Britam General Insurance Company (K) Limited v Rosslyn Suites Limited & another (Civil Application E627 of 2024) [2025] KECA 258 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 258 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E627 OF 2024

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

FEBRUARY 21, 2025

BETWEEN

BRITAM GENERAL INSURANCE COMPANY (K) LIMITED .... APPLICANT

AND

ROSSLYN SUITES LIMITED .... 1ST RESPONDENT

ROKOH (K) CONSTRUCTION LIMITED .... 2ND RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the High Court at Nairobi (N. Sifuna, J.) delivered on 3rd October 2024 in HCC No. E503 of 2022)

RULING

1. The applicant's notice of motion dated 12th August 2024 seeks an order of stay of execution of the judgment and decree of Sifuna, J delivered on 3rd October 2024 pending the hearing and determination of the intended appeal to this Court.

2. The brief facts of this matter were: that the 1st respondent, Rosslyn Suites Limited and the 2nd respondent, Rokoh (K) Construction Limited, as employer and contractor respectively, entered into a contract dated 4th June 2019 for the construction of the proposed development known as Enaki Residential Apartments situate on LR. No. 10688/219 and LR No. 10688/220 Redhill Road Nairobi-Phase 1, Contract 2; that the terms of the said contract required the 2nd respondent to provide a performance security bond from an established bank or insurance company for the due performance of the contract; that the performance security bond was provided by the applicant, Britam General Insurance Company (K) Limited, in the sum of Kshs.167,266,450.40; that by a letter dated 8th July 2021, the 1st respondent demanded immediate release of the said sum on the grounds that the 2nd respondent had failed to perform its obligations under the contract; that by way of a letter dated 4th August 2021, the 2nd respondent objected to that demand; that the refusal to release the bond amount precipitated the filing of a suit by the 1st respondent at the High Court in Nairobi to wit, HCCC No.

E503 of 2022 vide a plaint dated 17th November 2022; that after hearing the suit, the learned Judge declared the objection by the 2nd respondent to be invalid and ordered the applicant to pay to the 1st respondent the said sum of Kshs. 167,266,450/40 together with interest.

3. Aggrieved, the applicant lodged a Notice of Appeal dated 8th October 2024 and now seeks an order that pending the hearing and determination of its intended appeal, this Court grants stay of execution of the said decision.

4. In support of the application, the applicant's Legal Manager, Lynette Monzi, avers that the applicant's intended appeal is arguable and has high chances of success. According to her, the learned Judge erred in law and in fact in: finding that there was no evidence that the letter of objection addressed to the 1st respondent by the 2nd respondent was ever received by the 1st respondent when in fact there was evidence on record that the letter of objection was forwarded to the 1st respondent by the applicant's advocates vide the letter dated 17th July 2021; finding that the 2nd respondent failed to prove that by the time the 1st respondent made the demand to the applicant, the 1st respondent and the applicant had already received the objection, which finding was impractical because the 2nd respondent could not object to a demand that had not been made; holding that the applicant, not being a party to the construction contract, could not challenge the reasons for termination or the manner in which the contract was terminated; rejecting the applicant's argument that a Quantity Surveyor had found that only Kshs. 26,026,083/= was owing from the 2nd respondent to the 1st respondent; and holding that the performance bond did not contain any clause subjecting payment of the guarantee amount to prior valuation, assessment, quantification or particularization of actual loss when it was clear from the wordings of the performance bond that the recall was conditional on the 1st respondent stating on the notice the demanded amount which amount was not to exceed the sum of Kshs. 167,266,450.40 when aggregated with any amount previously paid.

5. Regarding the nugatory aspect of the intended appeal, it is averred: that unless the order sought is granted, the 1st respondent will proceed to execute the judgment in the event of which the intended appeal will be rendered nugatory; that the assets or source of income of the 1st respondent from which the applicant can recover the decretal amount, if the appeal were to succeed, are not known; that the applicant is financially sound and has been making profits yearly, thus it would easily pay the decretal sum in the unlikely event the intended appeal is not successful.

