



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kituyi v Musimba (Civil Appeal (Application) 91 of 2020)  
[2024] KECA 489 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 489 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 91 OF 2020  
DK MUSINGA, MSA MAKHANDIA & K M'INOTI, JJA  
MAY 9, 2024**

**BETWEEN**

**H.E. DR. MUKHISA KITUYI ..... APPLICANT**

**AND**

**HON. DR. PATRICK MWEU MUSIMBA ..... RESPONDENT**

*(Being an application to admit additional evidence and to seek stay of execution of the ruling and decree of the High Court at Nairobi (Okwany, J.) dated 11th December 2019 in HCCC No. E110 of 2018)*

**RULING**

1. Before this Court is a motion dated 27<sup>th</sup> February 2024 by the applicant pursuant to the provisions of rules 5 (2) (b), 29, 30, 31, 42, 47 and 87 of the Rules of this Court, Sections 3A and 3B of the *Appellate Jurisdiction Act* and Articles 47, 48, 50, 159 and 160 of *the Constitution*. The applicant seeks a multiplicity of orders, to wit, that: the conveyance executed by the appellant/applicant and the respondent in respect of the parcel of land known as L.R. No. 194/34 Karen be admitted as evidence in support of his appeal; the letter dated 13<sup>th</sup> February 2024 from Wachira Wambugu & Co. Advocates, LLP be admitted as evidence in support of the appeal; in support of the said conveyance, this Court allows the parties to testify by way of affidavits and/or otherwise and cross-examination be allowed; pending hearing and determination of his appeal, stay of execution of the trial court's judgment do issue; and such or further orders be issued to protect and preserve the applicant's rights.
2. The genesis to the dispute culminating in the application relates to a sum of money, Kshs.35,000,000, which changed hands between the applicant and the respondent some time ago. The contest, and which was litigated in Nairobi HCCC No. E110 of 2018, revolved around the actual purpose of the said sum of money. The respondent, who initiated the proceedings against the appellant/applicant, pleaded that the said sum was a loan advanced to the applicant, for which he sought refund.



3. In his defence, the appellant/applicant pleaded that the said sum was deposit for the purchase of his property known as L.R. No. 194/34 Karen (hereinafter referred to as “the suit property”). The only document annexed to the respondent’s suit according to the applicant was a Bank RTGS Report indicating that the money was a deposit of the purchase price for the suit property.
4. The respondent, vide an application dated 8<sup>th</sup> January 2019, moved the trial court to strike out the defence on the basis that it did not disclose a reasonable defence in law. He also prayed that judgment be entered in his favour for the sum of Kshs.35,000,000 together with interest at commercial rates from 19<sup>th</sup> June 2013 until payment in full. In response to the application, the applicant averred, inter alia, that the application was muddled up in contravention of the mandatory provisions of law and was thus fatally defective; the pleadings ex facie raised triable issues, amongst which was whether the money paid to the him was deposit for purchase of the suit property or a loan; the respondent’s own pleadings disclosed that the payment was a deposit for purchase of the suit property; the dispute could only be determined on merit and in a full trial and not peremptorily by way of an interlocutory application; and that the application was an abuse of the court process therefor.
5. The trial Court (Okwany, J.) in a ruling dated 11<sup>th</sup> December 2019, held that, vide a bank transfer dated 19<sup>th</sup> June 2013, a sum of Kshs.35,000,000 was paid to the applicant’s account held at Kenya Commercial Bank Limited, Kipande House Branch; that the contest was on the purpose of the said payment; that the applicant maintained that the payment was a deposit for purchase of the suit property but the respondent failed to complete the transfer transaction and thus forfeited the said deposit; that the respondent denied the existence of any land sale agreement and placed reliance on the provisions of Section 3(3) of the Law of Contract Act which provides, inter alia, that contracts for the disposition of an interest in land shall be in writing.
6. The learned judge held that the issue of whether the payment was in respect of a loan or for purchase of the suit property did not in any way take away the fact that the respondent had parted with the sum of Kshs.35,000,000, and that it was incumbent upon the applicant, if indeed he wanted the court to believe that he sold the suit property to the respondent for which he was paid the said sum of money, to present the sale agreement as proof of such sale as is envisaged under section 3(3) of the Law of Contract Act, and in compliance with Order 7 rule 5 of the Civil Procedure Rules. As regards the Bank Transfer document which showed that the payment was towards the purchase price for the suit property, the trial court held that this did not imply that any such sale actually took place as alleged. The trial court was also not persuaded that the respondent had failed to complete the sale transaction and therefore forfeited the deposit sum of Kshs.35,000,000 for the reason that the applicant had failed to avail to court a copy of a duly signed sale agreement containing a clause on forfeiture.
7. In sum, the trial court held that the applicant had not availed any documents to support his case and that he was indeed indebted to the respondent in the sum of Kshs.35,000,000. The application was therefore allowed as prayed with costs.
8. The applicant did not satisfy the decree issued pursuant to the ruling, leading to commencement of execution proceedings against him. To arrest the execution process, he filed an application dated 23<sup>rd</sup> June 2023 seeking, inter alia, setting aside of the warrants of attachment issued on 16<sup>th</sup> June 2023 and deposit of the decretal sum of Kshs.35,000,000 in court. He also sought a permanent stay of execution, subject to deposit of the decretal sum in court. He contested the sum of Kshs.84,251,915.60 that was shown as owing in the warrants of attachment.
9. In opposing the application, the respondent averred that the applicant had failed to disclose to court that a similar application for stay filed before this Court had been dismissed, and that there was a



