



REPUBLIC OF KENYA



**Ngisa & another practicing as Morara Ngisa & Co Advocates v National
Social Security Fund Board of Trustees (Civil Appeal (Application)
E245 of 2023) [2024] KECA 73 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 73 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E245 OF 2023
P NYAMWEYA, A ALI-ARONI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

**RONALD MORARA NGISA & ALICE NYOMENDA OERI PRACTICING AS
MORARA NGISA & CO ADVOCATES APPLICANT**

AND

**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES RESPONDENT**

*(An application for stay of execution pending appeal from the
judgment of the High Court of Kenya at Nairobi (D.S.Majanja, J.)
delivered on 30th March 2023 in HCC CASE NO. E146 OF 2022)*

RULING

1. Before us is an application by way of a Notice of Motion dated 26th April 2023 brought under Section 3 of the *Appellate Jurisdiction Act*, Rules 2, 5 (2)(b), 42 and 47 of the *Court of Appeal Rules* 2022.
2. Prayers a-c of the said notice of motion are spent. The substantive prayers remaining for our consideration seek for: an order of stay of execution of the judgement delivered in High Court Commercial Case No. E146 of 2022 (Majanja J.), and all consequential orders thereto, pending hearing and determination of the appeal; in the alternative an order of injunction restraining the respondent, its principals, servants, employees, agents or any other person from attaching, selling or in any other way interfering with the applicant's assets pursuant to the said judgement, pending hearing and determination of the appeal, and for costs of the application.
3. The application is supported by grounds set out in the application and are rehashed in the affidavits in support both sworn on the 23rd of April 2023 by the 2nd applicant, Ms. Alice Nyomenda Oeri, Advocate and the 1st applicant, Ronald Morara Ngisa, and a further affidavit of the 2nd applicant dated 10th May



2023. In her supporting and further affidavits, the 2nd applicant deposes inter alia that; judgement was entered jointly against her and the 1st applicant, that she has never been or held herself out, as a partner in the 1st applicant's law firm and, had the learned Judge considered the CR.13 form annexed to her replying affidavit, in response to the originating summons and/or considered the replying affidavit in totality, he would have arrived at a different conclusion.
4. She deposes further that they have an arguable appeal as the learned Judge fell into error and misdirected himself in fact and in law: in failing to consider the material evidence on record and dismissing the applicants application seeking to have her name struck out from the proceedings on the basis that she was not a partner in the firm of Morara Ngisa & Co. Advocates; in assuming and making a finding on the evidence tendered on by the respondent that she held herself out as a partner in the firm of Morara Ngisa & Co. Advocates; in considering that the 2nd respondent's name appeared in the letterhead of the law firm; and in failing to consider the fact that a professional undertaking is a personal undertaking by the individual making the undertaking and cannot extend to third parties who are not parties to the undertaking. Further she deposes that should the orders not be granted she will suffer irredeemable damage and the substratum of the appeal will be eroded.
 5. On his part the 1st appellant deposes that he is the sole proprietor of the law firm herein. He concurs fully with the averments of the 2nd applicant and states further, that unless the order is granted he will suffer hardship; that the crux of the matter is the undertaking issued by the law firm and there is need for the court to interrogate the terms of the undertaking.
 6. The applicant's counsel filed fairly brief submissions, where he reiterated that the applicant has an arguable appeal. On the nugatory aspect, he submitted that the applicant stands to suffer hardship that will be disproportionate to any suffering the respondent may experience while waiting for the appeal to be heard and determined on its' merit. Learned counsel relied on the following authorities in support of the application: *James Thomas Andafu v Joseph Makokha Akbulunya* [2018] eKLR Civil Application No. 61 of 2018; and *Regnoil Kenya Limited v Winfred Njeri Karanja* [2019] eKLR Civil Application No. Nai 329 of 2018 (UR 266 of 2018).
 7. The application was opposed by way of a replying affidavit sworn on 4th May 2023 by Caroline Rakama Odera, the respondent's principal officer (Legal and Regulatory Affairs), wherein she deposes that; the appellants issued an unambiguous and unequivocal professional undertaking to pay Kshs.6 million to the respondent upon release of completion documents of the property under sale, that the appellants did not honour their undertaking leading to the respondent filing HCC Case No. 146 of 2022, seeking to enforce the undertaking. That judgement was entered against the applicants who were ordered to pay the sum of Kshs.6 Million plus 12% interest from the time of filing suit until payment in full and costs of Kshs.250,000.
 8. Further it was deposed that most of the issues raised related to an earlier order where the court had declined to strike out the 2nd applicant's name and which ruling was not appealed against. Further, that the property has already been transferred to the purchaser yet the respondent, a public body is yet to be paid for the same and that should the orders be issued it will be inimical to public interest.
 9. The respondent's counsel in his written submissions dated 15th May 2023, rehashed the averments in the replying affidavit. . Learned counsel stated that the applicants did not produce any evidence that they had met their professional undertaking. On the nugatory aspect counsel submitted that this being a money decree, the respondent is capable of refunding the said funds if the applicant's appeal is successful. Learned counsel relied on the case of *Kenya Hotel Properties Limited v Willesden Properties Limited*, Civil application Nai. No. 322 of 2006 (UR 178/06) as quoted in *Housing Finance Company of Kenya v Sbarok Kber Mohamed Ali Hirji & Another* (2015).



