



REPUBLIC OF KENYA



KENYA LAW

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Board of Management Kaimosi Teachers Training College v Pambazuka Builders Construction Company Limited & another (Civil Application E263 of 2024) [2025] KECA 662 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 662 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E263 OF 2024
HA OMONDI, LK KIMARU & AO MUCHELULE, JJA
APRIL 11, 2025

BETWEEN

THE BOARD OF MANAGEMENT KAIMOSI TEACHERS TRAINING COLLEGE APPLICANT

AND

PAMBAZUKA BUILDERS CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

DESMOND SHIVACHI 2ND RESPONDENT

(Being an application for stay of execution from the judgment of the High Court of Kenya at Vihiga (J. Kamau, J.) dated 30th September 2024 in HCCC No. E010 of 2021)

RULING

1. The application before this Court is the Notice of Motion application dated 13th November 2024 brought pursuant to rule 5(2)(b) of the *Court of Appeal Rules, 2010*; seeking an order to stay the execution of the decision and orders in Vihiga HCCC No. E010 of 2021 pending hearing and determination of the appeal.

The application is supported by the affidavit of even date, sworn by Revered Ephraim Konzolo, the chairman of the applicant. The basis for seeking these prayers is the applicant's apprehension that the existence of the appeal does not automatically act as stay of execution of the judgment of the superior court and if the orders sought for are not granted the respondent will levy execution, leading to irreparable loss which would affect the applicant's operations; and would render the appeal nugatory, yet the applicant has an arguable appeal.

2. The application is opposed through a replying affidavit dated 22nd December 2024 sworn by Desmond Mmalenje Shivachi, the 2nd respondent; arguing that the applicant has not demonstrated an arguable



appeal; and that it is the applicant's intention to further delay the settlement of the decretal sum, thus denying the applicant a chance to enjoy the fruit of the judgment; that the applicant has also failed to show how its appeal would be rendered nugatory nor has it shown that it will not be able to pay the decretal sum should the appeal succeed and further that the applicants are utilizing the building that was the subject of the construction contract and as such are having their cake and eating it.

3. In support of this position, the respondent alludes to the genesis of the dispute, explaining that in the year 2017, the respondents applied for, and were awarded a tender to construct a multi- purpose hall and a kitchen for the applicant's training college. The respondents moved into the site, deposited building materials and commenced construction; that payment was to be effected by the applicant after the raising of periodic certificates and that after some time the applicant did not honor the said certificates prompting cancellation of the contract which resulted in the respondents losing over Kshs.31 million. Consequently, the respondents filed suit seeking orders of specific performance of the contract, namely payment of over Kshs.31 million; and judgment was entered in their favor for Kshs.7,000,000/-. As far as the respondent is concerned, the writing is clearly on the wall; and there is nothing to argue about in the appeal. We are thus urged to dismiss the application.
4. Has the applicant satisfied the requirements necessary for granting an order for stay of execution? This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in 5(2)(b) the applicant has to establish that:
 - i. The appeal is arguable,
 - ii. the appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.
5. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
6. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. For example, this Court in the case of *Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
7. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
8. Is the Appeal arguable? On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant



in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR where this Court described an arguable appeal in the following terms:

- “vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
- viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

9. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view the appeal is arguable inter alia whether the Court erred in failing to consider the applicant's counter claim dated 30th May 2023. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

10. Will the appeal be rendered nugatory should stay not be granted?

This Court held in the case of *Reliance Bank Limited vs Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

11. In the case of *African Safari Club Limited vs. Safe Rentals Limited*, [2010] eKLR, this Court held:

“...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.”

12. In short, the court is to decide which party's hardship is greater.

With that in mind, we are not persuaded that the appeal will be rendered nugatory, as the applicant is already utilizing the building constructed by the respondents having failed to pay for the same. The discretion of the court on an application of this kind must be exercised upon the established principles which require the applicant to satisfy the court that the appeal is arguable and that unless the order sought is granted, the appeal if successful would be rendered nugatory.

13. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the respondents having won the tender proceeded and constructed a multi-purpose hall for the applicant and the same is in use by the applicant's students, a fact that has not been refuted. The applicant is concerned that the respondent is not financially capable of refunding the decretal amount should the appeal succeed and that the appeal will be rendered nugatory. By parity of reasoning, the respondents will lose the money used in completing the tender. The applicant on the other hand is in use of the completed multi-purpose hall despite not paying the respondents. The upshot, the applicant has failed to prove the second limb of the Rule 5(2)(b).

14. Consequently, the applicant has failed to satisfy the twin principles for grant of an order of stay. Accordingly, the application dated 13th November 2024 fails and is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF APRIL, 2025.



H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

