



**Vaghjiyani Enterprises Ltd v Osundwa & Company Advocate (Civil Application E234 of 2023) [2024] KECA 81 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 81 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E234 OF 2023  
MA WARSAME, K M'INOTI & GWN MACHARIA, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**VAGHJIYANI ENTERPRISES LTD ..... APPLICANT**

**AND**

**OSUNDWA & COMPANY ADVOCATE ..... RESPONDENT**

*(An application for stay of execution against the ruling of the High Court at Nairobi (Lady Justice Margaret Mwangi) dated on 26th May 2023 in HCCOMM No. E140 of 2018)*

**RULING**

1. Vaghjiyani Enterprises Ltd. (the applicant), has moved this Court vide a notice of motion dated 2nd June 2023, seeking to stay the ruling of the High Court dismissing its application dated 25th January 2023 seeking conservatory orders pending an intended appeal.
2. The genesis of the application is the decision of the taxing master delivered on 17th July 2019 awarding the respondent law firm, Osundwa & Company Advocates, Advocate-Client fees of Kshs. 4,533,120.00 after the advocate-client relationship took a sour turn.
3. The applicant filed a reference seeking to set aside the award, but the Court declined to interfere and dismissed the application in a ruling dated 5th May 2022 concluding that the taxing master had acted properly in exercise of her discretion in awarding a sum of Kshs. 3,000,000 as instruction fees under Schedule II of paragraph 9 of the *Remuneration Order* and that the amount was neither too high or too low to cause injustice to either party.
4. Thereafter, the applicant sought leave to appeal that decision and the same was granted in a ruling dated 24th November 2022, wherein the Court also allowed the respondent's application dated 13th May 2020 for entry of judgment for Kshs. 4,533,120.00 as taxed. The applicant consequently filed an application to stay the ruling of 24th November 2022 pending its intended appeal, which was dismissed for lack of merit and which is the subject of the application before us.



5. The applicant being aggrieved, lodged a notice of appeal signifying its intention to appeal against the said decision and consequently invoked our discretionary jurisdiction under Rule 5(2)(b) of the [Court of Appeal Rules](#).
6. The applicant contends that the intended appeal raises arguable issues to wit, that the Judge misapprehended the principles governing stay of execution, the learned judge erred in failing to find that the bill of costs was pegged on an erroneous figure with a glaring mathematical error which the respondent is in the process of executing and that the appeal has high chances of success. The applicant further emphasised that its appeal will be rendered nugatory in the event the orders sought are not granted, given that the execution process has commenced pursuant to the warrants of attachment dated 17th January 2023 served upon it. Lastly, the applicant conceded that it was willing to provide security as a condition for the orders sought.
7. The application was opposed by a replying affidavit sworn on 8th June 2023, by Mr. Osundwa where he deposed that there was no appeal on record to justify the orders sought, the impugned decision is a negative order incapable of being stayed, that the applicant had not alleged that he was a man of straw incapable of refunding the decretal sum in the event the appeal was successful, that commencement of execution cannot be a ground for stay of execution, the allegation that the amount awarded is erroneous does not hold any basis, nor has it been demonstrated that the appeal will be rendered nugatory if the orders sought are not granted.
8. He further set out in detail the litigation history in the matter and urged that the applicant had filed a myriad of frivolous applications over the matter and that the instant application was one of the applicant's many attempts to deny the respondent the fruits of his decree and that by all means it was just that litigation must come to an end.
9. We have considered the application, the affidavits, the submissions by counsel and the law. The applicable guidelines in regard to orders sought in this regard are well settled. Firstly that the applicant must demonstrate that they have an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See *Reliance Bank Ltd. (in liquidation) v Norlake Investments Ltd.* [2002] 1 EA 227.
10. Taking caution not to make determinations that would otherwise prejudice the hearing of the intended appeal, we are of the view that whether the learned judge erred in failing to find that the bill of costs was pegged on an erroneous figure and whether the applicant had met the threshold for stay of execution stated under Order 42 of the [Civil Procedure Rules](#) are triable issues worthy of consideration before this Court.
11. The rule is that one arguable issue is sufficient and the issue does not need to succeed on appeal. This was held in the case of; - [Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others](#) [2014] eKLR: -
 

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication.”
12. As for the nugatory aspect, would the appeal be rendered academic so that it becomes proper to issue the orders sought at this stage?
13. It is trite what may render the success of an appeal nugatory must be considered within the circumstances of each particular case (*Reliance Bank Ltd. v NOR Lake Investments LTD.* (supra). Consequently, we do not think that the financial capability of the respondent to refund the decretal



sum in the event the appeal is successful is the only determining factor of whether an appeal will be rendered nugatory.

14. In this case, the Court granted the applicant leave to appeal against the ruling of 5th May 2023 which dismissed its reference objecting to the taxed bill of costs. There is an appeal pending, the amount that the respondent is ultimately entitled to is not settled and will only be ascertained after the determination of the appeal. In our view, such an eventuality should in the interest of justice be taken into account as it will render the appeal futile and furthermore, it is crucial in ensuring a just and effective determination of the appeal. Accordingly the application is allowed. Costs to abide by the outcome of the appeal.

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

**M. WARSAME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

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