



Gamma Villa Limited v Almasi Bottlers Limited (Civil Application E464 of 2024) [2025] KECA 19 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KECA 19 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E464 OF 2024
DK MUSINGA, F TUIYOT'T & GV ODUNGA, JJA
JANUARY 17, 2025**

BETWEEN

GAMMA VILLA LIMITED APPLICANT

AND

ALMASI BOTTLERS LIMITED RESPONDENT

(Being an application for stay of execution of the Judgment of the High Court of Kenya at Thika (Muchemi, J.) delivered on 11th July 2024 in Civil Case No. 8 of 2010)

RULING

1. The applicant's notice of motion dated 10th September 2024 seeks stay of execution of the judgment of Muchemi, J. delivered on 11th July 2024 in Nyeri High Court Civil Suit No. 8 of 2010, pending hearing and determination of an intended appeal.
2. In the said suit, the trial court entered judgment for the respondent against the applicant in the sum of Kshs.56,871,056 plus interest and costs.
3. The brief background of the suit is that the applicant, a clearing and forwarding agent, rendered services to the respondent for a period of about 25 years. In 2009, differences arose between the parties when the applicant, in alleged exercise of its right of lien, detained a consignment of concentrates imported by the respondent.
4. The respondent sought a declaration that the applicant's detention of the said consignment was wrongful; a declaration that the applicant was liable to compensate it for sums paid to the Kenya Revenue Authority (KRA) as tax and costs in defending a claim that KRA had raised against the respondent regarding the consignment; damages for wrongful detention of its goods; and liquidated damages in the sum of Kshs.55,575,677.



5. The applicant denied the claim in its entirety and stated, inter alia, that it acted lawfully because the respondent withheld payment for services it had rendered, and therefore it was entitled to exercise its right of lien in terms of the standard terms and conditions of the contract of service it was rendering to the respondent.
6. The trial court found for the respondent and awarded Kshs.52,060,606 as tax refund; Kshs.2,443,750 as costs for Judicial Review Proceedings; Kshs.376,700 for tax consultancy; and Kshs.2,000,000 for loss of business.
7. Being aggrieved by the said judgment, the applicant filed a notice of appeal, on which it founded the application for stay of its execution, that came up for hearing on 19th November 2024.
8. The applicant contended that its intended appeal is arguable and has overwhelming chances of success. In its Draft Memorandum of appeal, it faults the learned judge for, inter alia: failing to recognise the standard terms and conditions of the contract between the parties; and for finding that it was liable to pay tax arrears of Kshs.52,060,606 and for granting the other monetary awards.
9. On the nugatory aspect, the applicant submitted that the judgment sum is colossal; that if the orders sought are not granted, it will be financially ruined, and even if the appeal is successful it will be pyrrhic victory, as it will have ground to a halt.
10. The respondent opposed the application. Its contention was that the intended appeal is not arguable; that it was undeniable that the applicant received a sum of Kshs.52,060,606 from it but failed to pay the same to KRA; that the applicant's false insistence that it had paid the said sum to KRA caused the respondent to institute Judicial Review proceedings to contest KRA's claim for tax against it, which proceedings were unsuccessful, thus leading to payment of costs and other expenses.
11. The respondent further submitted that the applicant's intended appeal will not be rendered nugatory if the orders sought are not granted because the respondent is well able to refund the judgment sum if the appeal succeeds.
12. We have considered the application, the replying affidavit, the written submissions by both parties, and the oral highlights thereto by the parties' advocates, Mr. Ndung'u and Mr. Mugambi respectively.
13. The principles that guide this Court in determining an application of this nature are well settled. An applicant has to demonstrate that the appeal or intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory. See Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR.
14. An arguable appeal is not necessarily one that must succeed, it is one that raises issues that deserve full consideration by the Court. Having perused the Draft Memorandum of Appeal, we are satisfied that the intended appeal is arguable. We need not say more at this juncture, lest we embarrass the bench that will eventually hear the appeal.
15. Turning to the nugatory aspect of the intended appeal, we do not doubt the respondent's ability to refund the judgment sum in the event that the intended appeal is successful. However, the judgment sum is colossal, and the applicant argued that if the orders sought are not granted, the respondent would proceed to execute the resultant decree, which would collapse the company, and even if its appeal eventually succeeds, it would be pyrrhic victory.
16. The applicant's argument is not without some merit. On the other hand, the respondent, being the successful decree holder, is entitled to the fruits of the judgment. When the Court asked the applicant's advocate whether the applicant is able to provide reasonable security as a condition for grant of the



orders sought, he indicated that the applicant can only deposit Kshs.1,000,000 in an escrow account in the joint names of the parties' advocates, which the respondent's advocate argued was an unreasonable offer.

17. We are inclined to grant a conditional stay of execution of the trial court's judgment pending appeal, which we hereby do, but on the following terms:
- a. The applicant shall provide a bank guarantee in the sum of Kshs.28,000,000 in favour of the respondent within 45 days from the date hereof.
 - b. If the applicant fails to provide the guarantee within the stipulated period of time, the applicant's notice of motion dated 10th September 2024 shall stand dismissed, and the respondent shall be at liberty to execute the trial court's judgment.
18. The applicant shall bear the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI ON THE 17TH DAY OF JANUARY 2025.

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

