**Nielsen v Stern (Also known as Hermannus Philipus Steyn) & 2 others (Civil Application E648 of 2024) [2025] KECA 1168 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1168 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPLICATION E648 OF 2024**

**W KARANJA, P NYAMWEYA & K M'INOTI, JJA**

**JUNE 20, 2025**

**BETWEEN**

**JAN BONDE NIELSEN ..... APPLICANT**

**AND**

**HERMAN PHILIPUS STERN (ALSO KNOWN AS HERMANNUS PHILIPUS STEYN) ..... 1ST RESPONDENT**

**HEDDA STEYN ..... 2ND RESPONDENT**

**NGURUMAN LIMITED ..... 3RD RESPONDENT**

***(Application for stay of proceedings and stay of execution pending appeal from the ruling and order of the High Court of Kenya at Nairobi (Visram, J.) dated 31st October 2024 in HCCC No. 322 of 2010)***

**RULING**

1. Before the Court is the motion on notice dated 26th November 2024 taken out by the applicant, Jan Bonde Nielsen (Nielsen). In the motion the applicant seeks an order, under rule 5(2)(b) of the Court of Appeal Rules, for stay of execution and further proceedings, pending appeal from the ruling and order of the High Court of Kenya at Nairobi (Visram, J.) dated 31st October 2024. By the impugned ruling, the High Court ordered Nielsen to deposit Kshs 40,000,000.00 within 45 days as security for costs. There is an alternative prayer in motion for this Court to reduce the said amount to a figure it deems reasonable.

2. The parties to this application have had a myriad of cases in various courts, going back to 2009 and involving dealings going even further back to the 1980s. Among those cases are Nakuru HCCC No. 103 of 2009; Nakuru HCMA No. 52 of 2009; Nakuru HCCC No. 120 of 2010; Kibera Law Courts Crim. C. No. 3603 of 2010; Nairobi HCCC No. 322 of 2010; Nairobi Court of Appeal Civil Appeal

No. 118 of 2011; Nairobi Court of Appeal Civil Appeal No. 77 of 2012; Nairobi HCCC No. 234 of 2014; Nairobi HCCC No. 387 of 2014; and Nairobi Court of Appeal Civil Appeal No. 266 of 2015.

3. The brief background to this application is as follows. On 18th May 2010 Nielsen filed suit in the High Court at Nairobi (HCCC No. 322 of 2010) against the three respondents seeking, among others, a declaration that there was in existence a partnership between him the 1st respondent, Herman Philipus Steyn (Steyn), on a 50:50 basis; the lifting of the veil of the 3rd respondent, Nguruman Ltd. (Nguruman). and a consequential order that 50% of the shares held by Steyn and the 2nd respondent, Hedda Steyn (Hedda) in Nguruman are held in constructive trust for him; an order for transfer of the said shares to him; an order for the taking of accounts and payment to him of the amounts found to be due to him; an injunction to restrain the Steyn and Hedda from interfering with the applicant's participation in the management of Nguruman; payment of US$1,917,333 being money had and received by Steyn and Hedda for the use of Nielsen; costs; and interest.

4. After several interlocutory applications and appeals in both the High Court and this Court, on 27th July 2021, the respondents applied in the High Court for an order directing the Nielsen to deposit in court within 30 days US$ 1,500,000,00 or any other sum determined by the court, as security for costs and in default of compliance, his suit be dismissed with costs.

5. The application was based on a number of grounds, among them that Nielsen is a citizen of Denmark with no known assets in Kenya or anywhere else in the world; that he had failed or refused to pay the respondents total taxed costs of Kshs 1,298,167.50 awarded in Civil Appeal No. 77 of 2012; that the respondents were unable to recover those costs because Nielsen had no known assets; that he had a history of failure to pay his debts and had been declared bankrupt in Denmark on 28th November 1980 and in the United Kingdom between 3rd December 1996 and 2003; that he kept hopping from jurisdiction to jurisdiction to avoid the reach of the law; and that he was a fugitive from the law in Denmark, where he was facing a myriad of criminal charges, including obtaining property by deception, fraud by director of a company, theft and false accounting.

