



J&K Investments Limited v Gazemba Wekesa & Co Advocates (Civil Application E587 of 2023) [2024] KECA 513 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KECA 513 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E587 OF 2023
SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA
APRIL 26, 2024**

BETWEEN

J&K INVESTMENTS LIMITED APPLICANT

AND

GAZEMBA WEKESA & CO ADVOCATES RESPONDENT

(Being an application for stay of execution of the Ruling and Order of High Court at Nairobi, (Majanja, J.) dated 27th October 2023 in Misc. Comm. Application No. 377 of 2023 Consolidated with E437 of 2023)

RULING

1. Before us is a Notice of Motion dated 14th December 2023 filed by J & K Investments Limited (the applicant), under the provisions of rule 5 (2) (b) of the *Court of Appeal Rules*, 2010 (now Rules, 2022). The applicant seeks an order of stay of execution pending the hearing and determination of an intended appeal against the ruling and order in Nairobi High Court Misc. Comm. Application No. 377 of 2023 consolidated with Misc. Comm. Application E437 of 2023 (Hon. Majanja, J), dated and delivered on 27th October 2023. The firm of Gazemba Wekesa & Co. Advocates is the respondent herein.
2. The grounds upon which the application is premised are contained on its face and the affidavit sworn on 14th December 2023 by Li Shunkang, the applicant's Managing Director. It was deposed that the respondent filed Misc. Comm. Application No. E377 of 2023 seeking judgement against the applicant for Kshs.35,500,000/=, being the balance of the legal fees arising from a remuneration agreement dated 28th June 2022. Conversely, the applicant filed Misc. Comm. Application No. 437 of 2023 seeking to set aside the said remuneration agreement relied upon by the respondent. Both applications were consolidated and heard together.
3. By a ruling dated 27th October 2023, the learned Judge dismissed the applicant's application but allowed that of the respondent, and ordered that the respondent was entitled to Kshs.35,500,000/=,



costs of the application capped at Kshs.150,000/= plus interests from the date of filing the application. Thereafter, a decree dated 7th December 2023 was extracted.

4. The respondent commenced garnishee proceedings through an application dated 11th December 2023, to satisfy the decree dated 7th December 2023. The respondent sought to attach the applicant's three (3) bank accounts held with Stanbic Bank Kenya, Credit Bank Kenya and Bank of Africa Kenya Limited. The said application was heard ex-parte on 13th December 2023, and the superior court granted the respondent an order of garnishee nisi. It is this order that precipitated the proceedings before this Court. The applicant is apprehensive that if stay of execution orders are not issued, the intended appeal will be rendered nugatory.
5. In a replying affidavit sworn on 8th February 2024 by one Frank Walukwe, an advocate practicing in the firm of Gazemba Wekesa & Co. Advocates which has since merged to be J W. & Frank Advocates, deposed that the respondent was retained as an advocate to represent the applicant in arbitration proceedings; that the intended appeal raises vexatious grounds for the reason that the consultancy agreement dated 18th January 2021 between Kensetsu Kaihatsu Consulting Engineering Limited and the applicant also applied to the respondent. The respondent contended that this offends the doctrine of privity of contract because it is not the respondent who directly entered into the agreement with it (applicant).
6. Counsel deposed that the allegations that the agreement was procured under undue influence by one Engineer Sirmoi Wekesa is a non-starter; that the superior court found that the said Sirmoi wekesa was neither an employee nor an agent of the respondent; and that the fees being sought were not exorbitantly high as the subject matter was in excess of Kshs. 1 billion.
7. Counsel urged us that if we were inclined to grant the stay orders, the respondent should be paid the uncontested fees of Kshs.19,872,010.20, but was quick to add that the application fails to satisfy both limbs under rule 5(2)(b) as a consequent to which it should be dismissed with costs.
8. The application was canvassed by way of both oral and written submissions.
9. The applicant filed written submissions dated 20th December 2023. It submitted that the principles for granting stay of execution orders were well settled in the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* (2000) eKLR where it was held that the jurisdiction of this Court under rule 5 (2) (b) is original and discretionary; that the applicant has to show that the appeal is arguable and secondly, that if the stay is not granted, the appeal will be rendered nugatory.
10. On what constitutes an arguable appeal, the applicant has referred us to the decision of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR, where this Court held that an arguable appeal is not one which must necessarily succeed but one which is not frivolous.
11. The applicant cited some of the arguable points on appeal to be: that the purported remuneration agreement between the parties herein is invalid as it was procured under false pretence and coercion; that the trial court failed to consider the existence of a separate agreement which addressed the issues of quantum of fees and the time of settlement thereof; that the trial court also failed to appreciate that disputes arising out of the said agreement would be solved through arbitration and hence it lacked jurisdiction.
12. On the nugatory aspect, it was submitted that the respondent has commenced garnishee proceedings, and that if stay orders are not granted, the applicant will be stripped of an avenue of recovering the amounts that will be attached, thus rendering the intended appeal nugatory.