- similar application for stay pending before the trial court. As regards the sum of Kshs.84,252,945, the respondent averred that on 11<sup>th</sup> December 2019 judgment was entered in his favour for the sum of Kshs.35,000,000 plus costs and interests, which cumulatively totalled to Kshs.84,251,945. He further averred that costs had been taxed and assessed at Kshs.663,610 and a Certificate of Taxation issued on 18<sup>th</sup> February 2021; that the appellant/applicant had fully participated in the taxation proceedings; and that the sum of Kshs.35,000,000 deposited in court ought to be released to him in order to pursue the balance via execution.
10. The respondent also raised a preliminary objection on the grounds that the application dated 23<sup>rd</sup> June 2023 was res judicata as the applicant had made a similar application that had been dismissed by this Court, and that there was yet another application for stay of execution dated 23<sup>rd</sup> May 2023 pending before the trial court.
  11. The application and the preliminary objection were canvassed by way of written submissions. By a ruling delivered by the trial court (Mabeya, J.) on 9<sup>th</sup> February 2024, the preliminary objection was upheld and the appellant/applicant's application was struck out with costs.
  12. Turning to the grounds in support of the application, the applicant stated that the suit property is owned by himself and his wife, Dr. Ling Merete Kituyi; that sometime in the year 2010 the respondent purchased half of the suit property; that in the year 2013 the respondent expressed interest in purchasing the remaining portion thereof; that they executed a conveyance in favour of the respondent, upon which he transferred to him a sum of Kshs. 35,000,000; that the said transaction was to be undertaken by the respondent's advocates known as Wacira Wambugu & Co. Advocates LLP, who were to act for both parties; that at the time of the transaction he had just been appointed UNCTAD Secretary General for a period of four years, which required him to relocate to Geneva; that he was unable to trace a copy of the material conveyance as his documents were locked up in safe custody in Nairobi and Kitale while he was away; and that it was not until the end of January 2024 that he succeeded in retrieving a copy of the conveyance that was not duly executed as it had not been witnessed by the lawyers.
  13. The applicant further stated that vide a letter dated 13<sup>th</sup> February 2024, the law firm of Wachira Wambugu & Co. Advocates admitted that the sum of Kshs.35,000,000 was paid to him by the respondent as deposit for the purchase of the suit property; that when he made the earlier applications before this Court and the High Court he had not traced the conveyance document; that those applications were premised on different set of facts; and that the conveyance document that he wishes to be allowed to produce takes away the substratum of the respondent's claim and will enable this Court reach a fair and just determination of the matters in dispute.
  14. Regarding the prayer for stay of execution, the applicant contended that the appeal is arguable. In the Memorandum of Appeal dated 26<sup>th</sup> February 2020, he states, inter alia, that the learned Judge erred in law by: failing to place the burden of proof on the respondent but instead placed it on him; accepting ex tempore allegations of the respondent that the material sum was anything but purchase price down-payment and thereby admitted extraneous matters; determining the matter before parties had gone into pre-trial discovery; and failing to analyze pleadings to determine the correct issues, thereby arriving at an erroneous decision.
  15. As regards the nugatory aspect, the applicant contends that although the sum of Kshs.35,000,000 was released to the respondent by the trial court, the respondent still threatens to execute for the balance of the decretal sum in excess of Kshs.50,000,000 and if execution proceed without the additional evidence being admitted, he will suffer great loss and substantial injustice on perjured evidence.



