



**Bruton Gold Trading LLC v Amadi t/a Amadi & Associates & 6 others (Civil Application E422 of 2023) [2024] KECA 195 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 195 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E422 OF 2023  
S OLE KANTAI, M NGUGI & PM GACHOKA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**BRUTON GOLD TRADING LLC ..... APPLICANT**

**AND**

**ANNE ATIENO AMADI T/A AMADI & ASSOCIATES ..... 1<sup>ST</sup> RESPONDENT**

**BRIAN OCHIENG AMADI ..... 2<sup>ND</sup> RESPONDENT**

**ANDREW NJENGA KIARIE ..... 3<sup>RD</sup> RESPONDENT**

**DANIEL NDEGWA KANGARA ALIAS DANIEL MURIITHI 4<sup>TH</sup> RESPONDENT**

**KIKANAE ADRIAN TOPOTI ..... 5<sup>TH</sup> RESPONDENT**

**EDWARD TAYLOR ALIAS MBORONDA SEYENKULO SAKOR .... 6<sup>TH</sup>  
RESPONDENT**

**AFRICAN BANKING CORPORATION LIMITED (AKA ABC  
BANK) ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for injunction/conservatory orders and stay of execution and further proceedings pending hearing and determination of an intended appeal from part of the Ruling and order of the High Court at Nairobi (Mabeya J.) dated 9th June, 2023 in Nairobi High Court Case No. E211 of 2023)*

**RULING**

1. The applicant, Bruton Gold Trading LLC, has filed the application dated August 29, 2023 seeking orders that, pending hearing and determination of its intended appeal, there be a stay of execution of the orders issued on June 9, 2023 by the hon. Mabeya J; that this court issues an injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents or their agents from accessing, operating and/ or withdrawing funds



from account numbers 01121501xxxxx and 011239xxxxx domiciled at the 7<sup>th</sup> respondent, ABC Bank, Green House Mall, Nairobi, in the name of Amadi & Associates, Advocates, and any other bank account registered to Amadi & Associates, Advocates in any other bank within the Republic of Kenya, pending hearing and determination of its intended appeal; that this court grants an order that the intended appeal be heard expeditiously and on priority basis; and that the Court does issue an order staying further proceedings in High Court Civil Case No E211 of 2023 between the applicant and the respondents pending determination of its intended appeal. The applicant further seeks an order that the personal bank accounts registered to the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> respondents domiciled at any bank within the Republic of Kenya be frozen, and that no funds whatsoever be withdrawn from the accounts without an express order of the Court pending hearing and final determination of the applicant's intended appeal.

2. The application follows in the wake of the ruling of the High Court (Mabeya J.) delivered on June 9, 2023 in Nairobi High Court Civil Case No E211 of 2023. In the said ruling, the court struck out the affidavit verifying the applicant's plaint and ordered that the applicant files and serves a compliant verifying affidavit within 21 days of the date of the ruling. In default, the applicant's plaint would stand struck out. The court also dismissed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application dated May 19, 2023 seeking to strike out the applicant's suit. The court declined to issue a Mareva injunction against the 1<sup>st</sup> 2<sup>nd</sup>, and 3<sup>rd</sup> respondents as prayed by the applicant, and allowed the 1<sup>st</sup> respondent's application dated May 19, 2023, the effect of which was to set aside the conservatory orders made in favour of the applicant on May 18, 2023 freezing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' accounts.
3. The application is based on the grounds on the face of it and is supported by an affidavit sworn by Demetrious Bradshaw on August 27, 2023 and a further affidavit, also sworn by Bradshaw, on October 23, 2023. The applicant avers that as a gold trading company registered in the United Arab Emirates (UAE), it was interested in buying gold from Kenya. Its directors were introduced by the 5<sup>th</sup> respondent to the 6<sup>th</sup> respondent who was alleged to be an officer in an entity called Universal Global Logistics Limited ("UGL") which was in the gold export business and could export gold from Kenya to Dubai. That the applicant entered into an agreement under which the 5<sup>th</sup> respondent was to deliver gold for export to the 6<sup>th</sup> respondent to Dubai for sale at the applicant's cost, after which the applicant would be reimbursed its total costs for export and be paid a commission of 10% of the market value of the gold at point and time of sale. That on this understanding, the applicant entered into a transaction with UGL, represented by the 1<sup>st</sup> respondent's law firm, Amadi and Associates Advocates, for the export of one thousand five hundred kilogrammes (1,500 kg) of gold bars allegedly owned by the 6<sup>th</sup> respondent. The applicant avers that it sent a total of US\$ 592,970 to the 1<sup>st</sup> respondent's firm account number 0112150xxxxxx at the 7<sup>th</sup> respondent Bank; that it was convinced to release the funds through misrepresentation and production of false and forged documents by the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents; and that the said funds were withdrawn by the firm as disbursements.
4. The applicant further avers that it paid to the 6<sup>th</sup> respondent a sum of USD 149,236.48, but that despite these payments, no gold consignment was received in Dubai. Upon making enquiries, it was shown a court order allegedly issued in HCOME 873 of 2021, restraining the sale of the gold, an order which it asserts was forged. It then sought to have the said firm reimburse all the monies paid, but the parties did not reach an agreement, which culminated in the subject suit and the impugned order.
5. The applicant maintains that it has an arguable appeal, pointing to the finding of the court that it had jurisdiction over the applicant's claim; that the applicant had established that it had transferred USD 593,000 to the 1<sup>st</sup> respondent; that it never received gold, yet the court refused to issue a mareva injunction to preserve the accounts or, in the alternative, direct that the funds be deposited in court.



