



**Industries & 3 others v Bahari Forwarders Limited (Civil Application  
E002 of 2024) [2024] KECA 727 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 727 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E002 OF 2024  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
JUNE 21, 2024**

**BETWEEN**

**ABYSSINIA GROUP OF INDUSTRIES ..... 1<sup>ST</sup> APPLICANT  
ABYSSINIA IRON & STEEL LIMITED ..... 2<sup>ND</sup> APPLICANT  
WESTERN STEEL MILLS LIMITED ..... 3<sup>RD</sup> APPLICANT  
PRIME STEEL MILLS LIMITED ..... 4<sup>TH</sup> APPLICANT**

**AND**

**BAHARI FORWARDERS LIMITED ..... RESPONDENT**

*(Being an application for stay of execution pending appeal from the  
Judgment and Decree of the High Court of Kenya at Mombasa (F.  
Wangari, J.) delivered on 19th January 2024 in HCCC No. E024 of 2021)*

**RULING**

1. By a plaint dated 8<sup>th</sup> March 2021, the respondent, Bahari Forwarders Limited, sued the applicants in the High Court of Kenya at Mombasa in HCCC No. E024 of 2021 jointly and severally for: KShs. 20,492,884; compound interest on the sum aforesaid at 1.5% per month from 10<sup>th</sup> February 2021 to the date of payment in full; costs of the suit; interest on costs; and any other relief which the Honourable court deemed just to grant.
2. The respondents' case was that the 1<sup>st</sup> applicant, Abyssinia Group of Industries, was at all material times the holding company of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants; that the 1<sup>st</sup> applicant contracted the respondent to carry out clearing and transport goods to various destinations for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents; and that, as at 10<sup>th</sup> February 2021, the applicants jointly and severally owed the respondent Kshs. 20,492,884.



3. In the absence of a copy of the applicants' defence on the record, we can only gather from the impugned judgment that, in their defence, the applicants admitted the existence of the contract under which the respondent had sued, but denied the respondent's claim contending that it was not entitled to any of the reliefs sought.
4. In its judgment dated 19<sup>th</sup> January 2024, the High Court (F. Wangari, J.) allowed part of the respondent's claim and awarded it KShs. 20,492,884 together with interest at 1.5% per month from 10<sup>th</sup> February 2021 until payment in full. The learned Judge also awarded the respondent costs of the suit.
5. Aggrieved by the learned Judge's decision, the applicants moved to this Court on appeal on a whopping 12 grounds set out in their joint Memorandum of Appeal dated 6<sup>th</sup> February 2024 which goes against the grain of rule 88 of the Court of Appeal Rules, 2022 which enjoins appellants to "... concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against". In the circumstances, we take the liberty to summarise those grounds thus, namely that the learned Judge erred in law and in fact: by closing the applicants' case without their witness having testified; by making an order to close the applicants' case when the same was coming up for mention and not for defence hearing; by proceeding to render her judgment in disregard of the applicants' submissions; and by awarding the respondent the decretal amount aforesaid without according the applicants an opportunity to rebut its claim.
6. In addition to their appeal, the applicants filed a Notice of Motion dated 6<sup>th</sup> February 2024 pursuant to rule 5(2) (b) of the Rules of this Court praying for: stay of execution of the judgment and decree of the High Court of Kenya at Mombasa (F. Wangari, J.) delivered on 19<sup>th</sup> January 2024 in Mombasa HCCC No. E024 of 2021 pending hearing and determination of their intended appeal; that the orders sought be subject to such condition as the Court may deem just in the circumstances of the case; and that costs of their application be in the appeal.
7. The applicants' Motion was supported by the annexed affidavit of Revi Gada, the applicants' Chief Finance Officer, essentially deposing to the above-mentioned grounds on which the applicant's Motion is anchored. In addition to those grounds, the deponent avers that the applicants' Motion was filed within a reasonable time; that execution of the judgment and decree was imminent; that they stand to suffer tremendous loss if execution were to take place; that the decretal sum is colossal and could easily hamper the applicants' business if stay is not granted; that the intended appeal has good chances of success; that the applicants are prepared to furnish security for the orders pending hearing and determination of the intended appeal and that, therefore, no prejudice would be suffered by the respondent; and that the intended appeal would be rendered nugatory if the orders sought were not granted.
8. Learned counsel for the applicant, M/s. Olendo, Orare & Samba Advocates LLP, filed written submissions, list of authorities and case digest dated 15<sup>th</sup> February 2024 urging the Court to allow the applicants' Motion and grant stay of execution pending appeal as sought.
9. In support of the Motion, counsel cited 4 judicial authorities, namely: David Morton Silverstein vs. Atsango Chesoni [2002] eKLR, highlighting the twin principle for grant of orders under rule 5(2) (b); Rhoda Mukuma vs. John Abuoga [1988] eKLR, submitting that the court must depend on the facts of the case before them and consider them on a case-by-case basis; James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, highlighting the requirement for an applicant to demonstrate that they have an arguable appeal; and Butt vs. Rent Restriction Tribunal [1979] eKLR, highlighting the principle that the Court ought to exercise its discretion in such a way as not to prevent the appeal, if successful, from being rendered nugatory.



