



**Llyod Masika Limited v Stanbic Bank Limited (Civil Appeal (Application)
E200 of 2023) [2024] KECA 72 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 72 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E200 OF 2023
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
FEBRUARY 9, 2024**

BETWEEN

LLYOD MASIKA LIMITED APPLICANT

AND

STANBIC BANK LIMITED RESPONDENT

(Being an application for stay of execution of the Orders and Decree of the High Court (David Majanja, J.) delivered on 27th January 2023 dismissing the application for setting aside the arbitral award published on 3rd February 2022 and the decision rendered on 17th March 2023 dismissing the application seeking leave to appeal in Miscellaneous Civil Application NO. E206 of 2022)

RULING

1. Lloyd Masika Limited the applicant herein has filed three separate applications. The first one being the Motion application dated 31st March 2023. The second one dated 17th May 2023 while the third one is dated 3rd July 2023. In this application, (Motion dated 31st March 2023) the applicant seeks firstly, leave to file an appeal from the ruling rendered on 27th January 2023 and secondly, stay of execution of the said ruling of 27th January 2023 pending intended appeal. In the said ruling, the Court:

“dismissed the Applicant’s application dated 18th March 2022 seeking to set aside the Award dated 20th December 2021, the Additional/Corrected Final Award dated 3rd February 2022 and the Additional Award on Quantum of Costs dated 2nd May 2022 made by Dr. Wilfred A Mutubwa, the Sole Arbitrator.”

In the same vein the learned Judge ‘allowed the Respondent’s application dated 16th May 2022 recognizing the Award and granting leave for its enforcement.’”

2. The second application, that seems overtaken, seeks stay pending hearing of the first application.



3. The third application that equally seems overtaken, seeks stay pending hearing of the first and second application, of sale of the applicant's office furniture inter alia, scheduled to be sold by public auction on 7th July 2023 in execution of the decree of the High Court issued on 17th April 2023.
4. The background to the application was that the respondent instructed the applicant to value the property Machakos/Ndalani Phase II/461, 462 and 465 so that the respondent could advance facilities to a borrower. The applicant prepared a valuation report dated 13th February 2018. Relying on it, the respondent advanced the facilities of Kshs.40 million to a borrower who defaulted. The respondent sought a re-valuation of the suit property. The bank got the report in which the suit property was valued less than that indicated by the applicant. The respondent was aggrieved by the loss occasioned, due to the fact it advanced a loan facility on the footing of the applicant's report. That report indicated that the Property had an Open Market Value of Kshs.87 million, and a Forced Sale Value of Kshs.56.5 million. Yet the re-evaluation assigned the same Property a lower Open Market Value of Kshs.17 million and a Forced Sale Value of Kshs.13.125 million. The dispute was referred to arbitration and the arbitrator made the following material orders;
 - a. A declaration that the applicant was wholly negligent in submitting false valuation reports and is liable to meet the direct loss of Kshs.40 million suffered by the respondent who relied entirely on the valuation reports when lending money to its customer;
 - b. A declaration that the applicant's valuations over the properties known as Land Reference number Machakos/Ndalani Phase 11/461, Machakos/Ndalani Phase 11/462 and Machakos/Ndalani Phase 11/465, are outside permissible margins of error;
 - c. The applicant to forthwith pay the respondent the sum of Kshs.44,036,555.51;
 - d. The applicant shall also pay the respondent simple interest on the sum stated in (iii) above at the rate of fourteen per cent (14%) per annum, from the 1st day of July 2021 until payment in full;
 - e. The applicant shall bear all the costs of these proceedings; being the respondent's party and Party costs, and the Arbitrator's charges. These costs are to be paid within 30 days of the date of this award, failing which the applicant is at liberty to file its bill of costs with the Arbitral tribunal for taxation.
5. The applicant approached the High Court vide an application dated 18th March 2022, seeking to set aside the award. The respondent on its part approached the court vide application dated 16th May 2022 seeking to enforce the award.
6. The court saw no reason to set aside the impugned award and dismissed the applicant's application. The court found merit in the respondent's application and allowed the same by ordering that the mentioned award be recognized, entered as a judgement of the court. The respondent was granted leave to enforce it. The applicant was ordered to refund the Respondent the costs of Kshs.139,000.00 paid for the release of the Additional Award on Quantum of Costs dated 2nd May 2022. The applicant was awarded the costs of both applications assessed at Kshs.150,000.
7. The findings in the impugned judgement aggrieved the applicant who filed a notice of appeal dated 9th February 2023.
8. The grounds of the application are that the applicants have an arguable appeal that will be rendered moot if the arbitral award is enforced because there is reason enough to set it aside. The applicant vide



supplementary affidavit revealed that its property is scheduled for sale in an auction and the stay order sought ought to be granted.

