Majevdia & 2 others v NGM Financial Consultants Limited & another (Civil Appeal (Application) E829 of 2023) [2025] KECA 1147 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1147 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E829 OF 2023

W KARANJA, P NYAMWEYA & GV ODUNGA, JJA

JUNE 20, 2025

BETWEEN

HITAN CHAGLAL MAJEVDIA ..... 1ST APPLICANT

ST CLAIRE ESTATES LIMITED ..... 2ND APPLICANT

BIOPHARMA LIMITED ..... 3RD APPLICANT

AND

NGM FINANCIAL CONSULTANTS LIMITED ..... 1ST RESPONDENT

NITIN GORDHANDAS MANDAVIA ..... 2ND RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of the appeal against the ruling of the High Court at Nairobi (Mwita, J) delivered on 28th July 2023 in HCCC No. E003 of 2022)

RULING

1. Vide a Plaint dated 1st November, 2021, the respondents lodged a claim against the applicants seeking;
   i. 656,174 UK pounds;
   ii. general damages;
   iii. interest on (i) and (ii) at court rates;
   iv. any other remedy deemed fit by the court;
   v. costs of and incidental to the suit; and
   vi. an order that the 1st applicant issues the 1st respondent with a certificate of service.

2. By an application dated 10th May 2022 expressed to be brought under Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules, the applicants sought to strike out the suit with costs on the ground that the suit was res judicata and that it was barred by limitation. In his ruling delivered on 28th July 2023, the learned Judge, in dismissing the application found that the issues raised in the plaint were both factual and legal which could only be resolved after hearing parties.

3 Aggrieved, the applicants lodged a Notice of Appeal dated 4th August, 2023. Subsequently, they filed the Notice of Motion application dated 24th January 2025 seeking, in substance, that the proceedings in Nairobi HCCC No. E003 of 2022 - Nitin Gordhandas Mandavia & Anor v Hitan Chaglal Majevdia & 2 Others, be stayed pending the hearing and determination of Civil Appeal No. E829 of 2023. That application is the subject of this ruling.

4. In support of the application, the 1st applicant avers: that there is nothing before the High Court for court to certify as ready for hearing and determination hence the High Court suit is ripe for striking out; that the appeal, which is arguable has an excellent chance of success and that it will be rendered nugatory should the High Court proceed and conclude the hearing of the main suit; that the applicants are ready to abide by any conditions imposed by this Court in order to secure the stay order sought; and that the respondents will not be prejudiced by the stay of proceedings since they know for a fact that there is no privity of contract between the parties herein capable of enforcement by a court of law.

5. The applicants submit that their appeal is not only arguable but one with high probability of success since the learned Judge misdirected himself, and consequently erred in law and fact in making several findings in his ruling dated 28th July 2023. According to the applicants, the errors deserve the attention of this Court as well as reasoned arguments from the parties. They assert that should stay of proceedings be denied, the hearing of the matter shall proceed in the court below, rendering the present appeal worthless. In their view, that course would occasion irreparable harm upon the applicants. In support of their application, the applicants attached is a Memorandum of Appeal dated 12th October 2023 in which 6 grounds of appeal have been identified.

6. The respondents are opposed to the application through a replying affidavit sworn on 26th February, 2025 in which it was averred: that the trial court delivered a ruling on 28th July, 2023 dismissing the applicants application seeking to strike out the suit; that on 22nd November 2024, the trial court dismissed with costs the applicants' application dated 18th September, 2023 seeking stay of proceedings pending the hearing of this appeal for lack of merits for failing to satisfy the limb on substantial loss; that the applicants have filed the instant application seeking the same prayers; that if the applicants were aggrieved by the trial court's ruling delivered on 22nd November 2024, they ought to have appealed against the said decision; that the application is a thinly veiled attempt to appeal against the said ruling which is highly unprocedural as the issues raised in the application have been heard and determined; that an order for stay of proceedings will occasion the respondents great prejudice as it shall derail and delay the expeditious conclusion of the suit; that no prejudice will be occasioned to the applicants since they will have an opportunity to address the issues raised in their defence during the trial; that it has not been shown that there is an arguable appeal which will be rendered nugatory if the orders are denied; and that it is only just and fair that the application be dismissed with costs to the respondents.