6. With respect to the nugatory aspect, the applicant contends that in the absence of conservatory orders, the funds in the respondents' bank accounts, which accounts hold the funds of which the applicant was defrauded, are likely to be disbursed and become irrecoverable.
7. The 1<sup>st</sup> respondent opposes the application by a replying affidavit sworn on September 6, 2023. She has also filed submissions dated October 26, 2023. The 1<sup>st</sup> respondent's position is that the applicant has not properly invoked this Court's jurisdiction as its application is defective, having been brought under rule 122 of the 2022 *Court of Appeal Rules*, which rule revokes the *Court of Appeal Rules, 2010*. It is also her contention that the applicant has failed to satisfy the twin principles for grant of orders under rule 5(2)(b).
8. The 1<sup>st</sup> respondent terms the application for injunctive orders against her absurd. She avers that she is not a signatory to the bank accounts stated to be held at the 7<sup>th</sup> respondent bank and is therefore incapable of making withdrawals or any other transaction on those accounts. She further avers that she will be unfairly financially crippled if the orders sought are granted as she would be barred from providing for herself and her family.
9. The 3<sup>rd</sup> respondent, Andrew Njenga Kiarie, has opposed the application through an affidavit sworn on September 8, 2023 on his own behalf and on behalf of the 2<sup>nd</sup> respondent. He avers that the applicant has not satisfied the twin principles for an order under rule 5(2)(b); and that the intended appeal is not arguable and will not be rendered nugatory. He observes that the applicant filed the present application three months after the High Court declined to issue the freezing orders, and the orders being challenged are negative orders that cannot be implemented.
10. The 5<sup>th</sup> respondent has also filed a replying affidavit sworn by Daniel Ndegwa Kangara on September 11, 2023 as well as written submissions. He avers that the impugned ruling dismissed the applicant's motion and is not capable of being stayed; that it is unclear why the applicant would want to have the matter in the superior court stayed, despite the said court being the forum before which parties can prove their respective case and have the same determined on merit; and that the applicant has, despite the court's directions, failed to comply with order 11 of the Civil Procedure Rules.
11. The application came up for hearing before this Court in the presence of learned counsel, Mr. Murage for the applicant, Ms. Matu holding brief for Mr. Ochieng for the 1<sup>st</sup> respondent, Mr. Nyaberi for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Mr. Kariuki for the 5<sup>th</sup> respondent, and Mr. Owino for the 7<sup>th</sup> respondent. There was no appearance for the 4<sup>th</sup> and 6<sup>th</sup> respondents, though served.
12. In presenting the applicant's case, Mr. Murage submitted that the trial court took a pre-determined position and made a final determination at a preliminary stage of the suit; that he made, in an interlocutory application, a determination as to the amount of money that was received by the respondents, which differed from the amount of money that was claimed in the pleadings before the court.
13. It was his submission that the applicant was therefore asking this Court to stay the orders made by Mabeya, J. as well as the proceedings before the trial court pending determination of the applicant's appeal. According to Mr. Murage, the applicant had sought information to be produced to the court in order for the court to render a just determination on the entire suit. He submitted that by dismissing the applicant's application, crucial information that would be necessary for the court in coming to a just determination was removed from the jurisdiction of the court. The applicant was therefore praying for injunctive orders as a large amount of money was paid to an account that was opened by the 1<sup>st</sup> respondent. The trial court, according to Mr. Murage, had made a determination on the admissibility



of affidavits notarized in countries outside the commonwealth of states which would have the net effect of invalidating affidavits sworn in countries outside the commonwealth.

14. Regarding the question whether the appeal would be rendered nugatory, Mr. Murage made submissions, which echo averments in the affidavit in support of the application, impugning at length the conduct of the trial judge in dealing with the applications before him. As pointed out to counsel at the hearing of this application, we do not deem those averments and submissions relevant for determination of the present application. Such averments, as counsel tacitly conceded, are more relevant to an application before the trial judge for his recusal.
15. In highlighting the 1<sup>st</sup> respondent's submissions, learned counsel, Ms. Matu, contended that while the applicant was seeking orders of stay under rule 5(2)(b), an injunction and freezing orders against the respondents, its application was brought under the 2010 *Court of Appeal Rules*, and should therefore be struck out. Further, that the applicant had not met the requirements of rule 5(2)(b); that not a single bona fide arguable point has been presented to this Court, noting that the crux of the applicant's appeal is premised on the affidavits which were struck out by the trial court, which, in the 1<sup>st</sup> respondent's view, the court had done correctly.
16. As to whether the appeal will be rendered nugatory, the 1<sup>st</sup> respondent submitted that the applicant had not shown what irreversible consequence it would suffer as the amounts alleged to have been paid could always be recovered, or the applicant could be compensated in damages.
17. For the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, learned counsel, Mr. Nyaberi, associated himself with the submissions made by Ms. Matu, He submitted that the present application is vexatious, frivolous and is a clear abuse of the process. He observed that the application dated August 29, 2023 was supported by an affidavit sworn on August 24, 2023, long before the said application was presented before the court. The application before the Court was therefore unsupported. Further, that there is no arguable appeal before the Court. Like counsel for the other respondents, Mr. Nyaberi submitted that the applicant's appeal would not be rendered nugatory as the applicant's claim is a liquidated claim and the applicant can be compensated in damages.
18. Mr. Kariuki, learned counsel for the 5<sup>th</sup> respondent, also opposed the application. He too, took the position that the applicant had not raised a single arguable appeal, and its appeal would not be rendered nugatory. Mr. Owino for the 7<sup>th</sup> respondent took a neutral position on the application.
19. We have considered the application and the respective averments and the submissions, both written and oral, by the parties. While counsel for the respondents have raised several technical arguments with regard to the competence of the application before us, we shall confine ourselves to a consideration of the application against the principles to be established by an applicant under rule 5(2)(b), which we believe will be dispositive of the matter.
20. In an application under the said rule, a party is required to satisfy the Court with respect to two principles as was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. These are, first, that the applicant has an arguable appeal, and second, that the intended appeal would be rendered nugatory if the interim orders sought are not granted. With regard to whether an applicant has an arguable appeal, it is sufficient if a single *bona fide* arguable ground of appeal is raised; it need not be one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous.
21. 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; if it is not reversible, whether damages will reasonably compensate the aggrieved party. Where it is alleged that an appeal will be rendered nugatory on account



of the respondent's alleged impecunity, the onus shifts to the respondent to rebut such claim by evidence-see *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.

This argument has not been made with respect to the respondents in this case.

22. With these principles in mind, we turn to consider whether the applicant in this case has placed before us material to justify exercise of discretion in its favour under rule 5(2)(b). On the first principle, we have considered the applicant's memorandum of appeal. The applicant raises fourteen (14) grounds of appeal in which it contends, *inter alia*, that the trial court erred in striking out the affidavit verifying the applicant's plaint; in dismissing its application dated May 17, 2023; in declining to grant the applicant a mareva injunction; and in allowing the 1<sup>st</sup> respondent's application dated May 19, 2023. The applicant further challenges the ruling on the basis that the trial court misinterpreted and misapprehended the decision in *Pastificio Lucio Garofalo SPA v Security & Fire Equipment Co & another* (2001) and thus arrived at an absurd determination that an affidavit or declaration taken abroad before a notary public must be proved by an affidavit or other proof that the signature and or stamp is that of the notary public named therein. Having considered these grounds of appeal alongside the others raised in the memorandum of appeal, we are satisfied that the applicant has established that it has an arguable appeal, and has thus satisfied the first limb of the two principles under rule 5(2)(b).
23. Will the applicant's appeal be rendered nugatory should the court not issue the orders that it seeks? We have set out above the grounds on which the applicant challenges the decision of the trial court. The issues raised in these grounds, we find, will remain live, and if the appeal succeeds, will not be rendered nugatory as the applicant contends.
24. We further observe that the *ex parte* orders issued in favour of the applicant in relation to the bank accounts held by the 1<sup>st</sup> -3<sup>rd</sup> respondents were discharged on June 9, 2023. The applicant filed the present application two months later, on August 29, 2023. While the applicant is seeking stay orders in relation to the funds it alleges were fraudulently obtained by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent, we observe that the trial court dismissed its application on June 9, 2023 and discharged the interim orders issued in its favour on the same day. That was a negative order, incapable of being stayed under rule 5(2) (b) of the *Rules* of this court. Further, by its own averment, the funds in contention were withdrawn from the accounts immediately or soon after deposit, and so there is nothing for the court to preserve by issuing injunctive orders. We need not reassert the well-worn principle that the court does not issue orders in vain.
25. Accordingly, we find that the applicant has failed to satisfy the second limb of the principles under rule 5(2)(b) of the *Rules* of this court, and we accordingly find that its application is without merit. It is accordingly dismissed, with the costs thereof to abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

