



**Patel & another v Njeru (Civil Application E073 of 2024)
[2025] KECA 186 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KECA 186 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E073 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 6, 2025**

BETWEEN

BHAVESH JAYANTIBHAI PATEL 1ST APPLICANT

JAYANTIBHAI CHATURBHAI PATEL 2ND APPLICANT

AND

HENRY PAUL IRERI NJERU RESPONDENT

*(Being an Application for stay of execution pending appeal from
the Ruling of the High Court at Muranga (Linus P. Kassan, J.)
delivered on 11th July, 2024 in H.C. Misc. Appln. No. E009 of 2024)*

RULING

1. In an application filed at the High Court of Kenya, Meru, by Henry Paul Ileri Njeru (the respondent) it was prayed in the main that he (the respondent) be granted leave to file a derivative claim on behalf of Master Macadamia (EPZ) Limited (the Company) in respect of the acts and omissions by Bhavesh Jayantibhai Patel and Jayantibhai Chaturbhai Patel (the applicants) "... involving negligence, breach, default, breach of duty and breach of trust in their capacity as directors of Master Macadamia (EPZ) Limited on such terms as the Honourable Court considers fit ..." It was also prayed that pending the hearing and determination of the application an injunction do issue restraining the applicants from selling, alienating, transferring, charging, disposing, removing or dealing with the assets of the company; that pending the hearing and determination of the application an order do issue freezing named bank accounts at I&M Bank and other accounts held by the company; that pending the hearing and determination of the derivative claim the applicants be compelled to produce detailed accounts of the books and records, banking slips, audited financial accounts, management accounts, bank statements, toll processing agreements, offer letters, bank statements of the company in the applicants possession since 2022 to date; that pending the hearing of the derivative claim the applicants be compelled to produce records of sales, receipt books, invoices and all other documents pertaining to the



company including ledger books and registers, export contracts and other payment documents; that pending the hearing of the derivative claim the applicants be suspended from exercising any authority as directors of the company; that the applicants be restricted from entering into any major transactions or making significant financial commitment on behalf of the company without prior approval by the court; that pending hearing of derivative claim the applicants be compelled to relinquish their signatory mandates and that costs of the application be provided for. It was explained in the grounds in support of that motion and in a supporting affidavit of the respondent that in a resolution passed by the company on 15th March, 2022 the applicants had been appointed as directors of the company; that they (the applicants) had then assumed full control of the company and were the only signatories to the company's bank accounts; that since assuming office the applicants had not produced any bank or books of accounts to the respondent who was a shareholder and director of the company; that Criminal Investigation Department had filed a complaint to investigate affairs of the company; that as majority shareholders the applicants were abusing their office by excluding the respondent from the affairs of the company.

2. In a ruling delivered by Kassin, J on 11th July, 2024 the Judge held that:

“ 3. Operations of the company.

It is true that the interim orders issued by Hon Lady Justice Chere must have affected the operations of the company but I do not have an explanation why the said orders didn't prompt compliance. If indeed the operations of the company were grounded, why didn't the Respondents comply?-

4. Who is affected by the interim orders?

Both the Applicants and the Respondents are likely to be affected. It is not true that only directors are affected under these circumstances. If the company becomes insolvent, each one will suffer?

5. Can failure to produce books of accounts lead to insolvency?

The answer is yes because of such failure is occasioned by malpractice, theft or illegality in operations by directors, at the end the company will fall under and so either way the interim orders and failure to provide accountability where there is malpractice, the company is likely to fail. A call for accountability is a strong voice that must be addressed forthwith especially where the voice is coming from a shareholder.”

3. The Judge found in addition, that the applicants held 40% shareholding and the respondent 30% leaving a balance of 30%. On whether the prayers in the application could be implemented the Judge found that bank records and books of account were readily available documents. In the end the application was allowed in terms of prayers 2, 4, 5 and 6 of the same the Judge concluding:

“ ... Both parties to bear own Costs and in the alternative, (depending on the parties consent), the shareholders can be directly involved in the running of the affairs of the company in the interim to save possible wastage or losses. This can be done by engaging the shareholders in every step of the company's activities including financial obligations. This to me is a case that can be resolved amicably given that both the Appellant (sic) and the Respondents stand to loose in case the company becomes insolvent.”



4. The applicants filed a notice of appeal against the whole decision and have brought a motion under rule 5 (2)(b) of the [Court of Appeal Rules, 2022](#), sections IA, IB, and 3A of the [Civil Procedure Act](#) (this latter Act has no application to applications to this Court of this nature) where it is prayed in the main that pending the hearing and determination of the motion we grant stay of execution of the said ruling “... and decree ...” It is said in the grounds in support of the application and in a supporting affidavit of the 1st applicant Bhavesh Jayantibhai Patel that the applicants are dissatisfied with the said ruling and have appealed; that they have a strong and arguable appeal but have been denied stay of execution by the High Court and may be cited for contempt of Court; they say at paragraphs (d), (e) and (f) of the Motion:

“(d) The above-referenced apprehension stems from the inability of the Applicants herein to obey the orders emanating from the ruling and decree delivered on 11th July 2024 in High Court Miscellaneous Application Number E.009 of 2024 due to their ultra-vires nature.

e. That the said orders are adverse to the Affected Company herein as is (sic) deals in the export of a highly perishable commodity, to wit, MACADAMIA which risks destruction leading to bulk losses with the running of time, not to mention a plethora of litigation from the Affected Companies’ foreign contractors that may be imminent.

f. If the order of stay of execution is not granted the Applicants application herein and the intended appeal will be rendered nugatory and otiose.”

5. They conclude by stating that if stay of execution is not granted the application and the appeal will be rendered nugatory.

6. In opposing the application, the respondent depones that the application has no merit as it does not meet the threshold for grant of an order of stay of execution pending appeal. He says that the applicants have refused to obey a court order; at paragraphs 6-9 (inclusive) of replying affidavit where he states:

“6. That any order for stay, if granted, will be to the detriment of the affected company and its shareholders, which they are ironically trying to protect while clearly demonstrating a lack of accountability and their persistent refusal to produce books of accounts and financial statements – a legal duty owed to the members of the company.

7. That as a director and shareholder of Master Macadamia EPZ Limited, I have a fiduciary duty to ensure the company’s financial integrity and transparency, which the applicants are undermining by failing to comply with court orders. The actions of the applicants jeopardize not only the company’s operations but also my personal and professional standing.

8. That the applicants’ application and the intended appeal are meant to ensure that the applicants do not provide proper books of accounts and statements, which is a breach of their fiduciary duty as directors of the Company.

9. That I have consistently adhered to legal obligations and court directives, demonstrating my commitment to transparency and the financial health of the company. In contrast, the applicants have deliberately avoided accountability,



refusing to provide the necessary financial statements, which raises serious concerns about their intentions and the potential for financial misconduct.”

7. When the Motion came up for hearing before us on 29th October, 2024 the applicants were represented by learned counsel Mr. Kaimba while the respondent was represented by learned counsel Miss Kawira. Both sides had filed written submissions which they fully relied on without finding it necessary to give a highlight of the same.
8. The applicants in their written submissions, identify for determination in the motion issues hinged on Order 42 rule 6 *Civil Procedure Rules* which as we have already seen, has no application to applications of this nature to this Court. They cite the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417, on the power of the court to grant a stay of execution. It is submitted that the respondent should have pursued an alternative dispute resolution mechanism; that a derivative suit should be brought by a member of the company acting in good faith for the benefit of the company; that the orders of the High Court should be stayed as they have crippled operations of the company.
9. The respondent, in his written submissions, cites the case of *Trust Bank Limited & Another v Investec Bank Limited* [2000] eKLR on principles that apply in an application to this Court for stay of execution pending appeal. It is submitted that the grounds raised in the motion do not raise any triable issues; that the applicants are directors of the company with custody of all required documents; that the respondent as a shareholder of the company had a right to move the High Court for the orders he sought.
10. On the nugatory aspect the respondent cites the case of *Reliance Bank Limited v Norlake Investments Limited* [2002] 1 EA 227 for the proposition that what is considered nugatory depends on whether or not what is sought to be stayed if allowed is reversible, or if it is not reversible damages will reasonably compensate the party.
11. We have considered the motion, affidavits and submissions made.
12. The principles that apply in an application for a stay of execution pending appeal are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay - *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR.
13. There is no draft memorandum of appeal annexed to the application.
14. We have looked at the motion and supporting affidavit where the applicants merely state that they risk being cited for contempt of court for disobeying orders issued by the High Court. They further say that the company deals in perishable commodity that is likely to go to waste and the company would suffer losses. We are unable to discern what is arguable on appeal. All the High Court did was to order the applicants to provide books of account and other documents relating to operations of the company to the respondent who it admitted is a shareholder and director of the company.
15. The applicants as directors of the Company are legally required to operate the affairs of the company in an accountable manner. Providing those documents would be as required in law and they would not be prejudiced in any way at all.
16. The intended appeal cannot be rendered nugatory by the applicants being accountable to the respondent who is a shareholder of the company. The applicants have not met the threshold for grant of prayers for stay of execution pending appeal. The motion has no merit and is dismissed. Let each party meet their own costs as they are all shareholders of the company.



DATED AND DELIVERED AT NYERI THIS 6TH DAY OF FEBRUARY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

