



Wananchi Group (K) Limited & another v Globecast Africa Limited (Civil Appeal (Application) E836 of 2022) [2024] KECA 1322 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1322 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E836 OF 2022
SG KAIRU, S OLE KANTAI & P NYAMWEYA, JJA
SEPTEMBER 27, 2024**

BETWEEN

WANANCHI GROUP (K) LIMITED 1ST APPLICANT

WANANCHI PROGRAMMING LIMITED 2ND APPLICANT

AND

GLOBECAST AFRICA LIMITED RESPONDENT

(Being an Appeal from the Judgment of the High Court at Nairobi (Tuiyott, J.) delivered on 28th September, 2022 in H.C. Civil Suit No. E027 of 2018)

RULING

1. In a judgment delivered by Tuiyott, J. (as he then was) on 27th September, 2022 it was ordered:

“Ultimately, I enter judgment for the plaintiff as against the Defendants jointly and severally for the sum of USD 118,614.54 and interest thereon at court rates from the date of filing suit. If the same shall be paid in Kenya Shillings, then it shall be paid at the convertible rate prevailing and set by the Central Bank on the date of payment. Costs as well to the Plaintiff.”

2. The applicants Wananchi Group (K) Limited and Wananchi Programming Limited successfully applied to the High Court for stay of execution pending appeal where it was ordered that stay of execution be granted subject to the applicants issuing a bank guarantee of USD 45,000 in favour of the respondent (Globecast Africa Limited) from a reputable bank within 21 days, the order was to remain in force for 1 year unless extended by that Court or this Court and in default the order to automatically lapse and the respondent be at liberty to proceed with execution.



3. The applicant did issue a bank guarantee from NCBA Bank for the said sum of USD 45,000 and the same which is dated 29th November, 2022 states at the material part:

“This guarantee will remain valid until 28th November 2023.”

4. In the Motion on notice brought under rule 5 (2)(b) of The Court of Appeal Rules, 2022 the applicants pray in the main that pending the hearing and determination of an appeal there be a stay of execution of the judgment and decree of the High Court delivered on 28th September, 2022. In grounds in support of the application and in a supporting affidavit of Caroline Julio, the 1st applicant’s Regulatory Director it is said amongst other things that the High Court gave a conditional stay of execution pending appeal; that a guarantee was duly given and an appeal filed which is awaiting hearing; that the applicants’ application for extension of stay of execution order was not granted by the High Court; that there is sufficient security therefore we should extend the orders for stay of execution pending appeal; that the respondent has applied for decree and the applicants should be granted stay; that the appeal will be rendered nugatory if execution proceeds.
5. In a replying affidavit Alan Hird, the respondent’s Managing Director, says amongst other things that the application for stay of execution pending appeal at the High Court was allowed without merit and with strong objection by the respondent; that stay of execution orders were issued by the High Court irregularly against the principles in order 42 rule 6 Civil Procedure Rules, 2010; that the respondent applied for review of those orders; that the bank guarantee has expired; that the applicants have not demonstrated how the appeal would be rendered nugatory if execution takes place; that the respondent is an international company with presence in many countries including Kenya and is financially sound; that the respondent is entitled to the fruits of its judgment. There are many annexures to that affidavit which we need not discuss for purposes of this ruling.
6. When the application came up for hearing before us on 20th August, 2024 the applicants were represented by learned counsel Mr. Gakunga while learned counsel Mr. Kimata appeared for the respondent. Both sides had filed written submissions and in a highlight of the same the applicants submitted that there was an arguable appeal; that there was an indemnity by a third party who could compensate the applicants if there was a breach of the broadcast agreement between the applicants and the respondent. Counsel submitted that it was arguable on appeal whether the Judge should have given judgment to the respondent jointly and severally against the applicants. According to counsel the appeal would be rendered nugatory if execution proceeded because there was a valid guarantee to secure the judgment.
7. Counsel for the respondent thought that the application lacked merit and should be dismissed as it did not satisfy the principles for grant of stay of execution pending appeal. According to counsel there was no bona fide arguable point on appeal as the grounds set out in draft Memorandum of Appeal raised issues outside the judgment of the High Court. Counsel further submitted that the decree was for money and the respondent had demonstrated that it was capable of paying back should the appeal succeed.
8. In a rejoinder it was the applicants’ submission that the decree was for a large amount of money and that there may be difficulty recovering it.
9. We have considered the whole record of the motion and the applicable law.
10. The principles that apply in this Court in an application for stay pending appeal are well known- for an applicant to succeed it must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition,



show that the appeal will be rendered nugatory absent stay - See Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR.

11. We have perused draft Memorandum of Appeal which sets out various grounds of appeal. It is proposed to be argued on appeal, for instance, that the Judge erred in law and fact in holding that the 1st applicant did not demonstrate that the invoices raised by the third party were for the same services rendered by the respondent. It is also proposed to be argued that the Judge erred in law and fact in holding that the issues raised by the applicants were separate claims which ought to have formed the basis of a separate claim as a set-off against the counter-claim. We find these to be not idle grounds, they are arguable grounds on appeal and as has been held by this Court an arguable ground is not one that will succeed, it is one that requires determination by the Court - Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2004.
12. What about the nugatory aspect which the applicants must also satisfy to succeed in an application like this one?
13. The applicants were ordered to provide a guarantee as security for the decree which they did with the guarantee by NCBA Bank for USD 45,000. As we have seen in this ruling that guarantee had a life-span of 1 year, to expire on 28th November, 2023 (now past). The applicants have not renewed that guarantee. The decree is a money one. The respondent states that it is an international company with a presence in many countries including Kenya; that it is financially sound and would have no difficulty paying back the decretal sum should the appeal succeed. This Court state in NIC Bank Limited & 2 others vs. Mombasa Water Products Limited [2021] eKLR:

"In Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji & Ano. [2015] eklr cited by the respondent, this Court stated as follows:

"with time it became necessary to put certain riders to the legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."

...On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra) this Court stated that:

- "ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- x). 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."

14. As we have seen the decree subject of the appeal is a money decree. The applicants have not shown that the decretal sum, if paid, cannot be repaid by the respondent. The applicants did not renew the guarantee when it expired and it has not been shown how the appeal would be rendered nugatory if we do not grant stay. The applicants having failed to demonstrate that the appeal would be rendered nugatory in the absence of stay order have not satisfied that aspect of the principles on which we exercise our discretion in an application of this nature. The Motion fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb.,



.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