9. The applicant approached the High Court seeking leave to appeal against the decision rendered on 27th January 2023, however the court dismissed the application vide ruling rendered on 17th March 2023.
10. We heard the matter virtually on the 31st October 2023. Learned counsel Ms. Grace Katasi appeared for the Applicant, and Senior Counsel Mr. Allen Gichuhi appeared for the Respondent. Ms. Katasi relied on a supporting affidavit by Peter Musui dated 31st of March and further affidavit dated 17th of May and their filed submissions dated 26th of May, this year. Mr. Gichuhi relied on their filed replying affidavit dated 22nd May, 2023, together with written submissions dated 29th May, 2023 and the list of authorities. Both counsel highlighted their submissions, which we have considered.
11. We have considered the application before us which is the one dated 31st March 2023, the supporting and opposing affidavits, the rival arguments by counsel and authorities relied on. An applicant seeking an order of stay of execution, stay of proceedings and injunction pending appeal under rule 5(2)(b) of the Court of Appeal Rules must have filed a notice of appeal, that gives this court jurisdiction to entertain the application. Secondly, such applicant should demonstrate to the satisfaction of the Court that the intended appeal is arguable and will be rendered nugatory if stay is not granted.
12. On the arguability of an appeal, it is not necessary for an applicant to demonstrate a multiplicity of issues nor must that the issues necessarily succeed in the end. It will be enough for the applicant to show even a single issue which is not frivolous and deserves to be interrogated by the Court that will hear the intended appeal. See Somak Travels Ltd v Gladys Aganyo [2016] eKLR.
13. The second principle is that the applicant must demonstrate that if an order of stay or injunction, as the case may be, is not granted, and the appeal, or the intended appeal, were it to succeed, it would have been rendered nugatory by the refusal to grant the stay or the injunction. See Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.
14. We are guided by the decision in Stanley Kangethe Kinyanjui v Tonny Keter & others [2013] eKLR where the court summarized what should guide the court as follows:
 - xii. The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.
 - 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.
 - ix. Where it is alleged by the applicant that the appeal will be rendered nugatory on account of the respondent’s impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”
15. The submissions dated 25th May 2023 in support of the application were filed by Grace Katasi & Associates Advocates for the applicant. Counsel cited the case of Synergy Industrial Credit Ltd v Cape Holdings Ltd [2019] eKLR for the proposition that the subject arbitral award is contrary to public policy, under section 35(2)(b)(ii) of the Arbitration Act and ought to be set aside. It was explained that the subject matter of the dispute is a charge between the respondent and the borrower and the operative law is Section 88(1) of the Land Act; that the respondent did not mitigate its losses by exhausting the remedies under section 90(3) of the Land Act; that the respondent ought to go after the guarantors as the applicant was not privy to the loan agreement. It was urged that the applicant has an arguable



appeal and that execution of the subject decree would eviscerate the substratum of the suit. It was reiterated that the court has a role under section 35 of the *Arbitration Act* to correct errors of law in arbitration. To counsel, if the applicant pays the decretal sum then the borrower will go scot free in violation of the *Land Act* 2012.

16. In reply to the application, the court was reminded that the claim before the tribunal was professional negligence by a valuer. It was refuted that the applicant deserves leave to appeal because the parties submitted themselves to arbitration; that the applicant could not raise new allegations that were not before the arbitral tribunal; that there are no exceptional circumstances to warrant grant of leave to appeal. The deponent averred that the court lacks jurisdiction to grant stay in the absence of a notice of appeal. It was contested that the appeal is arguable because the grounds of appeal were not issues that were before the arbitrator. That the applicant's application for setting aside was found by the court to be an appeal disguised as an application under section 35 of the *Act*. That the respondent relied on the applicant's valuation report to give a loan.
17. Mr. Gichuhi urged that the applicant raised new issues that were not before the arbitrator. Cited was the case of *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR. Counsel urged that the application was time barred. However, the application before us was not on the competence of the application. As the applicant had filed a notice of appeal, that is sufficient to give this court jurisdiction to consider the application at hand. See rule 5(2) (b) of the *rules*.
18. On the arguability, the applicant has urged that the respondent should have pursued the principal borrower, the applicant not being privy to the charge, in deference to the principle of exhaustion, and the doctrine of unjust enrichment. We are satisfied that the appeal is arguable and deserving of consideration by this Court. It is not frivolous.
19. On the second limb of whether the appeal will be rendered nugatory if the stay sought is not granted. We have considered the averments in the supporting affidavit to this application and the submissions by Ms. Katasi. Nowhere has the applicant raise an issue on the ability of the respondent to repay the decree if the appeal were to succeed. It did not claim that the respondent was impecunious. All it decried is that it stood to suffer great loss.
20. As guided in the case of *Stanley Kangethe Kinyanjui v Tonny Keter & others, supra*, whether 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. Now that the appellant did not claim the respondent could not refund the amount of the decree if the appeal succeeded, we are satisfied that the applicant can adequately be compensated by an award of damages, and be restituted to as near a pecuniary state or position as it was before execution of the court's judgment and decree.
21. We find therefore that even though the appeal is arguable, it will not be rendered nugatory if the stay sought is declined. In the result, the application dated 31st March 2023 is dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED IN NAIROBI THE 9TH DAY OF FEBRUARY, 2024.

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