16. The respondent opposed the application. He contended that the prayer for stay of execution is res judicata, having been finally decided by this Court in its ruling delivered on 20<sup>th</sup> November 2020, and in that regard, it is therefore an abuse of the process of the Court. As regards the prayer to adduce additional evidence, the respondent denied having executed the conveyance document sought to be introduced by the applicant; that if indeed the conveyance document was genuine as alleged, the applicant would have had no difficulty in producing it before the trial court over the last five years; that the applicant is seeking to adduce further evidence in order to fill up omissions and/or patch up weak points in his appeal; that the additional evidence in respect of the events that occurred after the judgment of 11<sup>th</sup> December 2019 are not relevant to the appeal; and that the production of the additional evidence that arose after the judgment will be prejudicial to the respondent as the same will be considered out of context and without any explanation of the said documentation and will thus be of no probative value.
17. On those grounds, the respondent urged the Court to strike out the appellant’s application with costs.
18. At the hearing hereof, learned counsel Mr. Kipkorir appeared for the applicant, whereas Dr. Ojiambo, SC together with Ms. Onyango and Ms. Mima appeared for the respondent. Counsel highlighted their respective client’s written submissions, which basically reiterated the arguments summarized hereinabove.
19. We have considered the application, the response, the respective submissions, as well as the applicable law. The appellant seeks a multiplicity of orders, including an order that the conveyance allegedly executed by the parties in respect of the suit property, as well as the letter dated 13<sup>th</sup> February 2024 from Wachira Wambugu & Co. Advocates LLP be admitted as evidence.
20. The power to re-appraise evidence and to take additional evidence is provided for under rule 31(1) of the Rules of this Court (2022) which provides inter alia:
  - “ 31 (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
  - a. ....; and
  - b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.”
21. This Court, in a similar application as the instant one (made under rule 29(1) (b) of the 2010 Rules) in Attorney General vs. Torino Enterprises Limited [2019] eKLR stated thus:
  - “ 13. In Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR, it was expressed that under Rule 29 (1) (b), additional evidence will be introduced on appeal in the discretion of the Court, “for sufficient reason”. Though what constitutes ‘sufficient reason’ is not explained in the rule, through judicial practice the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing; two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible.”



22. Similarly, in *Mohamed Abdi Mohamed vs. Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR, the Supreme Court laid out guidelines on admission of additional evidence before appellate courts in Kenya. These guidelines were stated as follows:

“(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case-by-case basis exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the Court and be in the interest of Justice;
- b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was within the knowledge of, or could not have been produced at the time of the suit or Petition by the party seeking to adduce the additional evidence;
- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
- e. The evidence must be credible in the sense that it is capable of belief;
- f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. Whether the additional evidence discloses a strong prima facie case of willful deception of the Court;
- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;
- j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the omissions or patch up the weak points in his/her case.
- k. The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

[80] We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case-by-case basis and even then, sparingly, with abundant caution.”