7. The respondents submitted: that the applicants do not have an arguable appeal since they have merely registered their disagreement with the ruling of 28th July, 2023 without setting out sufficient arguable grounds for challenging the decision being appealed against hence the grounds of appeal are largely frivolous; that the intended appeal will not be rendered nugatory if the orders are denied since the applicants have not shown any loss, substantial or otherwise, that they are likely to suffer if the application is not granted; that the issues the applicants intend to ventilate before this Court will still be

open to them during the hearing of the suit before the trial court; that there is no likelihood of having conflicting decisions from the trial court and this Court since the applicants would still have a chance to appeal to this Court if dissatisfied with the trial court's decision after a full hearing; and that in the premises, the applicants have not satisfied the twin conditions necessary for the grant of an order for stay of proceedings pending hearing and determination of the appeal.

8. When the matter was called out for virtual hearing before us on 4th March 2025, learned counsel, Mr. Kyalo Mbobu, appeared for the applicants while there was no appearance for the respondents despite due service of the hearing notice. As noted above, a replying affidavit and submissions were filed by the respondents. Rule 58(1) and (2) of the Court of Appeal Rules provides that:

    1. If, on any day fixed for the hearing of an application, the applicant does not appear or comply with directions, the application may be dismissed, unless the Court sees fit to adjourn the hearing:

       Provided that the Court may order that an application may be heard by way of written submissions and where parties have filed written submissions, the court shall consider the submissions.

    2. If the applicant appears or complies and the respondent fails to appear or comply, the application shall proceed in the absence of the respondent, unless the Court sees fit to adjourn the hearing.

9. From the above rules, subject to the directions by the Court, parties may prosecute and oppose applications by way of written submissions. Where directions are given for the filing of written submissions, the mere fact that a party who has complied fails to appear on the hearing date does not automatically lead to the application being allowed or dismissed. The Court, in those circumstances, is enjoined to consider the application based on the material placed on the record. Accordingly, we will proceed to determine the application, the non-appearance of the respondent on the hearing date notwithstanding.

10. Before delving on the merits of the application, the respondents have taken issue with the competency of the application on the ground that a similar application was made before the trial court and was dismissed. In their view, this application is an attempt to appeal the said decision through the backdoor. Rule 43 of the Rules of this Court provide that:

    > The Court may entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.

11. It is clear that the above rule only provides for jurisdiction of this Court in cases where no application for stay of execution, injunction, stay of further proceedings or extension of time for doing any act authorised or required by the rules has been made before the court below. That notwithstanding, this Court has held, in a long line of decisions, that it has jurisdiction to consider such application de novo, notwithstanding that a similar application may have been made before the court below. That was the Court's view in Montague Charles Ruben & 9 others v Peter Charles Nderito & another [1989] eKLR where it expressed itself as follows:

    > "In dealing with rule 5(2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make

an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: See Stanley Munga Githunguri v Jimba Credit Corporation Civil Application NAI 161 of 1988."

12. We have considered the application, the written and oral submissions and the law. The principles that guide the consideration of an application of this nature are now well settled. For an applicant to succeed, he or she must demonstrate that the appeal is arguable, or as is often said, not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay. The two conditions are considered conjunctively so that failure to satisfy either leads to dismissal of the application.

13. Explaining the rationale for these twin principles, this Court in Peter Gathecha Gachiri v Attorney General and 4 Others Civil Application Nai 24 of 2014 (unreported) held that:

> " Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

14. Regarding the first principle on arguability of the appeal, this Court holds the view 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 but deserving of consideration by the Court and warrants a response from the opposite party. It is not necessary that the applicant demonstrates a multiplicity of arguable issues since a single bonafide arguable ground of appeal if raised is sufficient for the purposes of the first condition. See Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR).

