



**Nkoumondo v Mwaniki Gachoka & Co Advocates (Civil Application  
E475 of 2022) [2024] KECA 531 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 531 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E475 OF 2022  
HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA  
MAY 9, 2024**

**BETWEEN**

**ARISTIDE BRILLIANT NKOUMONDO ..... APPLICANT**

**AND**

**MWANIKI GACHOKA & CO ADVOCATES ..... RESPONDENT**

*(An application for stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi (Sergon, J.) delivered on 30th December 2021 in Misc. Application No. 113 of 2017)*

**RULING**

1. Before the court is an application brought under rule 5 (2) (b) of this Court's Rules seeking: a stay of execution of the ruling and orders of the High Court (Sergon, J.) that was delivered on the 30<sup>th</sup> of December 2021, pending hearing and determination of Civil Appeal No. E722 of 2022, *Aristide Brilliant Nkoumondo v Mwaniki Gachoka & Co. Advocates*; and for the costs to abide the outcome of the appeal.
2. The application was predicated on the grounds on the face of the application and the supporting affidavit of the applicant dated 20<sup>th</sup> December 2022 with similar averments. The applicant deposes that the High Court entered judgment in favour of the respondent on the 30<sup>th</sup> of December 2021, in the sum of Kshs.23,046,039/- pursuant to the Certificate of Taxation dated 7<sup>th</sup> October 2020; the applicant being aggrieved by the judgment has since preferred Appeal No. E722 of 2022; pending hearing and determination; that on 16<sup>th</sup> December 2022, the respondent served the applicant with an application dated 2<sup>nd</sup> November 2022 wherein it sought to attach the applicant's property known as L. R. Nairobi/Block 94/228, which the firm has been holding lien due to the contested fees subject of the appeal; that the trial court made grave factual and legal errors as is evident in the memorandum of appeal; that the trial court found that the Deputy Registrar correctly taxed the bill of costs under Schedule 6B of the *Advocates' Remuneration Order*, despite finding that there were two certificates of costs; and that the



trial court erred in failing to interrogate whether the taxation dated 6<sup>th</sup> February 2017 was arrived at correctly before sustaining the costs as taxed.

3. The application was opposed by way of an affidavit sworn by Raphael Ndirangu Gachoka, a managing partner of the respondent dated 9<sup>th</sup> February 2023, where he deposes that; the application is an afterthought as the ruling herein was delivered way back in 30<sup>th</sup> December 2021; the delay is inordinate; the application has been prompted by the respondent's application seeking to execute the court's order and meant to deny the respondent from enjoying the fruits of the judgment; that upon the impugned order being granted the applicant applied for a stay of execution before the trial court and the stay was granted on condition that the applicant deposits the entire decretal amount in an interest-earning account in the names of both counsels acting for the parties within 45 days failure to which the stay would automatically lapse; the applicant failed to comply with the conditional stay; that the applicant is a foreigner with no known address or movable asset capable of being attached to recover the decretal sum; this application is a second attempt by the applicant to unjustly seek the stay orders; the applicant has not demonstrated that he has an arguable appeal; the certificate of taxation made reference to was obtained from a consent order between the parties; and he has failed to demonstrate the substantive loss he will suffer that cannot be compensated by way of damages.

4. The application was canvassed through written submissions, which were briefly highlighted when the matter came up for hearing.

The applicant's counsel rehashed the averments in the supporting affidavit and we need not rehash them. In addition, learned counsel submitted that the applicant has met the twin principles necessary for the court to be able to grant the order for stay. On arguability counsel relied on the memorandum of appeal that raises several grounds, and referred to the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 9 Others* [2013] eKLR.

5. Learned counsel further contended that if the order of stay is not granted the appeal will be rendered nugatory. He submitted that the respondent had moved the trial court to execute the orders, by attaching and selling property L.R. No. Nairobi/Block 94/228 which means that the respondent's valuable property will be disposed of before the appeal is heard; that the respondent is already secured by holding the title to the applicant's property; the order of stay sought is for purposes of preserving the subject matter of the appeal. Learned counsel referred the case of *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR.

6. On the part of the respondent, learned counsel referring to the twin principles, contended that though an arguable ground of appeal need not be one that will necessarily succeed, it ought not to be frivolous, he argued further that the points being raised on appeal were not canvassed before the taxing master and cannot be raised at this stage; further, none of the grounds raised on appeal have any foundation, in propounding these grounds learned counsel referred to the case of *Stanley Kangethe v Tony Ketter (supra)*.

7. On the nugatory aspect learned counsel contended that the subject of the appeal is contested costs that cannot be rendered nugatory, secondly, the applicant failed to meet the conditional grant of stay that had been granted, further the court ought to look at the conflicting interest of the parties, in this regard, the court was referred to the case of *Waweru & 3 others v Karanja & another* [2022] KECA 1420 (KLR). In addition, counsel submitted that the respondent is a reputable firm of advocates that could refund the sums should the appeal succeed.

8. Rule 5(2) (b) of this Court's Rules empowers the court where a notice of appeal has been lodged under Rule 75 to grant an order of stay or an injunction on terms the court may think just. The Rule provides that:



- (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
- a. ...
  - b. In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”
9. The principles applicable in an application under Rule 5 (2) (b) have been the subject of many decisions and are now a well- trodden path. To succeed an applicant must satisfy the twin principles, namely:
- i. An applicant must demonstrate that they have an arguable appeal; and
  - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, or order of proceedings is not stayed.
10. On the first limb of the twin principles, this Court held in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR that for an order of stay to be issued, 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 stay be rendered nugatory. [See also *Reliable Bank Ltd. (in liquidation) v Norlake Investments* [2002] 1 EA 227, *Nation Newspapers Limited v Peter Baraza Rabando*, [2007] eKLR and *Republic v Kenya Anti- Corruption Commission & 2 others* [2009] eKLR.
11. On the question of whether the applicant has an arguable appeal, we are careful not to delve into the merits of the appeal, as this will be the preserve of the bench that will hear and determine the appeal. At a glance though, we form the view that the appellant has raised arguable points that are not frivolous and need to be ventilated at the hearing of this main appeal.
12. In determining whether or not an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be determined on its own merits, considering that the crux of the matter is a money decree. This court in *Youth Agenda v Rita Kijala Shako* [2014] eKLR, held;

“On the second requirement as to whether or not the appeal if successful would be rendered nugatory, what is involved here is a money decree. Ordinarily, an appeal arising out of a money decree cannot be rendered nugatory if payment is effected, the assumption being that in the event that the appellant succeeds, the respondent would be in a position to repay. However, for the applicant to overcome this general principle, it should be able to demonstrate that the respondent is a person of straw or as poor as a church mouse and given those circumstances, if the decretal sum was to be paid, it would not be able to repay the same, to the successful appellant. (see *Kenya Shell Ltd supra*). However, with the advent of Oraro and Rachier Advocates (*supra*), another consideration seems to have been added in the mix, although the Judges who president over the case were shy to not specifically say so, that in dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted particularly in money decrees, the Court ought to weigh the claims of both sides. The applicant may find itself in a very tight corner if it was forced to pay the decretal amount such that its operations may be crippled or adversely affected, whereas perhaps the respondent would not be hit as hard by being kept out of the sum for a while pending the outcome of the appeal.” (emphasis added)



13. Though this is a money decree, the decretal sum is colossal, and at stake is a property that is likely to be sold. We take note that the respondent has been holding the property lien, and continues to do so, to safeguard its interest. It is not clear to us what the value of the property is, nonetheless, our considered view, balancing the claim by both sides, is that the property ought to be preserved pending hearing and determination of the appeal.
14. Consequently, we stay the orders of the High Court dated 30<sup>th</sup> December 2021, pending the hearing and determination of the appeal. Costs will abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

