



**Lavington Security Ltd v Commissioner for Co-operative Development & another  
(Civil Application E284 of 2022) [2024] KECA 977 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 977 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E284 OF 2022  
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA  
JULY 26, 2024**

**BETWEEN**

**LAVINGTON SECURITY LTD ..... APPLICANT**

**AND**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT ... 1<sup>ST</sup> RESPONDENT**

**LAVINGTON UNITED SACCO SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Application for stay of execution pending the hearing and determination  
of an appeal against the ruling and order of the High Court of Kenya at  
Nairobi (Okwany, J.) dated 23rd July, 2022 in HCCC No. 61 of 2019)*

**RULING**

1. The Motion on Notice before us is dated 1<sup>st</sup> August 2022 and is taken out by the applicant, Lavington Security Ltd., who prays for an order of stay of execution of the ruling and order of the High Court of Kenya at Nairobi (Okwany, J.) dated 23<sup>rd</sup> July 2022 (erroneously indicated in the application as 23<sup>rd</sup> June 2022), pending the hearing and determination of an intended appeal. In the ruling that the applicant intends to appeal, the High Court heard and dismissed two applications by the applicant for review and committal for alleged contempt of court.
2. The brief background to the current application is as follows. A dispute arose between the applicant and the 2<sup>nd</sup> respondent, Lavington United Sacco Society Ltd., over the applicant's failure to deduct and remit to the 2<sup>nd</sup> respondent contributions from security guards in the applicant's employment. The two parties entered into an arrears agreement and an addendum agreement in which the applicant agreed to pay to the 2<sup>nd</sup> respondent, in instalments, the arrears of its employees' contributions. The agreements were duly recorded as an order of the court on 21<sup>st</sup> February 2019.



3. Another dispute arose between the parties on whether the applicant had complied with the arrears agreement, and the 1<sup>st</sup> respondent, the Commissioner for Co-operative Development, issued upon the applicant an agency notice demanding payment of Kshs 48,026,779.00. On 29<sup>th</sup> October 2019, the applicant moved to the High Court seeking, among others, a declaration that it had complied with the arrears agreement and the consent order. The applicant also sought leave to commence contempt of court proceedings against a Mr. Didacus Ityeng, an officer of the 1<sup>st</sup> respondent. The applicant's case was hinged on the contention that its employees had withdrawn from membership of the 2<sup>nd</sup> respondent and that, therefore, no remittances were due.
4. The matter was heard by Odero, J. who, by a ruling dated 4<sup>th</sup> September 2020 found that the applicant was indeed in breach of the arrears agreement by failing to continue to make future remittances as agreed between the parties. The court further found that the applicant had not presented any evidence of withdrawal of its employees from the 2<sup>nd</sup> respondent. Accordingly, the learned judge dismissed the application with costs.
5. Next, three applications were filed in the High Court touching on the dispute. The first was by the Co-operative Bank of Kenya Ltd. seeking to be joined in the proceedings on the grounds that it had advanced a loan to the 2<sup>nd</sup> respondent on the strength of representation that the applicant would continue to remit contributions from its employees, and that the applicant had unlawfully failed to make the remittances.
6. The second application sought review of the ruling of Odero, J. and a declaration that the applicant had fully satisfied the arrears agreement. The applicant also prayed for an order restraining the respondents from demanding from it payment of Kshs 48,026,779.00. The application for review was based on an alleged mistake on the face of the record as regards the finding that the applicant's employees had not withdrawn from the 2<sup>nd</sup> respondent.
7. The last application prayed for joinder of five parties to the suit and an order citing them together with the 2<sup>nd</sup> respondent for alleged contempt of court. The contempt of court was alleged to arise from demanding from the applicant remittances from its employees and restricting it from operating its bank accounts contrary to the terms of a court order.
8. By a ruling dated 23<sup>rd</sup> July 2022, Okwany, J. allowed the application for joinder of Co-operative Bank of Kenya Ltd., but dismissed the other two applications by the applicant after finding them lacking in merits. The applicant was aggrieved and applied in this Court for an order of stay of execution pending the hearing and determination of its intended appeal.
9. In support of the application for stay of execution, the applicant contended, both in the affidavit in support of the application and its written submissions dated 15<sup>th</sup> September 2022, that it has an arguable appeal because the Okwany, J. erred by failing to find that the applicant's employees had withdrawn from the 2<sup>nd</sup> respondent, and in holding that the applicant was in violation of the arrears agreement. In its draft memorandum of appeal, the applicant further intends to argue on appeal that the learned judge erred by failing to consider Order 45 of the Civil Procedure Rules in its entirety; by failing to find that there was an error apparent on the face of the record; by holding that there was no new and compelling evidence to justify review; by failing to find that the applicant had not breached the arrears agreement and the consent order; and by joining the Co-operative Bank of Kenya Ltd. as a party.
10. On whether the appeal risked being rendered nugatory, the applicant submitted that the 2<sup>nd</sup> respondent had already applied to the High Court for release to it of Kshs 48,026,779.00 deposited in a joint



interest-earning account in the names of the parties' advocates and that, if the High Court allowed the application, the intended appeal would be rendered academic. It was also contended that the 2<sup>nd</sup> respondent would not be able to refund the money if the appeal succeeded.

11. Lastly, the applicant submitted that it was in public interest that the order of stay of execution be granted as the dispute involved thousands of guards employed by the applicant, whose employment was at risk if the funds in question were released to the 2<sup>nd</sup> respondent.
12. The respondents did not attend court or file any written submissions although they were duly served with a hearing notice on 24<sup>th</sup> September 2022.
13. We have duly considered the application. To be entitled to the orders sought, it is common ground that the applicant must demonstrate that the intended appeal is arguable, or that it is not frivolous; and that, unless we grant an order of stay of execution, the appeals will be rendered nugatory. (See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR). We bear in mind that an arguable appeal is not one that must ultimately succeed. In addition, an applicant does not have to establish a multiplicity of grounds to make out an arguable appeal. Even one bona fide ground deserving further consideration by the Court will suffice.
14. As regards the question as to whether the appeal will be rendered nugatory or not, that depends on the peculiar circumstances of each case. The purpose of this consideration is to ensure that if the appeal succeeds, the applicant is not left only with a pyrrhic victory. In *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* (supra) the Court explained thus:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”. (Emphasis added).

15. In addition to the above principles, this Court has consistently held that a negative order cannot form the basis for issuing an order of stay of execution. The gravamen of the applicant's intended appeal is a challenge of the order by Okwany, J. dismissing the applicant's application for review of the ruling of Odera, J. It is patently clear that what was before Okwany, J. was not an appeal from the ruling of Odera, J., but an application for review limited to the issue as to whether there was an error apparent on the face of the record, and whether there was any new evidence that the applicant could not have obtained by exercise of reasonable diligence.
16. The outcome of that application was an order of dismissal. As far as we can tell from the record, there is no evidence of any appeal from the ruling of Odera, J. In *George Ole Sangui v. Kedong Ranch Ltd.* [2015] eKLR, this Court held as follows:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”



(See also *Western College of Arts & Applied Sciences v. Oranga & Others* [1976] eKLR; Republic v. Kenya Wildlife Services & 2 Others, CA . No. Nai. 12 of 2007; and FRS v. JDS CA. No. Nai. 114 of 2012).

17. Satisfied, as we are, that this application for stay of execution is essentially against a negative order of the High Court which dismissed the applicant’s application for review, we do not find any merit in the same. Accordingly, the Notice of Motion dated 1<sup>st</sup> August 2022 is hereby dismissed. We make no orders on costs because the respondents did not participate in the application. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**M. GACHOKA, C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

