



REPUBLIC OF KENYA



**KENYA LAW**  
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**Aga Khan Education Services Kenya v Njenga (Appeal E107 of 2024)  
[2024] KEELRC 13177 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13177 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E107 OF 2024  
JW KELI, J  
NOVEMBER 15, 2024  
(ON THE NOTICE OF MOTION APPLICATION DATED  
14<sup>TH</sup> MAY 2024 BY THE APPELLANT/APPLICANT)**

**BETWEEN**

**AGA KHAN EDUCATION SERVICES KENYA ..... APPELLANT**

**AND**

**CATHERINE WAITHIRA NJENGA ..... RESPONDENT**

**RULING**

1. The Appellant by way of a Notice of Motion application dated 14<sup>th</sup> May 2024 filed in Court on 16<sup>th</sup> May 2024 and brought under the provisions of Sections 12(3) of the [Employment and Labour Relations Court Act](#), Rules 17 and 28(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 sought the following orders: -
  - a. Spent.
  - b. Spent
  - c. Spent
  - d. That this Honourable Court be pleased to grant a stay of proceedings in Nairobi Chief Magistrates Court Employment Cause No. 1085 of 2023 pending the hearing and determination of the substantive appeal.
2. The Notice of Motion was premised on the grounds on the face of the Application and the grounds in the Supporting Affidavit of Teresiah Karanja, a human resources officer of the respondent, dated 14<sup>th</sup> May 2023 annexing pleadings in Nairobi Chief Magistrates Court Employment Cause No. 1085 of 2023 being:- a copy of Statement of claim dated 20<sup>th</sup> June 2023 (TK1), a copy of the respondent's notice of preliminary objection dated 4<sup>th</sup> August 2023, copies of the written submissions by the respective



parties(TK 3), and a copy the Ruling of 5<sup>th</sup> March 2024( TK4). The deponent further annexed the filed memorandum of appeal(TK5).

3. The Application was opposed by the Respondent vide her replying affidavit of 4<sup>th</sup> July 2024 and received in Court on the 5<sup>th</sup> July 2024. The respondent further filed a Preliminary Objection dated 28<sup>th</sup> May 2024 on the grounds:-
  - a. That the leave to appeal was neither sought nor granted contrary to the requirements of section 75(1) of the *Civil Procedure Act* Cap 21, Laws of Kenya.
  - b. The application is fatally defective , incompetent and abuse of the Court process having been filed prematurely before trial of the issues raised.
  - c. The application is misconceived , untenable in law , devoid of merit and amounts to an abuse of the judicial process.

### **Written Submissions**

4. The application was canvassed by way of written submissions. The Applicant filed written submissions drawn by Anne Babu & Company Advocates dated 17<sup>th</sup> July 2024. The Respondent filed written submissions drawn by Adrian Kamotho Njenga dated 19 July 2024.

### **Determination**

5. The Court having perused the pleadings and the written submissions of the parties was of the considered opinion that the issues for determination in the application were:-
  - a. Whether the preliminary objection was merited.
  - b. Whether the application was merited.

### **Decision**

#### **Whether the preliminary objection was merited.**

6. The appeal seeks to overturn the ruling of Hon. C.K. Cheptoo of 5<sup>th</sup> March 2024 where she pronounced herself on the preliminary objection raised by the appellant dated 4<sup>th</sup> August 2023 seeking to strike out the suit for want of jurisdiction.
6. The instant preliminary objection is under section 75 (1) of the *Civil Procedure Act* to wit:- ‘75. Orders from which appeal lies
  - (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal would lie if leave were granted—
    - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
    - (b) an order on an award stated in the form of a special case;
    - (c) an order modifying or correcting an award;
    - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;...” The instant appeal concerns a ruling on the jurisdiction of the trial court. It is settled law that anything done by a Court without jurisdiction is a nullity



ab initio. The rules of the Court have not provided for leave of the Magistrate Court to be sought by a party seeking to appeal against a decision of the said court (See Part 3 on Appeals of the Employment and Labour Relations Court (Procedure) Rules, 2024). That Court returns that for such a ruling, the leave of the subordinate Court to appeal was not mandatory. The Preliminary Objection is dismissed. Costs in the cause.

### **Whether the application was merited.**

7. The applicant seeks a stay of proceedings of the Trial Magistrate Court pending the hearing and determination of the appeal. The appeal is on an interlocutory ruling on the question of jurisdiction. The Court finds that the only condition for the Court to satisfy itself is whether there is an arguable appeal brought without inordinate delay. The Court of Appeal in *Rhoda Mukuma v John Abuoga*[1988] eKLR, held that “It was laid down in *Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979*, (following *Wilson v Church* (No 2) (1879) 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.”(Emphasis added). I uphold the decision to apply in the instant application.
8. The applicant annexed as TK5 filed a Memorandum of Appeal. The question of the jurisdiction of the magistrate Court to handle constitutional issues is in issue. The Respondent submitted that there was no arguable appeal before the court. That it is not in dispute at the subordinate court that the Respondent herein was an employee of the Appellant. That the issues of constitutional violations and general damages for discrimination were never raised anywhere in the Statement of Claim dated 20th June 2023 save for as prayers which the court with or without jurisdiction is not a guarantee that such prayers will be granted. The Appellant herein does not contest all the other issues raised by the Respondent in her Statement of Claim dated 20th June 2023.
9. A ruling has been issued on the question of jurisdiction raised in a preliminary objection by the appellant ,to the effect the Trial Magistrate Court has jurisdiction. The Court of Appeal in *Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR) (19 January 2024) (Ruling) held that: “An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One is sufficient. For a point to be arguable it needs merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and is worthy of the court’s consideration.
33. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there is no rule that it must be so. One can raise such grounds on the face of the motion and even in the supporting affidavit, as happened in this case. We reiterate what was said recently in *Ontweka & 3 others vs. Onderi* (supra)“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.”(Emphasis added) I uphold the foregoing decision to hold that the filed memorandum of appeal grounds discloses an arguable appeal on the question of jurisdiction which is a sufficient issue for the Court to grant a stay of the proceedings of the Trial Magistrate Court pending the hearing and determination of the appeal.



10. The impugned decision was delivered on the 5<sup>th</sup> of March 2024 and the application was filed on the 16<sup>th</sup> of May 2024. The Court finds no unreasonable delay in filing the instant application.
11. In the upshot, the Notice of Preliminary Objection dated 28<sup>th</sup> May 2024 is dismissed. The application dated 14<sup>th</sup> May 2024 is allowed as follows: -
  - a. That this Honourable Court hereby grants an order of stay of the proceedings in Nairobi Chief Magistrates Court Employment Court in Cause No. E1085 of 2023 pending the hearing and determination of the appeal. Costs in the cause.
12. The Court orders the record of appeal to be filed in 30 days. Mention on 15<sup>th</sup> January 2025 for further directions.
13. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15<sup>th</sup> DAY OF NOVEMBER, 2024.**

**JEMIMAH KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Caleb

Applicant: - Kogangah h/b Weru

Respondent: Lenrionka h/b Kamotho

