Muhsin & 3 others v Ibrahim (Civil Application E109 of 2023)
[2024] KECA 570 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 570 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E109 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

ABDULKARIM SALEH MUHSIN ..... 1ST APPLICANT

ZUMZUM INVESTMENT LIMITED ..... 2ND APPLICANT

AKABA INVESTMENT LIMITED ..... 3RD APPLICANT

ANCIENT INLAND SEAS LIMITED ..... 4TH APPLICANT

AND

NEDIM MOHAMMED IBRAHIM ..... RESPONDENT

(Being an application under sections 3, 3A and 3B of the Appellate Jurisdiction Act and rule 5(2)(b) of the Court of Appeal Rules for stay of execution/conservatory orders/injunction pending hearing and determination of an intended appeal from the judgement/orders of the High Court at Mombasa (F. Wangari, J.) delivered on 24th November 2023 in HCCC No E051 of 2021)

RULING

1. The prime movers of the dispute the subject of this ruling are the 1st applicant and the respondent. The two, during their happier times, decided to get into a joint business venture, a venture that bore fruits and, through the vehicle of business concerns, such as the 2nd applicant, they acquired properties in Mombasa and other parts of the country. The shareholding in the 2nd applicant is distributed between the 1st applicant, the respondent and the respondent's wife. As fate would have it, disagreements arose between the 1st applicant and the respondent on the manner in which their business ventures were being managed. The disagreements led to several suits whose particulars are not relevant for the determination of the present application.

2. Following various initiatives by friends and business associates, in 2017, the 1st applicant and the respondent eventually agreed to put their legal disputes on hold and refer them to mediation. Two

mediators were agreed upon, namely Mr Suggor Nurrow Hussein and Mr Aden Guleid Hassan, to assist the parties in resolving their disputes. On 7th May 2017, the two parties executed a Mediation Agreement and Resolutions (the Agreement). However, the immediate implementation of the Agreement seems to have run into headwinds. According to the applicants, the parties mutually agreed to abandon the Agreement and revive their pending litigation, some of which were eventually determined. The respondent was of a different view. According to him, the Mediation Agreement was never terminated.

3. While holding that view, the respondent commenced proceedings by a plaint dated 10th May 2021 in the High Court of Kenya at Mombasa being Civil Suit No. 51 of 2021 in which he sought specific performance of the Agreement, damages in lieu of or in addition to specific performance, costs of the suit, interest and any other remedy that the court deemed fit and just.

4. The respondent maintained that the Agreement was still in force having not been terminated. On the part of the applicants, it was contended that the said Agreement was mutually abandoned after it became difficult to effect, and the parties agreed to have the pending disputes resolved by the court. According to the applicants, the fact of abandonment of the Agreement was confirmed by the subsequent step taken by the respondent in Mombasa ELC Case No. 248 of 2014 – *Nedim Mohamed Ibrahim v Abdulbasit Swaleh Mohsin & anor*, which was still pending, but dismissed for want of prosecution, and which the respondent successfully applied to revive. The respondent maintained that the Agreement could only be terminated by another written agreement, and could not be terminated orally as the applicants contended.

5. After hearing the parties, the learned trial Judge (Wangari, J), on 24th November 2023, issued an order of specific performance of the Agreement and directed the 1st applicant and the respondent to meet with the help of their counsel and agree on how to set the ball rolling towards realisation of what they had initially intended; and that a meeting be organised not later than 15th December 2023. Each party was directed to bear own costs. It is this decision that the applicants are aggrieved with and against which they have lodged a Notice of Appeal.

6. In the meantime, the applicants moved this Court by way of Notice of Motion dated 6th December 2023 expressed to be brought pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 5(2) (b) and 42 of the *Court of Appeal Rules*. It is that Motion that is the subject of this ruling. In the Motion, the applicants, in substance, sought an order that, pending hearing and determination of the intended appeal, this Court issues an order staying execution and/or implementation of the judgement and orders issued on 24th November 2023.

7. Supporting the application was an affidavit sworn on 6th December 2023 by Abdulkarim Saleh Muhsin, the 1st applicant in the Motion, in his capacity as a director and shareholder in the 2nd, 3rd and 4th applicants. It was deposed that, subsequent to the abandonment of the Agreement, the existing court cases were revived, some of which were concluded. According to the applicants, upon the realisation that he was losing the cases, the respondent applied to have Mombasa ELC Case No. 248 of 2014 – *Nedim Mohammed Ibrahim v Abdulbasit Swaleh Mohsin & anor*, which had been dismissed for want of prosecution, revived, an application that was allowed. The said suit is now pending.