6. The respondents contended that from the foregoing, it was manifestly clear that Nielsen would not be able to pay their costs should his case fail.

7. Nielsen opposed the application contending that it was brought belatedly after 11 years and in bad faith; that although he was a citizen of Denmark, his primary residence was in Kenya where he has obtained an investor's permit and spends most of his time; that he was awarded some costs against the respondents which they should offset against the costs awarded to them; that the respondents averments regarding his financial and legal affairs were inaccurate and false and that he had fully responded to them in previous affidavits.

8. After considering the application, the High Court found that the making of an order for security for costs was discretionary; that Nielsen was a Danish national with his permanent residence in Denmark rather than Kenya; that he was a foreigner with no known assets in the jurisdiction; that in light of his previous bankruptcy and insolvency, he had not presented any evidence of his present financial status; that the respondents had inordinately delayed in making the application for security for costs; that the respondents had not denied owing the applicant costs; that the trial was likely to expend a substantial time and costs for all the parties; that security for costs ought not to be used as a sword to stifle claims or to prevent access to justice; that the respondents request for security for costs of US$1,500,000.00 (approximately Kshs 200,000,000.00) was excessive; and that a just and equitable amount in the circumstances of the case was Kshs 40,000,000.00.

9. Ultimately, the court made the following order:

> " The said sum shall be deposited into a joint interest-earning account in the names of the advocates on record for the Plaintiff and the 1st and 2nd Defendants within the next 45 days of the date of this order, and shall remain on deposit pending the hearing and determination of the present suit."

10. In support of the application for stay of execution and proceedings, Mr. Amoko, learned counsel for Nielsen, relied on Nielsen's supporting affidavit sworn on 26th November 2024 and written submissions dated 9th December 2024. To demonstrate that the intended appeal is arguable, counsel submitted that the High Court erred by failing to follow the authoritative and binding decision of the Supreme Court in Westmont Holdings SDN BHD v. Central Bank of Kenya & 2 Others [2023] KESC 11 (KLR); that the order for security for costs amounted to denial of Nielsen's unfettered right to access justice under Article 48 of *the Constitution* and his right to a fair trial under Article 50 of *the Constitution*; and that the High Court further erred by failing to dismiss the application for security for costs even after finding that there was unexplained and inordinate delay on the part of the respondents in making the application.

11. On whether the intended appeal risked being rendered nugatory, counsel submitted that Kshs 40,000,000.00 is not pocket change; that failure to pay the sum, which Neilsen deems arbitrary, will result in dismissal of his suit; and that if the suit is dismissed, it will defeat the whole purpose of the appeal.

12. Steyn and Hedda opposed the application vide a replying affidavit sworn on 27th January 2025 by their son, Martin Richard Steyn, to whom they had donated a power of attorney and submission of even date. The deponent is also a director and chairman of Nguruman.

13. It was contended that Nielsen's intended appeal is not arguable because the ruling of the High Court took into account all the relevant principles in an application for security for costs and was consistent with judicial precedent. Further, the two submitted that the High Court found, among others, that Nielsen is a foreign national with no known assets in the jurisdiction; that he had not provided any evidence of his business or financial status to demonstrate ability to meet costs; that the respondents had a bona fide defence to Nielsen's suit; and that the trial was likely to expend considerable time and costs.

14. Mr. Ahmednassir, SC for Steyn and Hedda added that Nielsen had been unable to pay costs awarded to the respondents against him, which was further evidence that he would not be able to meet their costs, should the court dismiss his suit. It was also contended that he had failed to honour his previous undertaking as to damages, leading to a suit against him. Counsel also cited Nielsen's bankruptcy and insolvency in Denmark and the United Kingdom as further justification for the order on security for costs.