6. In opposing the application, through a replying affidavit sworn on 2nd December, 2024 by the 1st respondent's Director, Farhana Hassanali, it is averred: that the application does not disclose any grounds for granting the orders sought and is lacking in merit; that the applicant has been guilty of laches in filing this application and has offered no tenable excuse for the excessive and unwarranted delay; that the applicant has no arguable appeal against the impugned judgment; that the applicant's claim that it is unaware of the 1st respondent's assets or source of income is not only untrue but unfounded since the 1st respondent has developed a residential resort in Nairobi and is in the process of constructing over 440 high-end residential units; that the 1st respondent's successful development of the Enaki Residential Development has led to the generation of fixed and moveable assets which are now valued at over Kshs. 7 billion, thus the 1st respondent is capable of repaying the decretal sum in the very unlikely event that this Court reverses the trial court's judgment; that the applicant has not demonstrated willingness to provide any security pending hearing and determination of the intended appeal; and that the application should be dismissed with costs.

7. We heard the application on this Court's virtual platform on 22nd January 2025 when learned counsel, Mr Daniel Musyoka appeared for the applicant, while learned counsel, Mr Muhindi, appeared for

the 1st respondent. Although the 2nd respondent was duly notified of the hearing notice, it was not represented. Both learned counsel relied entirely on their written submissions.

8. We have considered the application and the affidavit in support thereof as well as the submissions filed. This Court, in numerous decisions, has crystallised the basis for the exercise of its jurisdiction under rule 5(2)(b) aforesaid. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd* No (2) (1988) KLR 838). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited* [2013] eKLR. It only arises where the applicant has lodged a notice of appeal or the appeal itself (see *Safaricom Ltd v Ocean View Beach Hotel & 2 others* [2010] eKLR).

9. The conditions to be met before a party can obtain relief under rule 5(2)(b), as enunciated in case law, are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal or the intended appeal, as the case may be, if successful, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd* No (2) (*supra*). By the term "arguable", it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court. An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition. It is therefore trite that demonstration of one arguable point will suffice (see *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR)

10. As for the second requirement, an appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible and if not reversible, when damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tonny Keter & others* [2013] eKLR). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR).

11. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see *Republic v Kenya Anti-Corruption Commission & 2 others* (2009) KLR 31; *Reliance Bank Ltd v Norlake investments Ltd* (2002) IEA 227; and *Githunguri v Jimba Credit Corporation* (*supra*).

12. As regards the nugatory aspect, the term 'nugatory', as has been held, has to be given its full meaning since it does not only mean worthless, futile or invalid, but also means trifling. In addition, as held in *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others* (*supra*):

> "Whether or not an appeal will be rendered nugatory depends on whether 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."

13. In this regard, this Court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227 held that:

> "... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

14. As to what amounts to trifling, this Court in the case of *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR held that:

> "A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law."

15. In this case, the applicant's apprehension is that the respondent is likely to commence execution against it, yet the respondent's assets and means are unknown. The respondent has placed before us, by way of an affidavit, evidence of the projects it has been engaged in which dispel the applicant's notion that its means are unknown. The position, as was held in *Kenafric Matches Ltd v Match Masters Limited & another* (Civil Application E092 of 2021) [2021] KECA 188 (KLR) (19 November 2021) (Ruling) is that, in deciding whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and that each case has to be considered on its own merits. This is in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of proportionality ought to be taken into account. This position was restated in the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR where this Court held that:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

16. We have considered the material placed before us and in the circumstances of this case, the order that commends itself to us and which we hereby make is that there be a stay of execution of the judgment and decree of Sifuna, J delivered on 3rd October 2024 pending hearing and determination of the intended appeal to this Court, on condition that the applicant pays to the 1st respondent Kshs 83,633,225.20 being half of the bond amount within 45 days from the date of this ruling. In default, the application shall stand dismissed and the 1st respondent will be at liberty to execute for the decretal sum. The applicant shall bear the costs of this application.

17. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (PRESIDENT)

....

JUDGE OF APPEAL

MUMBI NGUGI

....

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.