8. The deponent set out 23 intended grounds of appeal, which he desired this Court to interrogate. According to the deponent, the decision of the trial court has exposed the applicants to potentially costly litigation by failing to address itself to the totality of the evidence presented before the court.

9. Opposing the application, the respondent relied on the affidavit sworn by himself on 13th December 2023 in which he likewise narrated his view of the history of the dispute. In the said affidavit, he

explained the tribulations which, according to him, the 1st applicant subjected him and his wife, and which have adversely affected his health and interfered with his ability to give his family a decent life. In his view, the implementation of the Agreement will not interfere with any of the disputes that the 1st applicant alleged to have been determined. Rather, the decision of the court seeks to have the parties effect their agreement in the same spirit in which they started. It was the respondent's position that granting the orders sought by the applicants would cause him and his family such hardship as would be out of proportion to any suffering the applicants can stand while awaiting the appeal.

10. When the matter was called out for virtual hearing before us on 31st January 2024, learned counsel, Mr. Muchoki, appeared for the applicants while Mr. Paul Mwangi appeared from the respondent. Both counsel informed the Court that they had filed their submissions, which they relied on save for minimal highlighting.

11. In their submissions dated 8th December 2023 and filed by the firm of Ahmednasir Abdullahi, Advocates, LLP, the applicants relied on the case of *Trust Bank Limited and another v Investech Bank Limited and 3 Others* [2000] eKLR where the twin principles for granting stay under rule 5(2) (b) of the Court's Rules were restated, that is – whether the appeal or intended appeal is arguable and whether the appeal or intended appeal, if successful, will be rendered nugatory. It was noted that even a single arguable ground suffices for the purposes of the first principle and that, based on *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR, an arguable appeal is not one that must succeed. In this case, the applicants identified a whopping 23 grounds of appeal which they intend to argue before the Court, notably whether it was necessary in law for the 1st applicant and the respondent to have a written agreement expressing an intention to abandon the Agreement even when it was clear from the representation by the respondent in Mombasa ELC Case No. 248 of 2018, and the general conduct of the parties, that they had mutually agreed to abandon the Agreement and to release each other from their respective rights and obligations thereunder.

12. As regards the second principle, the applicants relied on the case of *Reliance Bank Limited v Norlake Investment Ltd* [2002] 1 EA 227 on the meaning of the term "nugatory" and submitted that the court's decision has a huge bearing on the applicants' right to fair hearing; that the order directing specific performance of the agreement if allowed to take effect will aggravate the dispute between the parties and occasion confusion and immense losses to the parties; that the impugned decision essentially reopens wounds that have substantially been mended through the final decisions made by various courts; and that, should the High Court's decision be allowed to take effect, the applicants' intended appeal will be rendered useless, and that the resultant losses and damage will be irreversible.

13. In his oral address, Mr. Muchoki submitted that the impugned decision, if implemented, would result in a conflict with the already decided cases.

14. The respondent, through the submissions dated 13th December 2023 and filed and by the firm of Paul Mwangi and Company Advocates, contended that the only matter raised by the applicants as triable issue is whether the Agreement was abandoned and whether the parties mutually discharged each other from their obligations it. According to the respondent, this issue is not arguable since the Parol Evidence Rule bars a party from varying the terms of a written contract based on alleged oral representations. It was submitted that there was no allegation that the Agreement was terminated, and that no vitiating factor was shown to exist.

15. Regarding the second principle, it was submitted that, contrary to the submissions by the applicants, failing to implement the High Court judgement opens wounds and vacates the solutions reached, and which are final. It was submitted that, apart from general allegations the applicants have not specified any loss that they stand to suffer if the judgement is implemented. In support of the submissions,

the respondent relied on the case of *Kenafric Matches Ltd v Match Masters Limited & another* Civil Application No. E902 of 2021 (UR) where it was held that, in determining whether an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties, and that each case has to be considered on its own merits. The respondent also relied on the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR, submitting that, unless there is evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some event. In the respondent's view, there will be no loss to the applicants if stay is denied, yet there will be irreparable loss to him if it is granted.

16. We were further urged to consider the need to promote alternative dispute resolution mechanisms as an efficient and affordable method of settling matters; that granting stay in this case pending settlement of the dispute will undermine ADR because it opens avenues where parties can reverse progress in settlement of dispute and lengthen controversies, which is what ADR avoids; that each party in this case mediated, negotiated and accepted a resolution; that it is critical for the integrity of ADR that such resolution be implemented expeditiously; and that a grant of stay orders will undermine this noble intention of ADR. In his oral address, Mr. Mwangi submitted that implementation of the Agreement will accord all the parties their bargain.