15. It was further contended that Nielsen's suit, in which he claimed to be entitled to 50% of the shares of Nguruman was a sham because when he testified before the High Court of Justice in England on 30th May 2009, he testified under oath that the suit property in dispute belonged to Nguruman and was bought by Steyn rather than by himself.

16. On whether the intended appeal risked being rendered nugatory, counsel submitted that Nielsen would not suffer any irreparable loss or damage that could not be compensated by damages and that the High Court had ordered the money be deposited in a joint interest-earning account in the names of the advocates for the parties.

17. Counsel further argued that failure to deposit the security for costs would not lead to automatic dismissal of the suit because under Order 26 rule 5 of the Civil Procedure Rules, such dismissal is upon application and that the applicant had other avenues under the law, including applying to the trial court for reduction of the security; applying for extension of time to comply; and exercising a right of appeal in the event of dismissal of the suit.

18. As for Nguruman, it opposed the application vide written submissions dated 26th January 2027 which were highlighted by its learned counsel, Mr. Busaidy. The 3rd respondent's submissions closely mirrored those of the Steyn and Hedda that it will not add any value to rehash them.

19. We have anxiously considered the ruling of the High Court, the submissions of the parties and the authorities they cited. The principles that guide this Court in an application under rule 5(2)(b) of the Court of Appeal Rules are well settled and comprehensively summarised in the ruling of this Court in Stanley Kangethe Kinyanjui v. Tony Ketter & Others [2013] eKLR. The applicant has to satisfy the Court that the intended appeal is arguable or that it is not frivolous, and that unless stay of execution is granted, the appeal will be rendered nugatory if it ultimately succeeds.

20. While at this stage the Court does not make any definitive findings on the merits or otherwise of the intended appeal, we nevertheless must bear in mind that what the applicant will be challenging on appeal will be exercise of discretion by the trial court, which this Court does not normally interfere with except in the exceptional circumstances explained in a number of decisions, such as United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898. We also bear in mind that the applicant does not deny the fact that he is a foreign national or his previous bankruptcy and insolvency in Denmark and the United Kingdom, respectively. Nor does he challenge the fact that he did not place before the trial court any evidence of his business or financial status in Kenya.

21. However, as this Court has stated time without number, an arguable appeal is one that raises even one bona fide arguable point, which need not succeed when the appeal is heard. The threshold is fairly low and we therefore grant that the intended appeal is arguable.

22. On the issue as to whether the intended appeal risks being rendered nugatory, we bear in mind that the overarching concern of the Court in delving into this consideration is to ensure that should the intended appeal finally succeed, it will not be a mere pyrrhic or paper victory. (See Ahmed Musa Ismael v. Kumba ole Ntamorua & 4 Others [2014] eKLR). Further, whether or not an appeal or intended appeal will be rendered nugatory ultimately depends on the peculiar circumstances of every application. (See Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227).

23. The requirement to provide security for costs is expressly provided for in the law and on appeal, the question will only be whether or not in the circumstances of this case, the order was justified. It is crystal clear to us that requiring a party to provide security for costs is not ipso facto, a denial of the right to access justice. Whether or not it does constitute denial will depend on the circumstances of each case. The court is called upon to balance an applicant's right to access justice with the respondent's rights to recover costs, should the applicant's suit fail in circumstances where there is genuine reason for apprehension that the applicant may not be able to pay such costs.

24. As pointed out by the respondents, dismissal of the suit for failure to provide security is not automatic. Secondly, the High Court directed the money to be held in a joint-interest earning account in the names of the advocates for the applicant and 1st and 2nd respondents. That amount secures the interests of all the parties and will be available to the party who ultimately prevails in the suit before the High Court. We cannot see how, depositing the money, which is secured pending the hearing, can render the intended appeal nugatory.

25. For the foregoing reasons, the applicant has not satisfied both considerations under rule 5(2) (b) of the Court of Appeal Rules and therefore the notice of motion dated 26th November 2024 is hereby dismissed with costs to the respondents. It is so ordered.

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

**WANJIRU KARANJA**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL**

**P. NYAMWEYA**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**