10. Opposing the Motion, the respondent filed an undated replying affidavit of Meetal Parmar, the respondent's Group Finance Manager, contending that the applicants have no arguable appeal; that there is no evidence that, if the appeal is successful, it will be rendered nugatory by reason of the respondent being unable to refund the decretal amount; that grant of the stay orders sought would unjustifiably delay the respondent from realising the fruits of its judgment; that the instant application is an abuse of the court process; and that it is in the interest of justice that the Motion be dismissed with costs.
11. On her part, learned counsel for the respondent, Ms. Oruta, made oral submissions at the hearing of the applicants' Motion purportedly highlighting her firm's written submissions, which are not contained in the record before us. According to Ms. Oruta, the applicants had no arguable appeal. Counsel contended that, in the alternative, even if the appellants' intended appeal were successful, the same would not be rendered nugatory absent an order of stay. She urged us to dismiss their Motion with costs.
12. The twin principles that apply in applications under Rule 5(2) (b) of this Court's Rules for stay of execution pending appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must also demonstrate that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution of the impugned judgment, decree or order were not stayed.
13. On the 1<sup>st</sup> limb of this twin principle, this Court held in *Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, absent stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another vs. Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Ahmed Musa Ismail vs. Kumba Ole Ntamorua and 4 Others* [2014] eKLR).
14. A cursory look at the grounds of appeal advanced in the applicants' memorandum of appeal, viewed against the backdrop of the record as put to us reveals substantive issues of law and fact deserving of the Court's inquiry on appeal. Moreover, and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principles. *University of Nairobi vs. Ricatti Business of East Africa* [2020] eKLR is a case in point.
15. We need not say more with regard to those grounds lest we embarrass the bench that will ultimately pronounce itself on the merits or otherwise of the intended appeal. Suffice it to observe that, as this Court held in the case of *Wasike vs. Swala* [1984] KLR 591, an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court as is the case here (also see *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR. Put simply, an arguable appeal is one that is not idle and/or frivolous. After applying the foregoing parameters to this case, we are satisfied that the intended appeal is arguable.
16. With regard to the 2<sup>nd</sup> limb of the twin principle, the term "nugatory" was defined in *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA p.227 at p.232 as "worthless, futile or invalid". It also means "trifling".
17. Having concluded that the applicants' intended appeal is arguable, the decisive question is whether their intended appeal, if successful, would be rendered nugatory if the stay orders sought were not granted. We are not persuaded by the applicants' submission that it would. To our mind, it is not enough that the decreed amount is colossal. The appellants have not provided any security or bank



guarantee to secure the amount in issue. All attempts by counsel for the respondent to have the decretal amount secured as a condition to their concession or compromise remained unyielding.

18. This being a money decree, and there being no suggestion or evidence that the respondent would be incapable of refunding the decretal amount in the event that the applicants' intended appeal succeeded, we find nothing to suggest that such an appeal, if successful, would be rendered nugatory absent stay of the orders sought.
19. On our careful examination of the impugned judgment and decree, the applicant's Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the applicant and for the respondent, the cited authorities and the law, we reach the conclusion that the applicants have failed to satisfy the conjunctive limbs of the twin principles for grant of the stay orders sought under rule 5(2) (b) of the Rules of this Court. Consequently, the applicants' Motion dated 6<sup>th</sup> February 2024 fails and is hereby dismissed with costs to the respondent. Orders accordingly

**DATED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

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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**

