



REPUBLIC OF KENYA



**Amek v Ethics & Anti Corruption Commission (Civil Application
E620 of 2023) [2024] KECA 481 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 481 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E620 OF 2023
F TUIYOTT, JM MATIVO & GWN MACHARIA, JJA
MAY 9, 2024**

BETWEEN

MAURICE ODIWOUR AMEK APPLICANT

AND

ETHICS & ANTI CORRUPTION COMMISSION RESPONDENT

*(Being an application for Stay of Execution against the Judgment and Decree of
the High Court of Kenya at Nairobi, Anti-corruption & Economic Crime Division)
(E. N. Maina, J.) dated 7th December 2023 in ACEC Civil Suit No. E015 of 2021)*

RULING

1. The applicant herein, Maurice Odiwour Amek, filed a Notice of Motion dated 21st December 2023 pursuant to the provisions of Articles 40, 48 of the Constitution, sections 3, 3A and 3B of the Appellate Jurisdiction Act and rule 5
(2) (b) of the Court of Appeal Rules. The applicant is seeking an orders that: pending the hearing and determination of the intended appeal, there be a stay of execution and/or further execution of the decree including attachment and forfeiture of the applicant's immovable and movable properties and/or consequent orders issued by the learned Judge (E. Maina, J.) before the Anti-Corruption & Economic Crimes Court in Civil Suit No. E015 of 2021; any other orders that this Court deems fit; and that costs be in the cause. The application is supported by the grounds on the face of it and an affidavit sworn by the applicant on even date.
2. The applicant deposed that he worked as a Senior Accounts Controller in Homabay County until June 2022; that the Ethics and Anti-Corruption Commission (the respondent) filed Civil Suit No. E015 of 2021 against him and 3 others claiming Kshs. 47, 075, 978/=; that the High Court granted orders for the recovery of the said amount; that he is aggrieved by that decision which he alleges is laced with factual and legal errors; that the respondent has extracted a decree and it has now moved to realise



- the decretal sum by sale of movable and immovable properties; and that he has a meritorious arguable appeal and, as such, an order of stay of execution is merited.
3. To further support his position, the applicant filed written submissions dated 1st March 2024. On arguability of the intended appeal, he faulted the finding of the learned Judge that the applicant approved a sum of Kshs. 41,000,000/= by virtue of his office when there was no such evidence tendered before her. On whether the intended appeal will be rendered nugatory if the orders sought are not granted, he contended that the respondent has moved to execute the decree which execution will result in the sale of properties belonging to innocent purchasers; and that an award of damages will not be appropriate compensation in any event.
 4. In opposing the application, the respondent filed a replying affidavit sworn on 18th January 2024 by Getrude Sielei, its investigator. It was deposed that the respondent exercised its constitutional and statutory mandate under section 11 (1)
 - (d) of the *Ethics and Anti-Corruption Commission Act* for the purposes of recovery of Kshs. 47, 075, 978/= which was allegedly embezzled from Homabay County Assembly by the applicant and 3 others; and that upon conclusion of its investigations, it filed a suit before the High Court which rendered a final decision in its favour.
 5. The respondent contended that the instant application is devoid of merit as it does not meet the threshold envisaged under rule 5 (2) (b) of the *Court of Appeal Rules*, 2022, namely that it is not in the public interest to issue a stay of execution and that the applicant has failed to demonstrate how damages, if suffered, will not be reasonably compensated.
 6. The respondent also filed written submissions dated 17th January 2024. On whether the appeal is arguable, it is submitted that the trial court rightly found that the applicant received Kshs. 5,000,000/= in his account for services he did not render to Homabay County Assembly, and has not demonstrated how his intended appeal is arguable.
 7. On the nugatory aspect, it is contended that the fact that execution has been put in motion, does not, of itself amount to substantial loss. The respondent stated that the applicant has not availed evidence to prove the nature of loss that he is likely to suffer if stay is not granted. It affirmed that it is a constitutional and statutory Commission capable of refunding the decretal sum should the intended appeal succeed. We were accordingly urged to dismiss the appeal with costs.
 8. At the plenary hearing on 5th March 2024, learned counsel Mr. Ouma was present for the applicant while learned counsel Ms. Ochola was present for the respondent. Both counsel wholly adopted the respective written submissions.
 9. From the outset, we sought to know from Mr. Ouma whether his client would be willing to deposit the decretal amount of Kshs. 47, 075, 978/= as security pending the hearing of the intended appeal, and he informed the Court that he was certain that his client would not be able to even offer a bank guarantee for the Kshs. 5,000,000/= which the applicant was directly implicated on. On her part, Ms. Ochola was of the view that the applicant should at least pay a security if the Court was inclined to grant a stay of execution.
 10. We have accordingly considered the application, the response thereto and the respective written submissions.
 11. To succeed in the application for stay under rule 5 (2) (b) of this Court's Rules, 2022, an applicant is required to demonstrate that the intended appeal is arguable and if stay orders are not granted, and the



- appeal succeeds, it will be rendered nugatory. It is also trite that the twin principles must be satisfied conjunctively.
12. The jurisdiction of this Court to issue the stay orders is discretionary and it should not be exercised arbitrarily or capriciously, on a whim or in consideration of extraneous matters. We are also aware that we should not delve into the merits of the appeal as this is a preserve of the bench that will ultimately consider the arguments of the parties during the hearing of the main appeal.
 13. It is sufficient that an arguable appeal raises a single bona fide issue which may not necessarily succeed but it must not be frivolous. These were the findings of this Court in the cases of others (2013) eKLR and vs. Pioneer Holdings (A) Ltd. & 2 others (2009) eKLR.
 14. On our part, after considering the rival arguments by counsel for both parties, perusing and appreciating the grounds of appeal as set forth in the memorandum of appeal, we are of the view that it would be necessary to interrogate whether the appellant had legitimate reasons to approve the sum of Kshs. 41,000,000/= by virtue of being the Senior Accounts Controller of Homabay County, and the reasons given by the named 4th defendant, David Obonyo and Lilian Achieng T/A Damila Enterprises in the suit before the High Court, for advancing some Kshs. 5,000,000/= to the applicant. We are also of the view that it is arguable whether the respondent can resort to recover the whole decretal amount of Kshs. 47, 075, 978/= while in fact what is specifically sought from him is Kshs. 5,000,000/= . Accordingly, we find and hold that these are arguable grounds of appeal which, in any event are not frivolous.
 15. We now turn to the second issue for consideration which is whether the appeal will be rendered nugatory if stay is not granted. In making this determination, we need to consider and balance the interests of both parties. The subject issue before us is a money decree. The learned Judge found that the applicant together with others who are not participants in this appeal, are culpable to jointly and severally refund Kshs. 47, 075, 978/= which was allegedly and unlawfully siphoned from the coffers of Homabay County Government.
 16. We are aware that unlike in applications under the Order 42 rule 6 (2) (b) of the *Civil Procedure Rules*, where a stay is granted on condition that security is furnished, we are not obligated to do so under this Court's rule 5 (2) (b). However, this Court's discretion is wide and unfettered. We are at liberty to make orders which we may deem fit and just.
 17. We are fortified by the line of thinking of this Court in the case of *Youth Agenda vs. Rita Kijala Shako* (2014) eKLR where it was held, inter alia, that:

“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 seem to have been added in the mix, although the Judges who presided 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 ours)

18. We note from the affidavit deposed by the applicant that he was willing to abide by the terms this Court may give. However, his counsel commendably conceded that he did not think his client could deposit any sums of money or even furnish a bank guarantee.
19. Undoubtedly, the applicant wants to exercise his right of appeal. Apart from asserting that there is an arguable appeal and if stay is not granted, it will be rendered nugatory on account of sale of properties belonging to third parties, the applicant’s counsel did not allude to such a fact in his oral submissions and neither has such evidence been furnished before this Court. In the absence of such evidence, we are inclined to hold that the applicant has not demonstrated to our satisfaction that the intended appeal would be rendered nugatory if the decretal sum is paid.
20. It has not been demonstrated that the respondent, being a public body, is incapable of refunding the decretal sum should the appeal be successful. Indeed, Ms. Getrude Sielei had deponed to this fact, which averment has not been rebutted by the applicant.
21. Accordingly, we are not convinced that the applicant has satisfied both limbs for grant of stay of execution under rule 5 (2) (b). We hereby find and hold that the Notice of Motion dated 21st December 2023 is unmerited. We dismiss it with costs to abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

F. TUIYOTT

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