17. We have considered the application, the written and oral submissions and the law.

18. As both the applicants and the respondent appreciate, the principles that guide the consideration of an application of this nature are now well settled. For an applicant to succeed, he or she must have a pending appeal or must have expressed an intention to appeal against the decision in question by filing a Notice of Appeal in order to properly invoke this Court's jurisdiction. It should then be demonstrated that the appeal or intended appeal, as the case may be, is arguable, or as is often said, not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay. The two conditions are considered conjunctively so that failure to satisfy either of them means that the application fails.

19. The rationale for these twin principles was explained by this Court in *Peter Gathecha Gachiri v Attorney General and 4 Others* Civil Application Nai 24 of 2014 (unreported) where it was held that:

> " Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see *Butt v Rent Restriction Tribunal* [1982] KLR 417. See also *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

20. In *Stanley Kang'ethe v Tony Keter & 5 others* (*supra*), the Court emphasised that it is sufficient if a single bonafide arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body*

Care (K) Ltd, Civil Application No. Nai 345 of 2004. Further, 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. See *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No. 124 of 2008. It is one that is deserving of consideration by the Court and warrants a response from the opposite party. See *Kenafric Matches Ltd v Match Masters Limited & another* (*supra*).

21. In this case, the applicants set out 23 grounds upon which they intend to challenge the decision of the learned Judge. We must point out that it is not the number of the grounds that determines whether an appeal is not frivolous, but the *prima facie* arguability of the appeal or intended appeal. In its intended appeal, the applicants intend to argue, inter alia, whether it was necessary in law for the 1st applicant and the respondent to have a written agreement expressing an intention to abandon the agreement even when it was clear from the representation by the respondent in Mombasa ELC Case No. 248 of 2018, and the general conduct of the parties, that they had mutually agreed to abandon the agreement and release each other from their respective rights and obligations. It will be argued that by reviving Mombasa ELC Case No. 248 of 2018, the respondent indicated a clear intention to abandon the Agreement, and that the learned Judge's finding to the contrary is arguable. This Court in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR held that:

> "It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable."

22. While at the hearing of the intended appeal the applicants may fail to persuade the Court that their appeal is merited, we find, without saying more lest we embarrass the bench that will be seized of the main appeal, that the intended appeal is not frivolous. It is arguable. The issues raised are deserving of consideration by the Court and warrants response from the adverse party.

23. On the nugatory aspect, which an applicant must also demonstrate, this Court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 E.A. 227 held that:

> "... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

24. As to what amounts to trifling, the Court in the case of *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR it was held that:

> "A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law."

25. In this case, the applicants' argument is that that the order directing specific performance of the agreement if allowed to take effect will aggravate the dispute between the parties and occasion confusion and immense losses to the parties; that the impugned decision essentially reopens wounds that have substantially been mended through the final decisions made by various courts; and that, should the High Court's decision be allowed to take effect, the applicants' intended appeal will be rendered useless, and that the resultant losses and damage will be irreversible. On the other hand, the respondent's position is that, considering the fact that the parties have been litigating for 15 years, failing to implement the High Court judgement reopened wounds as the solutions reached would be vacated.

26. We agree that in applications such as the one before us, the position, as was held in *Kenafric Matches Ltd v Match Masters Limited & another* (*supra*), is that, in deciding whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and that each case has to be considered on its own merits. This is in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act* and requires that when exercising discretion, the principle of proportionality ought to be taken into account. This position was restated in the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR, where this Court held that:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

27. In this case, the applicants have only submitted on the hardships that they stand to face if stay is not granted. They contend that if the impugned decision is implemented, it will result in conflict of already decided cases. However, the applicants have not addressed us on the nature of the decisions already made, and how the judgement appealed against impacts negatively on them. We bear in mind the pronouncement by the Court in *Stanley Kangethe Kinyanjui v Tony Ketter & others*, *supra* that:

> " Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

28. We have not been addressed on how the implementation of the impugned decision will negatively impact already decided cases and hence render the success of the intended appeal nugatory. It is not contended that if implemented and the intended appeal succeeds, the implementation of the decision will be irreversible. We are mindful of the fact that it is not in dispute that the Mediation Agreement was executed by both the 1st applicant and the respondent. Hardship or lack of it is not the key consideration in applications under rule 5(2)(b) of the Court's Rules.

29. In the premises, we are not persuaded that the intended appeal, if successful, will be rendered nugatory. As the applicants have failed to surmount the second hurdle, this Motion fails and is hereby dismissed with costs.

30. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR