



Angela Mulwa t/a Mulwa & Partners Advocates v Mokoosio (Civil Application E733 of 2024) [2025] KECA 583 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KECA 583 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E733 OF 2024
FA OCHIENG, WK KORIR & JM NGUGI, JJA
MARCH 28, 2025**

BETWEEN

ANGELA MULWA T/A MULWA & PARTNERS ADVOCATES APPELLANT

AND

MARTIN LEMAIYAN MOKOOSIO RESPONDENT

(Being an Application for stay of execution pending the lodgment, hearing and determination of an intended appeal from the Decision of High Court of Kenya, (Mugambi, J) dated on 6th day of December, 2024 in HCCOMSIC Suit No. E250 of 2023 (O.S))

RULING

1. The underlying dispute between the parties here concerns three professional undertakings given by the applicant, in her capacity as an advocate of the High Court of Kenya, to the respondent. The professional undertaking respected a joint venture between the respondent (who owned a certain parcel of land) and a company known as HIMS Homes Limited (HHL) which acted as a developer of the land. The purpose of the joint venture was to develop and sell houses on the parcel of land. The applicant acted as a lawyer for both the respondent and HHL in the transaction. It would appear from the proceedings in the High Court that the applicant, in addition, was the director of HHL.
2. It is this (insalubrious) web of relations that gave rise to the conflict which was determined by the High Court (Freda Mugambi, J.) on 6th July, 2024. The dispute was presented to the High Court by way of an Originating Summons to enforce the professional undertakings given by the applicant to the respondent in her capacity as an advocate. The applicant resisted the enforcement of the professional undertakings primarily arguing that the professional undertakings were based on a Joint Venture Agreement (JVA) between the respondent and HHL which the respondent had maliciously prevented from full implementation. In the circumstances, the applicant argued, the professional undertakings were not enforceable.



3. The learned Judge was unpersuaded by the applicant's argument. Primarily finding that the professional undertakings given by the applicant were unambiguous; unrelated, for their enforcement, to the Joint Venture Agreement; and whose conditions for enforcement had been met. These conditions were, essentially, the receipt of purchase price from the purchasers/financiers of Units 6 and 18 of the housing development. The learned Judge having found all the conditions had been met entered judgment in favour of the respondent. If there were any breaches of the JVA among the parties, the learned Judge observed, the proper course was for the applicant to discharge the professional undertaking and then pursue any alleged breaches by the respondent afterwards.
4. Having so found, in the impugned judgment dated 19th July, 2024, the learned Judge ordered the applicant to pay to the respondent "Ksh. 16,991,428 in honoring the professional undertakings given on 4th and 13th October, 2022, together with interest calculated at commercial rates from the date of registration of units 6 and 18 until payment in full." The amount was to be paid within thirty (30) days of the High Court's judgment.
5. The applicant was aggrieved by the learned Judge's judgment of 19th July, 2024 and timeously lodged a Notice of Appeal to challenge it. At the same time, to cushion herself from the execution against the judgment, the applicant filed an application dated 6th August, 2024 before the High Court seeking a stay of execution of the judgment of 19th July, 2024.
6. The applicant was partly successful in that application. In a ruling delivered on 6th December, 2024, the High Court granted stay of execution pending the intended appeal but only on condition that the applicant deposits the entire decretal amount into an interest earning account in a reputable commercial bank, to be held by advocates for both parties to the intended appeal. The action was to be taken within thirty (30) days of that ruling.
7. The applicant is still unhappy with that partial success. She has filed an appeal against that ruling dated 6th December, 2024. Additionally, she has filed an application for stay of execution of that ruling (granting conditional stay). Her application before us is dated 23rd December, 2024 and is expressed to be brought under sections 3 and 3A of the *Appellate Jurisdiction Act*, Rule 5(2)(b) of the Court of Appeal Rules and all enabling provisions of the law. It is supported by the affidavit of the applicant sworn on 23rd December, 2024.
8. The application is opposed through the respondent's replying affidavit sworn on 23rd January, 2025. The respondent also filed Grounds of Opposition (a creature unknown in our Rules) dated 23rd January, 2025.
9. Following the directions of the Deputy Registrar, the parties filed written submissions and digest of authorities. Those for the applicant are dated 24th January, 2025. The applicant's case digest is of even date. The respondent's submissions are dated 23rd January, 2025 while his case digest is dated 26th January, 2025.
10. The plenary hearing for the application was held on 27th January, 2025. Learned counsel Mr. Kerandi appeared with Mr. Nyangena for the applicant while learned counsel Mr. Wekesa appeared with Mr. Matafu for the respondent. The learned counsel orally highlighted their written submissions and engaged with the court about various aspects of the application.
11. We have keenly read the application, the grounds in support of the application as well as the affidavit in its support. We have also read the grounds of opposition as well as the replying affidavit filed by the respondent in opposition to the application. Finally, we have read the written submissions and case authorities filed by the parties, and considered the oral highlights and representations made in Court



during the plenary hearing. We propose not to reiterate in any great detail all the parties presented in their filed documents and oral submissions. Suffice it to say that we have considered all of them most carefully.

