



Boniface v Iqbal (Sued as the Personal Representative of the Estate of Ghulam Rasool Janmohammed) (Civil Application E007 of 2023) [2024] KECA 185 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 185 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E007 OF 2023
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
FEBRUARY 23, 2024**

BETWEEN

**GEORGE BONIFACE MBUGUA ALIAS GEORGE BONIFACE
NYANJA APPLICANT**

AND

**MOHAMMED JAWAD IQBAL (SUED AS THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF GHULAM RASOOL JANMOHAMMED) RESPONDENT**

(An application for stay of execution of the Orders from the Judgment and Decree of the Environment and Land Court at Nairobi (O.A. Angote, J.) dated 24th day of November, 2022 in ELC Case No. 1107 of 2013)

RULING

1. Before the court is a Notice of Motion dated 9th January 2023, brought pursuant to rule 5(2) (b), 42 (b) of the [Court of Appeal Rules](#) and Section 3A and 3B of the [Appellate Jurisdiction Act](#) Cap 9 of the Laws of Kenya seeking orders that:
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to issue an order of stay of execution of the judgment and orders of the superior court (Hon. O.A. Angote, J.) delivered on 24th November, 2022.
 - iv. That an order of costs of the application be borne by the respondents.
2. The grounds upon which the application is grounded are replicated in the affidavit of the applicant, George Boniface Mbugua alias George Boniface Nyanja, sworn on the 9th of January 2023, where



he deposes inter alia that he filed Civil Suit No. 1989 of 1989, which was later transferred to the Environment and Land Court at Nairobi as ELC Case No. 1107 of 2013 George Boniface Nyanja v Mohammed Jawad Iqbal (Sued as the personal representative of the Estate of the late Ghulam Rasool Jan Mohammed), where he sought for specific performance to effect transfer of L.R. 1/387 along Ngong road Nairobi, following an agreement between him and the deceased, dated way back in 1985 for the purchase of the said property by him from the deceased.

3. The respondent on his part filed a defence and a counterclaim seeking mesne profit being; rent of the premises from the date the applicant took possession and interest at 16% till judgement.
4. The trial court in a judgment delivered on 8th November, 2018 found in favour of the applicant directing that the suit property be transferred to him. Dissatisfied with the judgment the respondent appealed to this Court in *Mohamed Jawad Iqbal (suing as the personal representative of the Estate of the late Ghulam Rasool Jan Mohammed) v George Boniface Mbugua*, Civil Appeal No. 242 of 2018.
5. In its judgment dated 8th November, 2019 this Court set aside the entire judgment of the court below and remitted the matter back to the ELC for assessment of rent/mesne profit and interest.
6. Following the judgment of this Court, Angote J., heard and determined the issues remitted to the ELC and rendered a judgment on 24th November 2022, where he ordered as follows:-The respondent be paid by the applicant a mesne profit of Kshs.4,980,000/-.The applicant to pay interest on the above amount at court rates from the date of filing suit until payment in full.The applicant to pay cost of the suit and counterclaim.
7. Further in the said affidavit the applicant states that he has an arguable appeal in that the learned judge erred in law and fact: by making an assessment without taking into account the current value of Kshs.1,500,000/- that the applicant had paid towards the purchase of the said property; by ordering payment of mesne profit without considering that the applicant was evicted by the respondent since April, 2020; and by ordering payment of mesne profit and interest thereon at court rates from date of filing suit until payment in full occasioning great injustice to the applicant, yet the respondent pleaded for interest to be paid until judgment is entered.
8. On the nugatory aspect, the applicant was apprehensive since the respondent's counsel has applied for the decree, and execution is looming, and should execution issue, the applicant will be forced to pay the sums which were unfairly and unjustly arrived at. Learned counsel further contended that the orders are necessary, otherwise the intended appeal will be reduced to a mere academic exercise. Further, if granted, the order will protect the applicant's right to fair trial and will obviate imminent difficulties, prejudice and injustice likely to be suffered by the applicant.
9. In objecting to the application, the respondent filed a replying affidavit dated 16th March 2023, where he deposed that the applicant, on or about 1986 entered into a sale agreement with Ghulam Rasool (the deceased); that a deposit was paid, however the applicant failed to pay the entire purchase price; that the matter was heard and determined in the ELC, where the court ruled in favour of the applicant, which judgement was overturned by this Court, and the matter remitted back to the ELC for calculation of the mesne profit and interest, which the said court did.
10. In his submissions, learned counsel for the respondent rehashed the points raised in the replying affidavit which we need not regurgitate. He further submitted, that the application has not met the necessary threshold for granting of the orders being sought as the memorandum of appeal does not raise any substantive points of law; it is frivolous. On the nugatory aspect, counsel submits that this is a money decree and is reversible.



11. Rule 5(2) (b) of this *Court's Rules* empowers the court where a Notice of Appeal has been lodged in accordance with Rule 75; to grant an order of stay or injunction on terms the court may think just. The Rule provides;

- “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
- a. ...
 - b. In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

12. In *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR this Court stated as follows;

“That in dealing with Rule 5(2) (b), the court exercise original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this court.

The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one

which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

In *Multimedia University & Another v Professor Gitile N. Naituli* [2014] eKLR the court stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and secondly, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5 (2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR.”

13. On the nugatory aspect this Court in *Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachia* Civil Application No. 211 of 2020 stated:

“On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

14. In order to grant an order of stay, an applicant must satisfy the court that he has an arguable appeal, one that is not frivolous but not necessary one that will succeed. Secondly, the applicant has to demonstrate that if the stay is not granted the appeal will be rendered nugatory. Having carefully considered the application, the supporting affidavit, grounds of appeal, the replying affidavit together with submissions cited, and without delving into the grounds of appeal, we are satisfied that the applicant has raised grounds that are arguable and require to be ventilated on appeal.

15. This is a money decree and in the event of a successful appeal, may be paid back. The second limb of the twin principle fails and thus the application must fail. Costs to abide the outcome of the appeal.



16. This matter has been in the court corridors for more than three decades. In view of this fact, we direct that the matter be given a priority hearing date.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

