



**Mwaura v Transeast Limited (Civil Application E104 of 2024)  
[2025] KECA 887 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KECA 887 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E104 OF 2024  
KI LAIBUTA, LA ACHODE & GWN MACHARIA, JJA  
MARCH 21, 2025**

**BETWEEN**

**ELIJAH CHEGE MWAURA ..... APPLICANT**

**AND**

**TRANSEAST LIMITED ..... RESPONDENT**

*(Being an application for stay of execution of the Judgement of the High Court of Kenya at Voi (Dulu, J.) delivered on 24th April 2024 in Civil Appeal No. E006 of 2023)*

**RULING**

1. The genesis of the instant application is the suit in the [Chief Magistrate's Court a Voi, being CMCC No. E071 of 2022](#), filed by the respondent, Transeast Limited against the applicant, Elijah Chege Mwaura for a material damage claim founded on negligence. The trial court found merit in the respondent's claim and, on 28<sup>th</sup> February 2023, it entered judgement in its favour for a sum of Kshs.2,544,195 plus costs and interest.
2. Aggrieved by the decision, the applicant preferred the first appeal before the High Court in Voi, being HCCA No. E006 of 2023 - Elijah Chege Mwaura vs. Transeast Limited. In a Judgment delivered on 24<sup>th</sup> April 2024, the High Court found no fault in the trial court's decision and accordingly dismissed the applicant's appeal.
3. Further dissatisfied, the applicant is now before this Court on a second appeal, which was commenced vide a Notice of Appeal dated 29<sup>th</sup> April 2024 and a letter bespeaking proceedings of even date. Separately, he has filed the instant Notice of Motion dated 16<sup>th</sup> September 2024, which is brought under rule 5(2) (b) of this Court's Rules, 2022 and sections 3A and 3B of the [Appellate Jurisdiction Act](#). He prays that the Court issues injunctive orders restraining the respondent, its agent or any other person acting under its instructions or for its benefit from attaching, seizing and selling the applicant's goods pending hearing and determination of the appeal, and for costs.



4. We hasten to add that, although in the caption to the title of the application the applicant indicates that the application seeks stay of execution, as stated above, the body of the application seeks injunctive orders. We shall revert to this issue later on in this ruling.
5. In his supporting affidavit sworn on 16<sup>th</sup> September 2024, the applicant reiterated the background to the appeal before this Court as we have summarised above. He further deposed that the intended appeal has high chances of success, and that it is arguable on 7 grounds of appeal, amongst them being that: the learned Judge erred in failing to hold that the testimony of the police on liability was hearsay evidence incapable of proving negligence; the award of special damages was made arbitrarily without due regard to binding judicial precedence; and that the learned Judge erred in failing to hold that the respondent bore the initial burden of proof, and that it failed to discharge this burden by failing to call the driver of the suit motor vehicle as a crucial witness.
6. On whether the intended appeal would be rendered nugatory if orders of injunction are not granted, the applicant deposed that there is an imminent threat of execution as the respondent instructed the firm of ICON Auctioneers on 12<sup>th</sup> September 2024 to commence the attachment proceedings through warrant of attachment and notice of proclamation of his goods, which were served upon him; that the decretal sum stood at Kshs.3,503,625.60 plus the Auctioneer's fees; that, his goods are due for removal on 19<sup>th</sup> September 2024; and that, therefore, if the orders sought are not granted, the intended appeal will be rendered an academic exercise.
7. The applicant further deposes that the respondent will suffer no prejudice if the application is allowed since it can be compensated by way of costs and interest if the appeal fails to succeed.
8. Opposing the application, the respondent filed a replying affidavit sworn by one Noel Mwamlamba, its Insurance Officer, on 4<sup>th</sup> November 2024. He deposed that the applicant has not demonstrated what substantial loss he is likely to suffer if the decretal sum is paid to his insurer; that the applicant had already paid a sum of Kshs.200,000 towards settling the decretal sum; and that, where the subject matter is a decree for payment of a quantifiable sum of money, the sum ought to be paid unless the applicant can demonstrate that the respondent is not able to pay back the decretal sum if the appeal against him succeeds; that the respondent is financially stable and it can refund the decretal sum in the event that the appeal succeeds; that the applicant has not satisfied the conditions set out for grant of stay of execution pending appeal; and that the application should be dismissed with costs.
9. We heard the application on 11<sup>th</sup> November 2024. Learned counsel Mr. Kioko appeared for the applicant while learned counsel Mr. Maina appeared for the respondent.
10. In highlighting the applicant's submissions dated 3<sup>rd</sup> October 2024, Mr. Kioko referred to the cases of NIC Bank Limited & 2 Others vs. Mombasa Water Products Limited (2021) KECA 481 (KLR) and Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (2013) eKLR on this Court's jurisdiction in applications brought under rule 5(2) (b). On the arguability of the appeal, he submitted that amongst other grounds to be urged was whether the evidence tendered at trial on liability was admissible given that the key witness whose evidence would have discharged this burden was not called to testify.
11. On the nugatory limb, it was urged that, once the respondent executes the impugned judgment whose decretal sum is estimated at Kshs.4,000,000, and in the event that the appeal is successful, the respondent will not be able to refund the money since its financial means is unknown; and that his motor vehicle had been attached by the auctioneers. Counsel relied on the case of Kiptoo vs. Hamadi & 292 Others (Civil Appeal E034 & E036 of 2021 (Consolidated) [2024] KECA 674 (KLR) (25 January 2024) (Judgment) for the proposition that, whether or not an appeal will be rendered nugatory