12. Both parties agree on the principles governing the grant of the orders sought under Rule 5(2)(b) of the Court of Appeal Rules. The parties agree that in order to succeed, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules as restated in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR. The requirements are that the intended appeal must be arguable and secondly, that the intended appeal would be rendered nugatory if the preservative orders sought are not granted. All the parties also agree that in appropriate cases, the Court must consider a third aspect: the public interest. This third requirement, the parties agree, was added courtesy of the Supreme Court's decision in Gatirau Peter Munya v Dickson Mwenda Kithinji (Civil Application No. 31 of 2012) [2014] eKLR where the Supreme Court declared public interest as a "third condition ... dictated by the expanded scope of the Bill of Rights, and the public- spiritedness that run through *the Constitution*." This case was cited with approval by this Court recently in National Assembly & 47 Others v Okoiti Omtatah & 169 Others [2024] KECA 39 (KLR)(26 January 2024).
13. For reasons which will become clear soon, it is important to reproduce the prayers sought in the application verbatim. The application seeks for orders:
 1. THAT the application be certified urgent and service thereof be dispensed with in the first instance.
 2. That pending the hearing and determination of this Application, there be a stay of execution of the Ruling and Orders delivered on 6th December, 2024 by Hon. Lady Justice Freda Mugambi in HCCOMM MISC. E250 OF 2023 (OS) Martin Lemaiyan Mokoosio Vs Angela Mulwa T/A Mulwa & partners Advocates.
 3. That pending the hearing and determination of the intended appeal, there be:
 - a. An unconditional stay of execution of the Ruling and Orders delivered on 6th December, 2024 by Hon. Lady Justice Freda Mugambi in HCCOMM MISC E250 OF 2023 (OS) Martin Lemaiyan Mokoosio Vs Angela Mulwa T/ A Mulwa & Partners Advocates.
 - b. A stay of further proceedings in HCCOMM MISC E250 OF 2023 (OS) Martin Lemaiyan Mokoosio Vs Angela Mulwa T/A Mulwa & Partners Advocates.
 - c. A stay of the Arbitral Proceedings and or delivery of the Arbitral Award between Martin Lemaiyan Mokoosio and HIMS Homes Limited before Collins Namachanja.
 4. Such further interim conservatory orders as may be found fair and just by the Honourable Court, given the circumstances of this matter.
 5. That this Honourable Court be pleased to make such other or further orders as it deems just and expedient in the circumstances.
14. It is clear that the main orders sought are those in prayer (3) of the application. We must point out the curiosity of those prayers namely that the lead prayer is expressed to be a stay of execution against the ruling and order of Justice Freda Mugambi dated 6th December, 2024. As the procedural history given above has shown, the ruling and orders of Justice Freda Mugambi dated 6th December, 2024 was with



respect to the applicant's application for stay of execution against the judgment dated 19th July, 2024. In other words, the applicant seeks a stay of execution against a ruling by the High Court granting stay of execution on certain conditions.

15. While our jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules is original and can be invoked notwithstanding the fact that an applicant has previously lodged such an application before the High Court, in this case, the applicant has elected to appeal against the decision of the High Court to grant conditional stay rather than invoke the original jurisdiction of the Court to grant stay of execution against the main judgment of 19th July, 2024. The applicant is entitled to that course of action and her advocate ponderously reminded the Court so. However, in addition to the fact that the action needlessly multiplies causes before this Court (we now have two substantive appeals arising from the same controversy rather than one), additionally, strategic choices such as the one the applicant has made, have consequences – as we will demonstrate shortly.
16. The applicant is required, in the first place, to demonstrate that the appeal they intend to file is arguable. In *Stanley Kengethe Kinyanjui Case (supra)*, this Court held that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. In other words, as the cases have emphasized, this is not to say that an arguable appeal is one which has a winning argument or even one that has a likelihood of success; it is merely to say that it presents serious legal issues warranting further judicial consideration on appeal.
17. What arguable points does the intended appeal raise? It is best to let the applicant speak for herself through the Grounds in support of the application. She states:

“The intended appeal raises substantial, arguable and weighty issues of law, including but not limited to:

- a. The duty of an advocate in balancing obligations while representing both parties under a Joint Venture Agreement;
- b. The liability and duty of an advocate issuing a professional undertaking to one party in a joint venture agreement whilst also issuing a professional undertaking in favour of the other party while representing both parties to the agreement for purposes of facilitating the transactions contemplated in the Agreement;
- c. The public interest lies in determining whether an advocate's professional undertaking remains enforceable under circumstances where the advocate represents both parties to the agreement and funds were forwarded to one party in reliance on the performance of a breached Joint Venture Agreement;
- d. The effect of breached contractual terms on a professional undertaking and whether such an obligation remains enforceable;
- e. Whether an advocate's fees can be set off against a purported professional undertaking where the advocate-client relationship has been terminated.
- f. The responsibility of an advocate where monies were not retained but forwarded to a third party pursuant to obligations under a joint venture agreement.
- g. The exercise of judicial discretion by the superior court and its limits.”



18. A cursory glance at the purported arguable grounds of appeal would immediately reveal that they are not, at all, arguable grounds of appeal against the ruling and orders of Mugambi, J. dated 6th December, 2024. They may be arguable grounds of appeal against the judgment and orders of the learned Judge dated 19th July, 2024 but they are certainly not arguable points of appeal against the ruling dated 6th December, 2024. This is because, as aforesaid, the subject of the impugned ruling in the present appeal is the conditional grant of stay of execution. For the applicant to succeed to demonstrate that she has an arguable appeal against the ruling and orders dated 6th December, 2024, she needed to show that the learned Judge had somewhat abused her discretion in imposing the condition that she did. No such ground was demonstrated. A perusal of the whooping 21 grounds of appeal in the Draft Memorandum of Appeal annexed to the application fares no better. They are all salvos against the judgment dated 19th July, 2024.
19. When confronted by this fact during the plenary hearing, counsel for the applicant offered that his submissions somehow cures this defect by raising arguments against the onerous nature of the condition placed by the learned Judge. The obvious answer to that is that the applicant's submission cannot take the place of evidence required to demonstrate arguability of an appeal.
20. In short, this becomes one of the rare cases where the Court can, without much hand-wringing, reach the conclusion that the applicant has failed to demonstrate the arguability of her appeal. The reason for this failure is not too far to discern: strategic choices have consequences.
21. What about the nugatory aspect of the application? The applicant argues that she will suffer irreparable harm if a stay is not granted for three reasons: first, that the decretal sum of Kshs. 18,321,428 is colossal, and the applicant does not have the financial capacity to deposit the same as directed by the High Court; two, that the funds in question were never retained by the applicant but were forwarded to the developer in accordance with the Joint Venture Agreement; and three, that the arbitration proceedings involve a duplicity of the issues being litigated in different forums, and any final award by the arbitrator will render the appeal's outcome inconsequential.
22. It is important to recall that what is at stake here is a money decree. Moreover, it is a money decree based on a professional undertaking by the applicant. In Kenyan jurisprudence, it is generally established that courts are reluctant to grant a stay of execution for money decrees. The rationale is that monetary awards can typically be refunded if an appeal succeeds, thereby not rendering the appeal nugatory. However, exceptions exist, particularly when the appellant demonstrates that paying the decretal sum would cause substantial loss or that the respondent may be unable to repay if the appeal is successful. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] KLR 410, this Court held that:

“It is not normal for an appeal to be rendered nugatory in monetary decrees if payment is made.”
23. However, in *Ujagar Singh v Runda Coffee Estates Ltd* [1966] EA 263, the Court observed that while it is uncommon to grant a stay for money decrees, exceptions can be made if there are special circumstances, such as doubts about the regularity of the judgment or concerns about the respondent's ability to repay.
24. In the present case, the applicant argues, without impugning the authenticity of the professional undertakings given to the respondents or contesting receipts of the monies anticipated by those professional undertakings, that it would cause her uncommon difficulty to deposit the decretal amounts in court. This position can simply not hold in the face of the professional undertakings given by the applicant. Indeed, her confessed difficulties raising the amounts in the face of the professional



undertaking becomes an argument in the opposite direction because it fuels reasonable apprehension in the respondent that the applicant would be unable to pay the decretal sums after accelerating the costs of the litigation through the two appeals already filed. For this reason, we hold that the applicant has not sufficiently demonstrated that her appeal will be rendered nugatory if the ruling in question is not granted.

25. We will finally address the two prayers by the applicant seeking stay of proceedings. The first one seeks to stay the proceedings in the High Court matter from which the impugned ruling was made. For the same reasons we have declined to grant stay of execution to the ruling dated 6th December, 2024, that aspect of the prayers is denied.
26. The second prayer for stay of proceedings is against the arbitral proceedings between the respondent and HIMS Homes Limited which are before arbitrator Collins Namachanja. As the applicant's counsel readily conceded during plenary hearing, the applicant is not a party to those arbitral proceedings. As such, they cannot obtain a stay of proceedings from this Court against those proceedings. The applicant admitted that she has not even made an application to be enjoined to the arbitration proceedings. It would be truly bizarre for this Court to stay the arbitration in those circumstances.
27. The upshot is that the application dated 23rd December, 2024 is wholly without merit and it is hereby dismissed with costs to the respondent.
28. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