10. 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 that:
 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.”
11. The principles applicable in an application under rule 5 (2) (b) have been the subject of many decisions and are now a well- trodden path. To succeed an applicant must satisfy the twin principles namely:
 - i. An applicant must demonstrate that they have an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order of proceedings is not stayed.
12. On the first limb of the twin principles, this Court held in [David Morton Silversein v Atsango Chesoni](#) [2002] eKLR that for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal would in the absence of stay be rendered nugatory. [See also [Reliable Bank Ltd. \(in liquidation\) v Norlake Investments](#) [2002] 1 EA 227, [Nation Newspapers Limited v Peter Baraza Rabando](#), [2007] eKLR and [Republic v Kenya Anti-Corruption Commission & 2 others](#) [2009] eKLR.
13. On the question of whether the applicants have an arguable appeal, we are careful not to delve into the merits of the appeal, as this will be the preserve of the bench that will hear and determine the appeal. At a glance though, we form the view that the appellants have raised arguable points that are not frivolous and need to be ventilated at the hearing of this main appeal.
14. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its own merits, considering that the crux of the matter is a money decree. This court in [Youth Agenda v Rita Kijala Shako](#) [2014] eKLR, held;

“On the second requirement as to whether or not the appeal if successful would be rendered nugatory, what is involved here is a money decree. Ordinarily an appeal arising out of a money decree cannot be rendered nugatory if payment is effected, the assumption being that in the event that the appellant succeeds, the respondent would be in a position to repay. However, for the applicant to overcome this general principle, it should be able to demonstrate that the respondent is a person of straw or as poor as a church mouse and given those circumstances, if the decretal sum was to be paid, it would not be able to repay the same, to the successful appellant. (see [Kenya Shell Ltd supra](#)). However, with the advent of [Oraro and Rachier Advocates \(supra\)](#), another consideration seems to have been added in the mix, although the Judges who presided over the case where shy to not specifically say so, that in dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted particularly in money decrees, the Court ought to weigh the claims of both sides. The applicant may find itself in a very tight corner if it was forced to pay the decretal amount such that its operations may be crippled or adversely affected, whereas



perhaps the respondent would not be hit as hard by being kept out of the sum for a while pending the outcome of the appeal.” (emphasis added)

15. It has not been demonstrated that the respondent is incapable of refunding the decretal sum, should the applicants be successful in their appeal. Indeed, the respondent is a state corporation and as stated by its principal officer, which averment was not disputed, it is capable of paying back.
16. Accordingly, the applicants having failed to satisfy both the limbs, their application is consigned to the realm of dismissal. The same is dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

