



**Kiru Investment Housing Company Limited v Others (Civil Appeal  
(Application) 166 of 2019) [2024] KECA 361 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KECA 361 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 166 OF 2019  
MK KOOME, MSA MAKHANDIA & AK MURGOR, JJA  
MARCH 22, 2024**

**BETWEEN**

**KIRU INVESTMENT HOUSING COMPANY LIMITED ..... APPLICANT**

**AND**

**JANERUS WANJAU WANDERI & 7 OTHERS ..... RESPONDENT**

*(Being an application for stay of execution of the orders of High Court  
at Murang'a issued on 8th October 2019 in Civil Case No 5 of 2019)*

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> October 2019, brought pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#), the applicant Kiru Investment Housing Company Limited sought: (i) an order for stay of execution of the orders issued on 8<sup>th</sup> October 2019 by High Court at Murang'a until the intended appeal is heard and determined and (ii) that there be a status quo maintained until the intended appeal is heard and determined.
2. The Motion was brought pursuant to the grounds on its face and the affidavit in support sworn by Peter Gatwa Muthoga the Chairman of the applicant in which he reiterates the ground on the face of the application and further contends that in the interlocutory ruling delivered on 8<sup>th</sup> October 2019 it was ordered that elections be held within 90 days; that being dissatisfied the applicant instructed its advocates to lodge a Notice of appeal on 15<sup>th</sup> October 2019. It was contended that the issues raised in the plaint were that the respondents were not bonafide members of the applicant; that in ordering by the trial court for the conduct of elections at this interlocutory stage was tantamount to determining the suit; that the applicant shall suffer irreparable loss if stay is not granted and more confusion will ensue in the company; that it is unfair and unjust to order an election before the real questions are resolved, more particularly whether the respondents are bonafide members; and that the applicant



stands to suffer irreparable loss. A copy of a Notice of appeal dated 14<sup>th</sup> October 2019 was annexed to the application.

3. In a replying affidavit sworn on 1<sup>st</sup> March 2020, Jenerus Wanjau Wanderi on behalf of himself and other respondents opposed the application and deposed that the application is frivolous, lacks merit and is an abuse of the court process; that the application shows that either the applicant did not understand the ruling of the High Court or he merely seeks to delay or defeat the course of justice as was expressed in the ruling; that the reason that the court ordered that the Annual General Meeting be held was primarily for the members to elect interim Directors and appoint an interim Company Secretary to ensure the proper conduct by the company of its affairs; that the order issued was within the court's mandate under section 280 of the *Companies Act*; that the court order did not dispose of the suit contrary to the applicant's averment; that the applicant's intention is to ensure that the elections do not take place so that the current officeholders continue to deplete company assets contrary to public policy and the law; that from 2006 no Annual General Meeting has been held by the applicant.
4. In their written submissions, the applicant submitted that the orders issued by the trial Judge were granted at an interim stage before the applicant had a chance to file its defence and explain its side of the story; that the company elections had been infiltrated by bogus members and by ordering an election without the safeguards or consideration of all concerned parties had worsened the applicant's election process; that the orders if executed, will render the intended appeal nugatory as once the elections are carried out there would be no issue left for determination.
5. The respondent's submissions were not made available to the Court.
6. As a brief background to the application, the respondents who claim to be shareholders of the applicant, a public limited liability company sued the applicant seeking an order that the applicant be ordered within a reasonably short period to hold an Annual General Meeting to discuss the matters pertaining to the company including conducting of elections of the directors, and tendering of accounts among other issues. Simultaneously with filing the suit, the respondents filed an application seeking, i) to compel the applicant company to hold a general meeting to elect directors; and, ii) for an order that accounts be tabled. The respondents contended that they had acquired Loc.14/ Kiru/1965/56 which earned an estimated monthly rental income of Kshs.200,000 through immense effort, but the members had not reaped any fruits of their efforts; that the last Annual General Meeting was held in 2006 when some directors were elected, while other directors had died, resigned or were removed from office by the current chairman. In summary, they contended that the very existence of the applicant was in serious jeopardy.
7. The application was opposed and in a replying affidavit sworn on 20<sup>th</sup> June 2019 by Peter Gatawa, the applicant's chairman who averred that only two of the respondents appeared on the official list of members submitted to the Registrar. He contended that the motion was an abuse of court process. He blamed the respondents for blocking the company meetings through court orders in Nairobi High Court Judicial Review 436 of 2006 and Chief Magistrates Court at Murang'a Civil Case 191 of 2017; that the issue of the bona fide officials and members should be resolved first without undue interference from the court.
8. The trial judge upon considering the application held that it was merited and ordered, inter alia the conduct of a general meeting of the company within 90 days of the date of the ruling. It is on the basis of this ruling that the applicant brought this rule 5 (2) (b) application.
9. The jurisdiction under rule 5(2)(b) of this *Court's rules* is discretionary. In the exercise of this discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. See



Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR and Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others [2013] eKLR.

10. In the case of Trust Bank Limited and Another v Investech Bank Limited & 3 Others [2000] eKLR, this Court held that:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

11. On the first consideration of an arguable appeal, we have stated that an arguable appeal is not one which must necessarily succeed but rather one which is not frivolous and raises even a single bona fide arguable point that deserves to be considered and determined by the Court. See Kenya Tea Growers Association & another vs Kenya Planters & Agricultural Workers Union, Civil Application No. Nai. 72 of 2001 and Damji Premji Mandavia v Sara Lee Household & Body Care (K) Limited, Civil Application No. Nai. 345 of 2005 (UR).

12. In the instant case, as to whether the appeal is arguable, it is observed that the applicant did not annex a copy of the draft Memorandum of appeal to the application. However, a consideration of the motion discloses that the applicant’s complaint in the main is that, the trial court’s ruling in effect determined the intended appeal at an interlocutory stage. This is an arguable ground upon which we consider that the applicant should be heard on appeal.

13. Turning to the second prerequisite, whether the appeal, if successful, would be rendered nugatory in the event the Court declines to grant the orders sought, and the intended appeal succeeds, the applicant asserts that the trial court ordered that the Annual General Meeting be held within 90 days from the date of the ruling. The ruling was delivered on 8<sup>th</sup> October 2021, and this application was heard on 8<sup>th</sup> March 2021. Given the lapse of time between the ruling and the hearing of the application, our view is that following the expiry of 90 days as ordered by the trial court, the application would have been overtaken by events and there would be nothing left for us to stay. Accordingly the appeal if successful, will not be rendered nugatory.

14. In sum, the applicant having failed to satisfy one limb of the key requirements for a rule 5 (2) (b) application, the Notice of Motion dated 24<sup>th</sup> October 2021 is unmerited and is hereby dismissed. Costs in the appeal.

15. This ruling is delivered under rule 32 (3) of the Court of Appeal Rules, 2022 for the reason that Koome, JA (as she then was) was appointed Chief Justice and President of the Supreme Court of Kenya.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original



Signed

**DEPUTY REGISTRAR**