depends on whether or not what is sought to be stayed if allowed to happen is reversible; or, if it is not reversible, whether damages will reasonably compensate the party aggrieved.

12. On his part, Mr. Maina highlighted the respondent's submissions dated 4<sup>th</sup> November 2024. He submitted orally in Court that there is no substantial loss that will be suffered by the applicant given that, on 18<sup>th</sup> October 2024, he paid Kshs.1,000,000 towards settling the decretal amount through his insurance, Kenya Orient.
13. Having considered the application, the oral and written rival submissions by both parties, the authorities cited and the law, we deduce that the only issue that commends for our determination is whether the applicant has satisfied the conditions for grant of the orders sought under rule 5(2) (b) of this Court's Rules.
14. It is now settled law that the principles that a party is required to satisfy for an application seeking an injunctive order are similar to those required where a party is seeking stay of execution or stay of proceedings, which applications are all brought under this Court's rule 5(2) (b). It is for this reason we find and hold that, although the applicant indicated in the title of the Motion that he is seeking stay of execution, but the substantive prayer reads that he seeks injunctive orders, does not divest us of jurisdiction to consider the application. We nonetheless emphasise the need to be diligent with consistency whilst drafting pleadings as, in other instances, it could cost a party an order in a well-deserved circumstance.
15. The twin principles are that: the applicant must demonstrate that he/ she has an arguable appeal; and, secondly, that, if the order sought is not granted, the appeal or the intended appeal will be rendered nugatory. This Court in *Najib Balala & 13 Others vs. David M. Githere & 9 Others* (2005) KECA 139 (KLR) summarized the principles as follows:

“The principles for granting an order of stay of proceedings; stay of execution or an order of injunction in this Court pending appeal are well known. Before the Court can exercise its unfettered discretion in favour of the applicants, the applicants have to satisfy the court, among other things, that the intended appeal is arguable; that the appeal is likely to be rendered nugatory unless the order of stay of execution is granted and that the respondents will not suffer undue prejudice if the order of stay is granted.”

16. An arguable appeal is one which is not frivolous. Even a single bona fide ground of appeal is enough to render the appeal arguable. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (2013) KECA 378 (KLR). We have enumerated some of the grounds that the applicant intends to front in the intended appeal. In our view, they are not idle. It matters not whether he will succeed in the appeal; to us, they are arguable. We shall say no more under this limb lest we embarrass the hearing of the main appeal.
17. On the second limb, the consequential effect for failure to grant the interim relief sought would result to the appeal being rendered nugatory as was held by this Court in *Estate of Harish Chandra Hindocha (Deceased)* (2021) KECA 1068 (KLR). Further that, if we do not grant the injunction, the effect will be to cause substantial loss on the applicant's part as was held by this Court in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* (1986) KECA 94 (KLR) that:

“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”



18. The subject issue in this appeal is a money decree premised on the doctrine of subrogation. The applicant contended that the respondent will be unable to pay back the decretal sum should the judgement be satisfied. The respondent averred that it is dishonest for the applicant to seek stay orders while there was part payment of the decretal sum. It was also averred that the respondent is a corporation with financial stability which can refund the decretal sum in the event that the appeal succeeds.
19. Once an applicant alleges that there is a remote possibility that the decretal amount cannot be refunded, he/she bears the sole obligation to prove that the respondent will not be able to pay. To merely assert that one party will not be able to pay the decretal sum is not enough. See National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another (2006) KECA 333 (KLR).
20. Unfortunately, the applicant has simply made a blanket statement that the respondent will not be able to repay the amount. Noting that the applicant's insurance company has started payment of the decretal sum, we are unable to see how the applicant anticipated he will suffer any prejudice if he was already satisfying the decree.
21. Be that as it may, it would be remiss of us not to point out the fact that injunctive relief pending appeal is usually sought to preserve the subject matter of the appeal without which its substratum would be eroded. That is not the case here. To pray for an injunction to restrain execution is an indirect way of seeking stay of such execution, which is in itself an anomaly for which the instant Motion is incompetent.
22. That said, the grant of orders under rule 5(2) (b) of this Court's Rules is discretionary. An applicant must satisfy the twin conditions which operate conjunctively. Having failed to satisfy both limbs ultimately means that the application must fail. In the end, the Notice of Motion dated 16<sup>th</sup> September 2024 is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**G. W. NGENYE MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

