Ndwati v Nakachi & another (Civil Application E598 of 2024)
[2025] KECA 502 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 502 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E598 OF 2024

W KARANJA, WK KORIR & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

PETER KENNETH CHEGE NDWATI ..... APPLICANT

AND

PRAXEDES NAKACHI ..... 1ST RESPONDENT

CENTRIC AIR AMBULANCE ..... 2ND RESPONDENT

(Being an application for stay of execution of the Ruling and Orders of the Employment and Labour Relations Court at Nairobi (Abuodha, J) delivered on 22nd October 2024 in ELRC Cause No. E614 of 2021)

RULING

1. On 9th December 2024, we dismissed the Notice of Motion dated 5th November 2024 and reserved our reasons which we hereby give.

2. In the said Motion, the applicant sought orders that pending the hearing and determination of the intended appeal, this Court be pleased to grant an order of stay of execution of the ruling and orders of the Employment and Labour Relations Court at Nairobi made by Abuodha, J. on 22nd October 2024 in Cause No E614 of 2021.

3. The applicant's case was: that by way of a Memorandum of Claim dated 30th July 2021, the 1st respondent instituted a suit against the 2nd respondent complaining about the withdrawal of his salary; that after hearing the said Claim, judgement was delivered in favour of the 1st respondent against the 2nd respondent; that although the applicant was not initially a party to those proceedings, by an application dated 19th June 2023, the 1st respondent moved the court seeking that a Notice to Show Cause issue against the applicant and in its ruling dated 5th December 2023, the court allowed the said application; that by an application dated 13th February 2024, the 1st respondent sought orders that the applicant

shows cause why he should not be committed to civil jail for failure to settle the decretal sum; that the applicant was then joined to the proceedings as an interested party and responded to the application by way of a replying affidavit and submissions; and that by a ruling delivered on 22nd October 2024, the learned Judge allowed the application and ordered the applicant to physically appear in court on 10th December 2024 to show cause why he should not be committed to a maximum of 6 months in civil jail.

4. The applicant believed: that the learned Judge erred in law in ignoring his affidavit evidence as well as his submissions hence violated his rights to fair hearing; that the learned Judge erred in erroneously basing his decision on the premise that the applicant had been found guilty of engaging in fraud and that corporate veil had been lifted; that since the applicant had already shown cause, the court appearance for 10th December 2024 would have been solely for the purpose of committing him to jail in perpetuation of a miscarriage of justice; that the intended appeal is arguable and has high probability of success; and that should this Court not intervene, the applicant risked being committed to civil jail hence rendering the intended appeal nugatory.

5. In reply to the application, the 1st respondent averred: that applicant was the sole director of the 2nd respondent at the time of the institution of the Claim before the trial court and is still the 2nd respondent's sole director; that after the delivery of the judgement, which was never challenged, the decree and certificate of costs were extracted and served upon the applicant in his capacity as the 2nd respondent's sole principal officer; that upon failure to settle the decree, the 1st respondent applied for Notice to Show Cause against the applicant why he should not be committed to civil jail for wilful disobedience to comply with the judgement; that the applicant appointed the same counsel who was on record for the 2nd respondent and upon coming on record for the applicant, the said counsel applied to cease acting for the 2nd respondent; and that the applicant opposed the Notice to Show Cause and by a ruling delivered on 5th December 2023, the court allowed the application.

6. It was the 1st respondent's position: that the effect of allowing the application was the lifting of the 2nd respondent's veil of incorporation and making the applicant personally liable for the indebtedness of the 2nd respondent; that in arriving at its decision, the trial court found that the applicant had engaged in fraudulent activities meant to obstruct the enjoyment, by the 1st respondent, of his fruits of judgement; that since the applicant did not challenge that decision, the order was extracted and served upon the applicant who failed to comply therewith; that by an application dated 13th February 2024,the 1st respondent applied to have the said ruling enforced to which the applicant responded by filing a replying affidavit and submissions; that it was through the said responses that the applicant was introduced into the proceedings as an interested party without any application being made to that effect; and that in his ruling delivered on 22nd October 2024, the trial court was not persuaded by the applicant's response.

7. It was further contended: that the applicant, having not been joined to the proceedings as an interested party, lacked the legal capacity to appeal against the said decision; that the applicant ought to have appealed against the decision of 5th December 2023 which made him liable for the decree against the 2nd respondent; that the applicant was heard at every stage of the proceedings; that the application is premature and based on the apprehension that the applicant would be jailed on 10th December 2024; that stay can only be granted where a final order has been made hence it would be futile and embarrassing; that without appealing against the decision that lifted the corporate veil of the 2nd respondent, the application is frivolous, vexatious and an abuse of the court process; and that should this Court be inclined to grant a stay, the same should be granted on condition that the applicant provides security for the appeal.

8. When the application was called out for the virtual hearing of the Notice of Motion dated 5th November 2024 on 9th December 2024, learned counsel, Mr. Victor Obondi, appeared for the applicant while learned counsel, Mr Lwande, held brief for Mr Oningo for the 1st respondent. Despite due service of the hearing notice, the 2nd respondent, who had not filed any submissions, was not represented. Learned Counsel for the applicant and the 1st respondent substantially relied on their written submissions.

9. It is trite law that in an application of this nature an applicant must satisfy the Court that the appeal or intended appeal, as the case may be, is arguable and that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR. An applicant need not prove a multiplicity of arguable grounds as even one bona fide ground will suffice.

10. Having perused the impugned judgment and considered the proposed grounds of appeal as highlighted in the applicant's affidavit in support of his application as well as the submissions of learned counsel, we were not satisfied that the intended appeal is arguable. The applicant's challenge in the intended appeal, we were informed, will be directed towards the decision holding him liable for the indebtedness of the 2nd respondent. To our mind, that decision was made on 15th December 2023 when the trial court made a ruling calling upon him to show cause why he cannot be found in contempt for failure to settle the 2nd respondent's indebtedness. Whether or not that decision was correct is not the subject of the intended appeal the subject of this application. The trial court having made that decision, without successfully challenging it, the challenge to the subsequent decision, even if successful, will leave that crucial decision intact and any such success would be inconsequential. Accordingly, we are not satisfied that the intended appeal is arguable.

11. For the applicant to succeed in this application it was incumbent upon him to satisfy us on both limbs of the application (see Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31; Reliance Bank Ltd v Norlake investments Ltd [2012] 1 EA 22). Since we were not satisfied on the first limb, there was no need for us to consider the second limb.

12. It was on that basis that we dismissed the application with costs.

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

W. KARANJA

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR