



**Principal Secretary Ministry of Regional Development/or its Successor  
Ministry Through the Office of the Attorney General v N.K Brothers Ltd (Civil  
Application E279 of 2023) [2024] KECA 421 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 421 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E279 OF 2023  
DK MUSINGA, K M'NOTI & M NGUGI, JJA  
APRIL 26, 2024**

**BETWEEN**

**PRINCIPAL SECRETARY MINISTRY OF REGIONAL DEVELOPMENT/OR  
ITS SUCCESSOR MINISTRY THROUGH THE OFFICE OF THE ATTORNEY  
GENERAL ..... APPLICANT**

**AND**

**N.K BROTHERS LTD ..... RESPONDENT**

*(Being an application for stay of execution of the ruling of the High Court of Kenya at Nairobi  
Judicial Review Division (J. Ngaah, J.) dated 12th May 2023 in JR Misc. Cause No. 196 of 2019)*

**RULING**

1. By an application dated 21<sup>st</sup> June, 2023 the applicant seeks an order of stay of execution of the ruling rendered by Ngaah J. on 12<sup>th</sup> May, 2023 in Judicial Review Mis. Application No. 196 of 2019 pending the hearing and determination of its intended appeal. It further seeks an order that pending the hearing and determination of the intended appeal, this Court do grant an order of injunction stopping the respondent from taking any step pursuant to the impugned ruling.
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn by Idris S. Dokota, the Principal Secretary of the applicant, on 21<sup>st</sup> June, 2023. The grounds in support of the application are that this Court is clothed with wide and unfettered discretion to grant the stay orders sought provided it is just to do so; that the intended appeal raises substantial and arguable points of law and fact; that the impugned ruling directed that the Principal Secretary of the State Department for Regional Development be committed to civil jail without having been heard on merit; and that the trial judge erred by failing to recognize that the right to be heard embodies the right of audience which should be jealously guarded by the court as a cornerstone of the rule of law.



3. The applicant argues that its appeal raises substantial and arguable points of law and fact. Referring to its draft memorandum of appeal, the applicant highlights a number of the said grounds of appeal, the crux of which being that in the impugned ruling, the court directed that the applicant be committed to civil jail without having been heard on merit, and that the learned judge failed to recognize the applicant's right to be heard. The applicant avers that the intended appeal is meritorious with a high probability of success as it raises serious and arguable legal issues; that the applicant stands to suffer irreparable harm and irredeemable injustice if the orders sought are not granted; and that the application has been brought without unreasonable delay.
4. The application is opposed by an affidavit sworn by Rajesh D. Rathod, the Chief Executive Officer of the respondent. Mr. Rathod goes into some detail regarding the background to the present application and the indebtedness of the applicant to the respondent in the sum of Kshs. 67,279,524.92 as at 1<sup>st</sup> February 2019 with interest at 12% per annum until full and final payment.
5. Mr. Rathod further avers that the said indebtedness was not disputed and had been expressly admitted by the applicant's predecessor, one Dr. Margaret W. Mwakima. An order of mandamus had been issued on 26<sup>th</sup> November 2021 in favour of the respondent directing the applicant to comply with and satisfy the decree. That despite various demands being made and letters sent to the applicant, the applicant had failed to comply with the orders of the court, and as at 30<sup>th</sup> June 2023, the amount outstanding stood at Kshs. 85,461,884.24. The respondent had therefore filed the application dated 18<sup>th</sup> February 2022 seeking orders that the applicant was in contempt of Court, and that the orders were granted in the ruling of Ngaah J., culminating in the present application.
6. We note that following the respondent's application, on 21<sup>st</sup> October 2022, the Principal Secretary, Ministry of Regional Development or its successor, was held to be in contempt of court. The matter then came up before the court on 23<sup>rd</sup> November 2022 for the Principal Secretary to show cause why he should not be committed to civil jail. The matter did not proceed on that date as learned counsel for the applicant, then the respondent before the court, informed the court that he could only attend court on a virtual platform. Given the nature of the proceedings which required the physical presence of the applicant, the court adjourned the matter.
7. On 8<sup>th</sup> December 2022, the applicant appeared in court to explain why he should not be committed to civil jail. Upon hearing him, the court directed that he makes a firm commitment on the payment of the sum outstanding and due to the respondent, failing which he would be committed to civil jail for six months.
8. On 11<sup>th</sup> February 2023, counsel for the respondent, Mr. Billing, informed the court that he had received a payment plan from the respondent, under which the amount due to the respondent would be paid by instalments spread over seven years, a proposal that the respondent rejected as it demonstrated lack of seriousness to comply with the court order.
9. The trial court observed that it had bent over backwards to give the applicant an opportunity to comply with the court order; that the proposal that the applicant had given on settlement of the outstanding sum, which had been rejected, was not reasonable considering the period the amount has been outstanding. The court was therefore satisfied that the applicant had not purged his contempt, and the court proceeded to issue the orders the subject of the present application before us.
10. At the hearing of the application, Ms. Karanja appeared for the applicant while Mr. Billing appeared for the respondent. The parties filed submissions dated 3<sup>rd</sup> July 2023 and 6<sup>th</sup> July 2023 respectively, which we have read and considered.



11. The grounds on which this Court will issue orders of stay under rule 5(2)(b) of the *Rules of the Court* are settled. In order to succeed, an applicant must demonstrate that he has an arguable appeal and, secondly, that the intended appeal, if successful, will be rendered nugatory absent an order of stay.
12. These principles have been reiterated in several decisions of this Court, the Court holding, regarding the first principle, that for an order of stay of execution or proceedings 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 an order of stay, be rendered nugatory-see David Morton Silversein -vs- Atsango Chesoni [2002] eKLR and Reliable Bank Ltd (in liquidation) v Norlake Investments [2002] 1 EA 227.
13. In Republic v Kenya Anti-Corruption Commission & 2 Others (2009) KLR 31, this Court stated that:

“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.”
14. At the hearing of this application, we sought to know from learned counsel for the applicant, Ms. Karanja, the issue or issues, specifically, that the applicant sought to raise on appeal. While maintaining that the applicant has an arguable appeal, Ms. Karanja submitted that in the draft memorandum of appeal, the applicant intended to argue, inter alia, that he was condemned unheard. Ms. Karanja contended that the current Principal Secretary of the applicant Ministry, Idris Dokota, was not the one who had been heard by the court in the contempt application, but his predecessor.
15. The crux of the applicant’s argument, then, as we understand it from the submissions and as maintained by learned counsel, is that an order such as the contempt order in this case is directed at the Principal Secretary personally, not to the office; and that every time there is a change in the office, the new office holder has to be heard again before the order can be enforced; that a person succeeding to the office of Principal Secretary ought to be given an opportunity to show cause whether he should be committed to civil jail, because he will be committed to civil jail personally.
16. The applicant submits that the contempt orders in this case were made against the previous holder of the office of Principal Secretary in the Ministry, Dr. Belio Kipsang, and not the current holder of the office, Idris Dokota; that there is no evidence before the Court to show that any contempt proceedings have been instituted against Idris Dokota; and, therefore, Idris Dokota will be condemned unheard. Ms. Karanja conceded, however, that the Principal Secretary was the accounting officer in a Ministry. She maintained, however, that the applicant had a problem with the orders of contempt being directed at the Principal Secretary or his successor.
17. The essential facts of this matter are not in dispute. A decree in favour of the respondent was issued in the trial court on 28<sup>th</sup> November 2018 for the sum of Kshs 67,279,524.92 as at 1<sup>st</sup> February 2019, with interest at 12% per annum until payment in full. Various demands were made to the applicant, but no payment was forthcoming. On 6<sup>th</sup> October 2020, the then Principal Secretary, Dr. Margaret W. Mwakima, admitted that the respondent owed the said amounts.



18. Following the respondent's application to commit the applicant to civil jail for contempt of court, the applicant made a proposal for payment, which was rejected, and the orders of committal to civil jail were issued. The applicant argues that the issue it wishes to raise on appeal is that he, Idris Dokota, was not heard, as a different holder of the office he now holds was the one who appeared before the court and was heard on the issue of contempt.
19. This, we find, is an unsustainable argument. It is the duty of the accounting officer of a government Ministry to act with respect to debts adjudged to be due from the Ministry. The accounting officer of a Ministry is the Principal Secretary. The only person who can be committed to civil jail for failure to obey court orders in the circumstances such as are before us is the person holding the position of the accounting officer.
20. The argument by Ms. Karanja that upon a change in the holder of an officer a matter has, as it were, to be reopened in order for the new holder to be heard is untenable. It cannot be seriously contested that all government obligations, including obligations to pay debts due and to obey court orders, remain in force, regardless of changes in the persons holding office at all levels. The applicant is not required to personally meet the obligations due from the Ministry in which he is the accounting officer. His obligation to obey court orders arise from his duties as the holder of the office.
21. We find that the applicant's arguments are unsustainable, and that he has not satisfied the first limb of the principles under rule 5(2)(b). We therefore find no basis for inquiring into the second limb. The application dated 21<sup>st</sup> June 2023 is without merit, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL, 2024.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

