



REPUBLIC OF KENYA



**Julius v Motrex Limited & another (Civil Application
E091 of 2024) [2025] KECA 895 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 895 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E091 OF 2024
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MAY 23, 2025**

BETWEEN

NDURUHU JULIUS APPLICANT

AND

MOTREX LIMITED 1ST RESPONDENT

NYERI MOTOR SERVICES LIMITED 2ND RESPONDENT

*(An application for stay of execution of the judgment and decree of
the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on
9th February, 2018 in Mombasa High Court Civil Case No. 84 of 2010)*

RULING

1. The Applicant, Nduruhu Julius' Notice of Motion dated 26th July 2024 is brought pursuant to Rules 5 (2) (b) of the Court of Appeal Rules, 2022; and sections 3A and 3B of the [Appellate Jurisdiction Act](#), seeking, inter alia, orders that pending the hearing and determination of the appeal known as, Mombasa Court of Appeal Civil Appeal No. E152 of 2024 Nduruhu Julius v Motrex Limited & Another, an order of stay of execution of the judgment delivered in the High Court be issued; and that the costs be in the appeal.
2. The Applicant's Motion was brought on the grounds that, by a Judgment delivered on 9th February 2018, the High Court ordered the Applicant to pay Kshs. 4,949,318.56 together with interest and costs to the 1st respondent, Motrex Limited, following an accident that occurred between the Applicant's motor 'vehicle registration No. KBJ 631E and the 1st Respondent's motor vehicle registration No. KBE 568U/ZC 9580. The Applicant filed a Notice of Appeal on 9th March, 2018, and by a consent order made between the parties on 9th July 2019, the Applicant was granted sixty (60) days to file the Record of Appeal in this Court. The Applicant applied severally to be supplied with certified copies



of the proceedings, which were eventually supplied on 9th July, 2024. Thereafter, he filed the Record of Appeal on 25th July, 2024.

3. The Applicant contended that he has a strong and arguable appeal and that, unless the application is granted, the appeal will be rendered nugatory. He also averred that he was willing to provide reasonable security.
4. The Application is supported by the Applicant's affidavit in which he reiterates the grounds of the motion, and further depones that, in the High Court, the 1st Respondent stated that its motor vehicle had been rendered completely written off and it claimed an award of Kshs. 7,025,100; that, it later emerged that the 1st Respondent's motor vehicle was written off and its claim for the total loss was not sustainable; that the 1st respondent is a limited liability company whose assets are unknown; and that, Kshs. 6,749,529.72 is a huge sum of money which, if paid, the 1st Respondent would not be in a position to refund in the event the appeal were to succeed.
5. It was deponed that the Applicant is ready and willing to pay the 1st Respondent Kshs. 2,120,600 and has already paid Kshs. 1,000,000 following the consent order dated 9th July, 2019 and, additionally, he was willing to deposit in court a logbook of one of his motor vehicles, to wit, registration No. KCW 028V make MAN bus as security valued at Kshs. 7,000,000; that the Applicant is apprehensive that the 1st Respondent will instruct auctioneers to execute the impugned Judgement and he will suffer irreparably because his motor vehicles are used for transportation of passengers and removal of any one of them would affect the transport operations resulting in loss of business, reputation and income.
6. Annexed to the application is a Memorandum of Appeal raising the grounds that the learned trial Judge was in error in awarding the 1st Respondent cost of repair of Kshs. 4,949,318.56, which was never pleaded by the 1st Respondent, and that the Judge misapplied the legal principals and judicial precedent applicable to the dispute; that parties are bound by their pleadings, and the 1st Respondent ought not to have been awarded an amount that was not pleaded; and, further, that the learned Judge in failing to consider the evidence on record therefore arrived at a wrong finding on quantum.
7. In response, the 1st Respondent filed a Replying affidavit sworn by Richard Mwaniki, its Operations Manager, in which he deposed that the application is res judicata and cannot be granted in view of the consent order dated 12th July 2019, which concluded the issue of stay of execution pending appeal in this matter which issue, cannot be raised again; that this Court does not have power to interfere with or override a consent willfully entered into by the parties, unless the consent is set aside; that this is not the first time the Applicant has attempted to circumvent the consent order after failing to comply with the timelines set out for filing the appeal; that, by the application dated 11th October 2019, the Applicant sought stay of execution after failing to comply with the consent in full, and thereafter, 1st Respondent reactivated the execution process; that, by a ruling dated 4th February 2020, the High Court dismissed the Applicant's application, holding that it was res judicata, and that the court could not interfere with the consent order; and that the Applicant has not appealed against the trial court's ruling on stay of execution, which remains binding on him. It was further averred that the Applicant's appeal is against the Judgment of 9th February 2018, and not against the ruling on stay of execution, and that the Applicant has filed three other similar applications for stay of execution dated 17th September 2020, 6th September 2022 and 15th November 2023, all of which were dismissed by the trial court.
8. Finally, it was deponed that this application is a gross abuse of the court process as it does not satisfy the threshold requirements necessary for grant of the orders of stay of execution sought.
9. Both parties filed written submissions. When the application came up for hearing on the Court's virtual platform, learned counsel for the Applicant, Mr. Kabebe holding brief for Mr. Gikandi,



