



REPUBLIC OF KENYA



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**Mugambi v Galaxy Merchants Limited (Civil Appeal (Application)
E071 of 2024) [2025] KECA 1007 (KLR) (2 May 2025) (Ruling)**

Neutral citation: [2025] KECA 1007 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E071 OF 2024
J MOHAMMED, JW LESSIT & A ALI-ARONI, JJA
MAY 2, 2025**

BETWEEN

KENNETH MUTEMBEI MUGAMBI APPELLANT

AND

GALAXY MERCHANTS LIMITED RESPONDENT

*(Being an application for stay of execution and proceedings from the
Judgment of High Court of Kenya at Meru (Murithi, J.) dated and
delivered on 29th February, 2024 in H.C.C.A. No. E042 of 2022)*

RULING

1. In this application which is dated 28th October 2024, and brought under Rule 5 (2)(b) of the [Court of Appeal Rules, 2022](#), the applicant, Kenneth Mutembei Mugambi seeks: Moot; That the Honourable Court be pleased to order for a stay of execution in the High Court Civil Case No. 20 of 2017 and the judgment of Hon. Edward M. Murithi, J. at Meru delivered on the 29th February 2024, in HCCA No. E042 of 2022, pending the determination of the appeal and Costs of the suit to abide.
2. The application is supported by grounds on the face of the application and in the supporting affidavit sworn by the applicant of even date. The applicant avers that on the 29th February, 2024 the High Court at Meru in Civil Appeal No. EO42 of 2022 (HCCA) allowed the respondent, Galaxy Merchants Limited, to proceed with the execution for the recovery of a money decree arising from Chief Magistrates Civil Case No. 40 of 2014 (CMCC) and HCCA No. 20 of 2017 respectively. That the respondent proceeded to commit him to civil jail for a period of six months using the lower court file CMCC 40 of 2014. That at the same time, it filed an application for notice to show cause in HCCA 20 of 2017 but did not prosecute it.
3. The applicant avers that he served the six months' civil jail term, and that the respondent intends to commit him to a further jail term of six months, this time using HCCA 20 of 2017 to compel him to



pay the costs of that suit, and that it has taken out a date for the hearing of the pending application for Notice to show cause, slated for the 5th December 2024.

4. The applicant further avers that he was declared insolvent under the *Insolvency Act* and was challenging the propriety of the respondent's action to execute against him. Under these circumstances, his appeal raises substantive legal matters that are not frivolous, and warrant the intervention of this Court. He urges that if the respondent is allowed to proceed with execution and it commits him to a further civil jail term, then there would be no doubt at all that this would be escalating an already bad situation because he tendered credible evidence of his insolvency status which clearly shows his inability to pay the respondent. He averred that he has already suffered much prejudice due to the six months' civil jail incarceration at the Meru Main GK Prison, but that the respondent herein wishes to further compound a bad situation by committing him to civil jail yet again.
5. The applicant further averred that he had reliable information that the respondent closed its business, and even though it declares that it has the ability to compensate him should his appeal succeed, he would still be greatly prejudiced and punished with continuous and undeserved incarceration in civil jail.
6. The application is opposed. The respondent has filed a replying affidavit, sworn by its Director, Mr. Vivit Arvind Salva dated 22nd November 2024. He avers that the application is res judicata as a similar application by the applicant was made in HCCA No. E029 of 2024 which was dismissed. He explains that the initial judgment was in CMCC No. 40 of 2019 which was entered in the respondent's favour for goods obtained and not paid for as the payment cheques issued by the applicant bounced; that it remains outstanding in the sum of Kshs.4,496,343/14. He stated that the applicant filed an appeal against the decision of CMCC No. E042 of 2022, which was dismissed.
7. The respondent averred that as the judgment appealed from was a negative order, there was nothing to stay, and secondly, being a money decree, the appeal cannot be rendered nugatory. It averred that the respondent was a successful business and capable of reimbursing the applicant if the appeal succeeds. Mr. Muriuki invoked the case of *African Safari Club Ltd v. Safe Rentals Ltd* [2010] eKLR for the proposition that as the respondent was able to reimburse the decretal sum if the appeal succeeded, the Court should order the applicant to pay the decretal amount as a condition for the issuance of the stay sought. The respondent urged that the application was seeking stay of two judgments of the High Court, which it averred was not proper. Finally, the respondent urged us to balance the interest of the applicant and the respondent. It was averred that the respondent stands to suffer greater hardships, and for that proposition relied on the case of *Corporate Insurance Co. Ltd v. Hurlingham Park Ltd* [2023] eKLR.
8. We heard the application virtually on the 9th December 2024, through this Court's virtual platform. The applicant was present in person, while learned counsel Mr. Kenneth Muriuki represented the respondent. Both parties had filed their written submissions, and they briefly highlighted them.
9. We have given due consideration to the application together with the supporting affidavit, the respondent's replying affidavit, the rival submissions and the authorities relied thereon and the applicable law. We continue to emphasize that to merit an order of stay, an applicant must satisfy the Court that first, he has an arguable appeal, which means one that raises a bona fide point worthy of consideration, though it must not necessarily succeed and; second, that if the stay is not granted the appeal, if successful, would be rendered nugatory. See. *Stanely Kang'ethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR.
10. This application seeks to stay a money decree, however there is more, the issue of the execution process and the incarceration of the applicant. The issue is whether there is an arguable appeal. Mr. Muriuki



for the respondent has urged that the application is res judicata by virtue of an earlier application he had filed in HCCA No. E029 of 2024. We have considered that matter and found that the applicant's application was dismissed on a technicality for having applied for stay of the trial court's judgment as opposed to stay of the High Court matter. Further, all the cases mentioned by the parties in this application all emanate from the same trial before the Chief Magistrates' Court, CMCC No. 40 of 2014, and are based on the same debt. In regard to the HCCA No. E029 of 2024, we are satisfied that as the application was not determined on merit, section 7 of the Civil Procedure Act does not apply. See The Independent Electoral & Boundaries Commission v. Maina Kiai & 5 Others, [2017] eKLR),

11. The respondent has challenged the appeal, the subject matter of this application as being against two judgments of the High Court and wondered whether it was a proper appeal. Before we answer this we want to emphasize that an application under rule 5 (2)(b) is not an appeal. This Court in Equity Bank Limited v. West Link MBO Limited, Civil Application No. 78 of 2011 (UR 53/2011), Githinji, JA. remarked:

“.....an application under Rule 5(2) (b) is not an appeal as envisaged by Article 164(3). For purposes of judicial proceedings an appeal is broadly speaking, a substantive proceeding instituted in accordance with the practice and procedure of the Court, by an aggrieved party, against a decision of a Court to a hierarchically-superior Court with appellate jurisdiction, seeking consideration and review of the decision in his favour.” [Emphasis supplied]

12. We associate with the observation by the learned Judge. In that regard, the challenge raised regarding the propriety of the appeal is a matter for the appellate Court to decide, as there is no application before us challenging the same. Such challenge cannot be raised in a replying affidavit or submissions as the respondent has done in this matter. In our view, the important issue is whether our jurisdiction to entertain this application has been invoked, which the respondent does not challenge. We leave it at that.
13. As we stated herein, the applicant must satisfy the twin principles, that he has an arguable appeal and that it will be rendered nugatory if the appeal were to succeed and the stay was declined.
14. On the arguability, we are guided by this Court's decision in Somak Travels Ltd v. Gladys Aganyo [2016] eKLR.

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

15. Having considered the application and the supporting affidavit we have identified arguable issues. The first one is that having been committed to civil jail and served six months, can the respondent apply to commit him to civil jail for a further term of six months as intended in an application pending when he filed this application? How many times can one be incarcerated for the same debt?
16. The second issue we identify from this application is as regards insolvency. The applicant annexed Gazette Notice No. 11664 dated 28th October 2018 in which the Acting Official Receiver M Gakuru notified that the applicant was admitted and declared “No Asset Procedure” under the Insolvency Act. It is an arguable case whether the debt was discharged. The respondent raises an issue with the



interpretation of section 360(2) of the Insolvency Act. The matter of interpretation is for consideration in the appeal itself, it cannot be raised at this stage.

17. The respondent raised issue with the debt which he argued was incurred through bounced cheques issued to it by the applicant for goods he obtained, claiming that the applicant committed fraud. In our view, this is an arguable issue for the appeal Court to determine whether credit purchase was fraudulent. It is trite that 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. See Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008. We are satisfied that the appeal is not frivolous. It is arguable.
18. On the nugatory aspect, we are guided by the decision in Stanley Kangethe Kinyanjui v. Tonny Keter & Others [2013] eKLR where the court defined what constitutes nugatory as including:
 - “ xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
19. We have considered the applicant’s submissions on this point and are satisfied that the applicant has demonstrated that he is likely to be sent to jail a second time if the stay is not granted. It is our view that incarceration of the applicant cannot be compensated by an award of damages, repaid or reversed if the order for stay is not granted and the appeal succeeds
20. The result is that the application is merited. The application dated 28th October 2024 is allowed as prayed. The costs to abide the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF MAY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

