High Court delivered a judgment finding *inter alia* that the applicant's action not to pay mill cane tractor drivers house allowance offends Sections 31 (1), 31 (2) and 31 (3) of the [Employment Act 2007](#) and ordered the applicant to start paying the mill cane tractor drivers house allowance from March 2021, and that being aggrieved with the aforesaid decision, the applicant had filed an appeal against the same.
3. He further deposed that should the said execution proceed, the whole substratum of the intended appeal will be destroyed rendering the same nugatory should the applicant commence making payments of house allowance to the mill cane tractor drivers and it would be impossible to recover the said sums should the appeal be allowed in view of the fact that tractor drivers were high turnover category of employees and that further the appeal had high chances of success founded on the applicant's evidence which demonstrated that mill cane tractor drivers were paid a consolidated salary which was *inter alia* inclusive of house allowance.
4. The application was opposed vide a replying affidavit of Felix Idamang'eyo the Branch Secretary of KUSPAW-Butali Branch of the respondent herein who deposed *inter alia* that payment of house allowance was an entitlement to members of the respondent under the law and thus the intended appeal cannot be rendered nugatory and that further the draft memorandum of appeal raises no triable issues and had no chances of success and was only meant to deny members of the respondent their entitlement under the law.
5. The applicant in its submissions urged *inter alia* that the learned Judge erred in fact and in law by failing to have due regard or take into account the evidence and facts that demonstrated mill cane tractor drivers were subject of a collective bargaining agreement and written contracts binding the mill cane tractor drivers and the applicant which did not provide for them to be paid house allowance.
6. As to whether the appeal would be rendered nugatory, it was submitted that should the applicant start paying the mill cane tractor drivers house allowance from March 2021 as ordered by the trial court, the amounts would not be recoverable in the event that the appeal succeeds as many of the drivers would have left employment and/or the term of their fixed term contracts will have expired, this category of employees having an unusually high turnover.
7. On the other hand, it was submitted for the respondent that the applicant did not have an arguable appeal and that the same would not succeed; that the instant orders being sought were only bound to discriminate against part of the applicant's employees and deny them their house allowance as prescribed by law. On the nugatory aspect, it was submitted that the applicant had not stated that the respondent's members were incapable of refunding the amounts paid neither were their contracts annexed for the court to make a determination on the time they were likely to expire.
8. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
9. The applicant's motion is brought under Rule (5) (2) (b) of this Court's Rules. Rule 5 (2) (b) of the Rules, which guides the Court in applications of these nature provides:

“(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:

(a)...



- 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.”

10. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR* as follows:

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- i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.
 - xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
 - xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

11. From a cursory perusal of the pleadings herein, we are indeed satisfied that the applicant has demonstrated that it has an arguable appeal and more particularly so because, the applicant’s contention is that the evidence demonstrated that mill cane tractor drivers were paid a consolidated salary which was *inter alia* inclusive of house allowances. We are however mindful of the fact that we shall say no more regarding this issue lest we embarrass the bench that will be eventually seized of the appeal. Be that as it may, from the circumstances of this case we are satisfied that the applicant has met



the first limb for consideration by this Court pursuant to the principles laid out by this Court in the Stanley Kang'ethe case (supra).

12. As to whether the appeal will be rendered nugatory if an order of stay is not granted, we are of the considered opinion that should the applicant start paying the mill cane tractor drivers house allowance from March 2021 as ordered by the High Court, the amounts would not be recoverable in the event that the appeal succeeds as many of the drivers would have left employment and/or the term of their fixed term contract would have expired leaving the applicant exposed to loss.
13. Ultimately, we are satisfied that the appeal will be rendered nugatory if an order of stay is not granted.
14. In view of the above, and the applicant having established the twin principles for consideration in an application under Rule 5 (2) b. of this Court's Rules to warrant grant of an order of stay of execution, the motion dated 18th March 2021 is hereby allowed. Accordingly, judgment of Radido J dated 10th March 2021** is hereby stayed pending the hearing and determination of the intended appeal.
15. The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