submitted that the application is not res judicata by reason of the consent order recorded on 12th July, 2019. This is on account of the fact that, under section 7 of the Civil Procedure Act, res judicata does not exist unless the matter in issue was substantially and directly in issue in a previous suit, and was determined by a court of competent jurisdiction. In this regard, the application for an order of stay of execution that was dealt with by the trial court under Order 42, Rule 6 of the Civil Procedure Rules, 2010 involved consideration of ingredients that are very different from the ingredients that are applicable under Rule 5(2)(b) of the Court of Appeal Rules, 2022. Counsel submitted that the appeal raises triable issues, especially on the grounds that the trial Judge awarded damages not pleaded; and that the court also disregarded a report by the appellant's assessor, which estimated the repair costs at Kshs. 2,120,600.

10. On the nugatory aspect, it was submitted that the 1st Respondent is a limited liability company, whose assets and financial capabilities are unknown to the Applicant, and that the amount of Kshs. 4,949,318.56 together with interest and costs is a huge sum of money, which the Applicant is apprehensive will be irrecoverable, which would render the appeal nugatory.
11. On their part, learned counsel for the 1st Respondent, Mr. K'Bahati, reiterated the contents of the Replying Affidavit that the consent order fully and finally determined the issue of stay of execution pending appeal in this matter, and that the same issue cannot be raised before this Court; that, further, all the rulings for stay filed after the consent order were res judicata, and that this Court has no powers to grant any of the prayers sought because to do so would amount to overriding or interfering with the consent order; that the appeal is fatally defective and patently incompetent since it is filed out of time in contravention of the consent order dated 12th July 2019, which required the appeal to be filed within 30 days of filing the consent; and that the application is devoid of merit and was only meant to obstruct justice and delay the realization of the judgment.
12. With regard to the nugatory aspect of the appeal, counsel submitted that the Applicant has merely alleged, without any facts, that the 1st Respondent would not be in a position to repay the decretal sum in the event the appeal succeeds; that no evidence was produced to shift the burden to the 1st Respondent; and that, in any event, the 1st Respondent has demonstrated that it is a large transnational logistics and transport business that would not be unable to refund the amount which, in any case, is not that substantial.
13. We have considered all the material placed before us. We remind ourselves that the purpose of applications brought under Rule 5(2)(b) of this Court's Rules, 2022 is to issue interlocutory orders and not to give any dispositive orders that might render the substantive appeal nugatory.
14. Before addressing the application for stay of execution, the 1st Respondent has raised various issues that we ought to address at the outset. First, there is the issue as to whether this application is res judicata in the face of the numerous applications for stay of execution filed before the High Court; secondly, whether the Notice of Appeal filed is in respect of the judgment or the ruling on stay of execution by the High Court; and thirdly, whether this Court has jurisdiction to entertain the application in light of the consent entered into by the parties.
15. Regarding the question of res judicata, and whether this Court has jurisdiction to entertain the application in view that a consent was entered in the High Court by the parties, we have stated time and again that the exercise of this Court's jurisdiction is original, independent and discretionary (See Githunguri v Jimba Credit Corporation Ltd No (2) [1988] KLR 838). An application under Rule 5(2) (b) of this Court's Rules is a necessary intervention to enable the preservation of the subject matter of the appeal or intended appeal prior to the appeal being determined. (See Equity Bank Ltd v West Link Mbo Limited [2013] eKLR).



16. With respect to the Notice of Appeal filed, it is trite that the filing of a Notice of Appeal is a prerequisite to the grant of stay under Rule 5(2)(b) of the *Court of Appeal Rules*. However, at this point, the Court is not concerned with the validity or otherwise of that Notice of Appeal since the rule does make reference to a valid Notice of Appeal. See *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR.
17. In view of the foregoing considerations, there is nothing that prevents this Court from determining this application. As a consequence, we turn to consider whether the Applicant is entitled to the reliefs sought.
18. As stated above, the instant motion has been brought under Rule 5 (2) (b) of this Court's Rules. The principles that guide this Court in determination of an application under Rule 5 (2)(b) of this Court's Rules are well settled to wit; an applicant must demonstrate that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR; and *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR. See also the case of *Multimedia University & Another v Professor Gitile N. Naituli* [2014] eKLR.
19. An arguable appeal need not raise a multiplicity of points, but a single arguable point is sufficient to satisfy the first limb. See *Damji Premji Mandavia v Sara Lee Household & Body Care (K) Limited*, Civil Application No. Nai.345 of 2005 (UR); *Kenya Railways v Ederman Properties Ltd*, Civil Appeal No. Nai 176 of 2012; and *Ahmed Musa Isamel v Kumba ole Ntamorua & 4 others*, Civil Appeal No. Nai 256 of 2013.
20. As to whether the appeal is arguable, the Applicant has argued that the learned trial Judge was in error in awarding the 1st Respondent the cost of 'repair of Kshs. 4,949,318.56 which was never pleaded, and in failing to evaluate and analyse the evidence on record thereby arriving at a wrong conclusion on quantum.
21. Our consideration of the grounds raised would lead us to conclude that the issues are not trifling or idle. The merit would warrant that they be ventilated before this Court. In addition, we have variously stated that, where a complaint is raised that the trial court failed to evaluate the evidence, then such ground is considered to be arguable. In view of what we have said, we are persuaded that the intended appeal is arguable.
22. On the nugatory aspect, the Applicant claims that the amount involved is colossal, and that there is no guarantee that the 1st Respondent will be in a position to refund the amounts paid pursuant to the Judgment. On the other hand, the 1st Respondent describes itself as a large transnational logistics and transport business that would not be incapable of refunding the amount paid which, in its view, is not "...that substantial".
23. This being a money decree, and the 1st respondent having stated that it is capable of refunding the decretal amount in the event that the Applicant's intended appeal were to succeed, we find nothing to suggest that such an appeal, if successful, would be rendered nugatory absent the stay orders sought.
24. In sum, we reach the conclusion that the Applicant has failed to satisfy the conjunctive limbs of the twin principles for grant of the stay orders sought under Rule 5(2) (b) of the Rules of this Court. Consequently, the Applicant's Motion dated 26th July 2024 fails and is hereby dismissed. Costs in the appeal.

It is so Ordered.



DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

A. K. MURGOR

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA CARb, FCIArb.

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