13. The respondent relied on written submissions dated 26th January 2024. On the arguability limb, it basically reiterated the averments set out in the replying affidavit, and we thus see no need to rehash them save to state that it relied on the case of *Opiyo & 123 Others v Teleposta Pension Scheme Registered Trustees* (Civil Application No. E276 of 2022) (2022) KECA 1276 (KLR) for the proposition on the twin principles that a party must demonstrate to qualify for grant of orders under rule 5(2)(b) of this *Court's Rules*, 2022.
14. On the nugatory aspect, it was submitted that of the amount in the garnishee absolute order that was issued, only Kshs.63,610.00/= was recovered, out of which Kshs.35,500,000/= is still outstanding; that therefore, the applicant cannot argue that the appeal would be rendered nugatory based on an amount which is not available in its accounts that can satisfy the decretal sum; and that in any case, it (the respondent) is a firm of reputable standing which is capable of repaying any money in the event that the appeal is successful.
15. It was further submitted that the applicant is a foreign national with no known assets in Kenya and therefore, in the interest of justice, it should be asked to pay the respondent Kshs.19,872,010.20 which is the uncontested fees.
16. The respondent asked us to find that the second limb has not been satisfied and in support thereof, reliance was placed on the case of *Mungai v Mwangi Keng'ara & Co. Advocates* (Civil Application No. E407 of 2022) (2023) KECA 1328 KLR, where the Court in observing that the applicant has not demonstrated the nugatory aspect, held that the issue before it being of a monetary decree, and therefore ascertainable, the applicant could be compensated by way of costs. We were accordingly urged to dismiss the application.
17. We heard the parties virtually via the Goto virtual platform on 13th February 2024. Learned counsel Ms. Olendo appeared for the applicant while learned counsel Mr. Walukwe appeared for the respondent. Both counsel highlighted their respective submissions, which we shall briefly revisit.
18. On the arguability limb, Ms. Olendo highlighted two out of the six grounds of appeal which the applicant had raised in its memorandum of appeal. It was submitted to us that the consultancy agreement between the applicant and third parties touched on several issues including legal services; and that the respondent stated in its submissions and replying affidavit that it is not a party to that agreement and in that case, it is not bound by its terms. In this regard, we were urged to consider the respondent's replying affidavit in which the respondent deposed that it is willing to concede to the application if the amount of Kshs.19,872,010/= is paid. To the applicant, the concession is a pointer that the respondent is fully aware of the terms of the agreement even though it was denying it.
19. It was further the contention of Ms. Olendo that the Court will require to determine whether her client agreed to pay a fee of Kshs. 30,000,000/= for which an agreement was made.
20. Mr. Walukwe on the other hand submitted that the appeal is anchored on three main grounds. Firstly, there is the purported consultancy agreement dated 18th January 2021 between Kensetsu Kaihatsu Consulting Engineering Limited and the applicant, which also applies to the respondent. To the counsel, this is an issue that was argued before the superior court, and the court rightly held that the doctrine of privity of contract applies. He contended that the respondent is not a party to the agreement and it was individually instructed by the applicant, a fact that is deposed to at page 6 of the respondent's replying affidavit.
21. Secondly, is the contention by the applicant that the remuneration agreement was procured through undue influence by a person the applicant named as Engineer Sirmoi Wekesa. It was stated that Engineer Sirmoi Wekesa was the applicant's agent and main witness in the arbitral proceedings.



- Additionally, the remuneration agreement actually, was signed by the managing director and the beneficial owner of the applicant company, who also is the deponent to the applicant's supporting affidavit. To this extent, it was urged, the applicant cannot be heard to say that the agreement was procured through coercion.
22. Thirdly, is the argument fronted by the applicant that the fees as charged are exorbitantly high. Counsel asked us to note that it is through the respondent's diligent work that the applicant was awarded Kshs.397,440,203.93, and that in fact, it (the respondent) prepared and prosecuted an application for an additional award of Kshs.517,430,001/=. Counsel submitted that the learned Judge rightly found that in the circumstances, the amount of Kshs.35,000,000.00 could not be said to be exorbitant.
 23. Additionally, it was argued that the Managing Director and beneficial owner of the applicant is a Chinese national. Under those circumstances, counsel asked that the Court balances the interests of both parties and order that the respondent be paid at least the amount of Kshs.19,872,010/= which is the uncontested fees. In the alternative, counsel asked that the amount be ordered to be deposited as security for the decretal sum.
 24. Counsel submitted that the grounds upon which the application is anchored have since been overtaken by events because the respondent garnisheed the three known accounts of the applicant and it only recovered an amount of Kshs.63,610.00/=:, yet the garnishee order was for Kshs.38,000,000/=. Based on the foregoing arguments, counsel submitted that the intended appeal is neither arguable nor will it be rendered nugatory if the orders sought are not granted.
 25. We have duly considered the application, the response thereto, the rival arguments of the parties and the law. The applicant asks us to exercise our discretionary powers and grant the orders envisaged under rule 5 (2) (b) of the *Court of Appeal Rules*, 2022. We are thus required to examine whether the applicant has demonstrated the twin principles under the rule, being whether the appeal is arguable and if the orders sought are not granted, the intended appeal will be rendered nugatory. We do not hesitate to add that the twin principles must be determined conjunctively and not disjunctively, and to this Court's satisfaction.
 26. We are also minded that we should not make definitive findings at this stage so as not to embarrass the hearing of the main appeal. These principles were reiterated by this Court in the case of *R. K. K. v M. W. K. & 2 others* (2016) eKLR as follows:

“It is now settled that an applicant need not demonstrate a litany of arguable points. It is sufficient even if there be a solitary arguable point. It has been held by this Court in many decisions that in determining whether the appeal is arguable, the Court will advisedly avoid delving into the merits of the appeal to eschew prejudicing the appeal or intended appeal.”
 27. On the first principle, which is whether there exists an arguable appeal, the principle is that it should not be a frivolous one. It is sufficient that the applicant has an arguable appeal even if it is on a single point. This principle was restated in Stanley Kang'ethe Kinyanjui (supra) where this Court described an arguable appeal in the following terms:

“An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”
 28. We have carefully considered the grounds in the Motion and the Memorandum of Appeal as filed by the applicant. The applicant's proposed arguable grounds are that the learned Judge erred by failing to find that there was a separate contract other than the remuneration agreement dated 28th June 2022 which addressed the issue of remuneration; that the remuneration agreement dated 28th June 2022 was



invalid, non-binding and was procured by coercion; that the legal fees were exorbitantly high; and that the trial court had no jurisdiction over the matter as per clause 10 of the remuneration agreement.

29. In his ruling, the learned Judge found that there was a binding remuneration agreement between the parties, and that indeed, no evidence was produced to prove the alleged coercion claims. The trial court also found that the remuneration agreed upon was not exorbitant owing to the fact that the subject matter was above 1 billion Kenya Shillings.
30. The applicant has not annexed any fee settlement agreement in its application. The respondent in its replying affidavit has annexed a consultancy agreement dated 18th January 2021 and an addendum to it dated 5th April 2022 executed on 29th March 2022.
31. The subject disputed agreement that was placed before the High Court was dated 28th June 2022. This agreement is in the form of a letter vide which the respondent agreed to pay legal fees of Kshs.8,000,000/=, upon publication of the award and the balance thereof of Kshs.34,000,000/= upon payment by the client.
32. From the foregone discourse, we cannot hesitate to find and hold that the applicant has not sufficiently demonstrated that there is an arguable appeal worthy of being admitted by this Court.
33. And, since the first limb has not been satisfied, we are not obliged to address the second limb on the nugatory aspect. It automatically falls by the wayside. At any rate this is a monetary decree which can be compensated. And rightly so, Mr. Walukwe submitted that the respondent being a firm of reputable standing, would be able to refund any money decree in the event that the appeal was to succeed. In fact, the applicant did not depose that the respondent is not in a position to refund.
34. On the whole, we find that since the applicant has failed to satisfy both limbs under rule 5 (2) (b) of this *Court's Rules*. Accordingly, we find that the Notice of Motion dated 13th December 2023 is devoid of merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