23. We note that the guidelines given by the Supreme Court in *Mohamed Abdi Mohamed vs. Ahmed Abdullahi Mohamed* (supra) are not necessarily conjunctive, but an applicant must substantially comply with them. One of the documents sought to be introduced by the appellant is a conveyance document in respect of the suit property. Whereas the applicant believes that the document has the necessary probative value to show that the money paid to him was in respect of a sale transaction between the parties and not a loan, the respondent contends that the said document has not probative value, and he denies that he ever signed the said document.
24. The applicant contends that he was unable to trace a copy of the conveyance document as his documents were locked up in safe custody at his Nairobi and Kitale homes, and that it was not until the end of January 2024 that he succeeded in getting a copy of it. Whereas we appreciate that the applicant had been appointed to the position of UNCTAD Secretary General, which position required him to relocate to Geneva, thereby denying him frequent access to his Nairobi and Kitale homes, he has not, in our view, demonstrated due diligence that was required of him in tracing the important legal document, if indeed be believed that it was vital in his defence against the suit that had been instituted against him. The onus lay on him to demonstrate, for instance, that in the intervening period when he was UNCTAD Secretary General and during the proceedings before the trial court he did not visit his two homes, or that for some reason he could not have been able to access his records at the two homes. The fact that he was able to retrieve the said document from his records after what he describes as an “agonizing search” in our view means that he was well aware of the availability of the said document in his records. We believe that with reasonable diligence, the said document could have been retrieved and produced before the trial court during the pendency of proceedings before the said Court. It is inconceivable that it took the appellant nearly five years to trace such an important legal document that he had kept in his own house, and the existence of which he was aware!
25. In addition, the applicant acknowledges that the conveyance document sought to be produced as further evidence is not duly executed as it was not attested by an advocate or any witness for that matter. The respondent denied having signed the same. When the appellant/applicant’s advocate wrote to Wachira Wambugu & Co Advocates on 13<sup>th</sup> February 2024 requesting for a copy of the executed conveyance, the advocates responded thereto, stating: “From our records, we do not have the copy of the duly executed conveyance of 2013 for reason that your clients did not sign and/or execute the sale agreement despite receiving a deposit of the purchase price.” In the circumstances, the probative value of the draft sale agreement that the applicant wishes to adduce in evidence is doubtful. In the circumstances, we are not persuaded that the appellant has made a case for grant of leave to adduce additional evidence.
26. Turning to the application seeking orders of stay of execution, it is well established that in an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR.
27. The said prayer was strenuously opposed by the respondent, who urged us to find that it was res judicata, this Court having previously pronounced itself on a similar application by the applicant dated 22<sup>nd</sup> April 2020. We have perused the said application and note that just like in the instant application, the applicant sought stay of execution of the decree of the High Court dated 11<sup>th</sup> December 2019. This Court, vide a ruling delivered on 20<sup>th</sup> November 2020, found the application unmeritorious and dismissed it with costs. Therefore, the instant application, in so far as it seeks stay of execution of the decree of the High Court is res judicata. The applicant’s argument that the previous application(s) for stay of execution were based on a different set of facts is without basis. In our view, the applicant is attempting to have a second bite at the cherry.



- 28. Having arrived at this conclusion, we need not consider whether the appeal is arguable or if the appeal will be rendered nugatory if the orders sought are not granted.
- 29. In the upshot, the applicant has not satisfied the requirements for grant of the orders sought in his application. Accordingly, the notice of motion dated 27<sup>th</sup> February 2024 is unmerited and is hereby dismissed with costs to the respondent.

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

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

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