15. In this case, the applicant intends to argue, amongst other grounds, that the learned Judge erred in treating the application as one grounded on non-disclosure of reasonable cause of action, in which event evidence was inadmissible, when the application was based on Order 2 rule 15(1)(b), (c) and (d) of the Civil Procedure Rules which permitted the applicants to adduce evidence in support of the application; and that that the learned Judge erred and misdirected himself by finding that statutory time bar and res judicata principles were issues of fact not determinable by affidavit evidence.

16. As this Court held in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR: arguable.

17. While the applicant may well fail to persuade the Court at the hearing of the intended appeal that its appeal is merited, we find, without saying more, lest we embarrass the bench that will be seized of the main appeal, that the intended appeal is not frivolous. It is arguable and deserving of consideration by the Court and warrants a response from the opposite party.

18. On the nugatory aspect, which an applicant must also demonstrate, this Court in Reliance Bank Limited v Norlake Investments Ltd [2002] 1 E.A. 227 held that:

> " ..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

19. "A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier As to what amounts to trifling, the Court in the case ofPermanent Secretary Ministry of Roads & another v Fleur Investments Limited [2014] eKLR it was held that: finding by a court of law."

20. In this case, the applicants' argument is that should stay of proceedings be denied, the hearing of the matter will proceed in the court below, rendering he present appeal worthless. Whereas the considerations for granting stay of execution pending appeal are the same as those for stay of proceedings pending appeal, when it comes to the nugatory aspect, in the latter case a higher threshold is required to be met than in the former case. This must be so because an order staying proceedings has the effect of derailing the pending proceedings before a final determination is made therein. It interferes with the hearing schedules of the trial court and may lead to injustice being occasioned to the respondent whose constitutional right under Articles 159(2)(d) may thereby be curtailed. In deciding whether an appeal will be rendered nugatory, the Court has to go further and consider the conflicting claims of both parties and each case has to be considered on its own merits in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act* and the need to ensure that, when exercising discretion, the principle of proportionality is taken into account. This position was restated in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR, where this Court held that:

> " ...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."

21. We bear in mind this Court position in Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association (Interested Party) [2020] eKLR that:

> " We note that stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation. (See: Francis N. Githiari v Njama Limited [2006] eKLR). It impinges on the right of access to justice, right to be heard without delay and the right to a fair trial. While addressing the issue of stay of proceedings in the

persuasive case of Global Tours & Travels Limited (supra), Ringera, J as he then was stated thus:

'As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of whether or not the intended appeal will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.'"

22. We agree with Gikonyo, J's views in the case of Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri [2015] eKLR where he expressed himself as hereunder:

> "The Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of *the Constitution* which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

23. In arriving at his decision in the above cited case, the learned Judge cited a passage in Halsbury's Laws of England, 4th Edn. Vo. 37 page 330 and 332, that:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue...This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

24. We bear in mind the pronouncement by the Court in Stanley Kangethe Kinyanjui v Tony Ketter & others (supra) that:

> " 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."

25. This Court in David Morton Silverstein v Atsango Chesoni [2002] 1 KLR 867; [2002] 1 EA 296 expressed itself as follows:

> "On this aspect of the matter we think we must follow the decision of this Court in the case of Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd & Another, Civil Application No. NAI 50 of 2001 (29/2001 UR), (Unreported). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:
>
> '... The onus of satisfying us on the second condition, that un less stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.'
>
> These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.
>
> The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay."

26. We are not saying that under no circumstances should proceedings be stayed. Each case must be considered on its own facts and circumstances. Where a deserving case is made, the Court may well issue the order staying proceedings pending an appeal or an intended appeal. In this case, the applicants are appealing against an exercise of discretion by the learned Judge in dismissing their application to strike out the suit. If the suit proceeds and it is dismissed, the applicants' fears would not have been realised. If on the other hand, the suit fails, nothing will bar the applicants from taking the issues which it raised in the application on appeal. If we understand the decision being appealed from correctly, the learned Judge only held that it was necessary to hear the parties in order to arrive at a just decision. The learned Judge did not bar the applicants from raising the same issues in the main suit.

27. In the premises, we are not persuaded that the intended appeal, if successful, will be rendered nugatory absent stay of proceedings. As the applicant has failed to surmount the second hurdle, this Motion fails and is hereby dismissed with costs.

28. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

W. KARANJA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR