



Avistia SRO Limited v Njenga & 8 others (Civil Appeal (Application) E621 of 2023) [2024] KECA 1210 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1210 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E621 OF 2023
PO KIAGE, K M'INOTI & F TUIYOT'T, JJA
SEPTEMBER 20, 2024**

BETWEEN

AVISTIA SRO LIMITED APPLICANT

AND

MAINA STEPHEN NJENGA 1ST RESPONDENT

FELIX RANTUU LEKISHE 2ND RESPONDENT

SOLOMON JOSEPH MAINA 3RD RESPONDENT

MONTHIDA RASHI 4TH RESPONDENT

ECO BANK KENYA LIMITED 5TH RESPONDENT

KIWIPAY PTE LIMITED 6TH RESPONDENT

GREGORY SCHIMIDT 7TH RESPONDENT

PAYGRAM COMPANY LIMITED 8TH RESPONDENT

KIWIPAY (KENYA) LIMITED 9TH RESPONDENT

(An application for stay of execution of the Judgment and Decree of the High Court at Nairobi (Mabeya, J.) dated 19th December, 2023 in HCC No. E484 of 2022 Consolidated with HCC No. E454 & E469 of 2022)



RULING

1. The applicant by the motion dated 28th December, 2023 brought under, sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rule 5(2)(b) of the Court of Appeal Rules, seeks in the main, the following orders;
 - “3. That this Honourable Court be pleased to grant orders of stay of execution of the entire Judgment and Decree of the High Court (Commercial & Admiralty Division) dated and delivered on 19th December 2023 at Nairobi (Hon. Justice Alfred Mabeya) in HCCOMM No. E484 of 2022 [consolidated with HCC E454 of 2022 & HCC E469 of 2022] pending the hearing and determination of the intended appeal.
 4. That this Honourable Court be pleased to grant an order of injunction directed at the Respondents either by themselves or through their agents, servants or any person acting through them restraining them from withdrawing any sum or in any manner transacting on Bank Accounts Nos. 668200xxxx, 668200xxxx and 66820xxxx held by 6th Respondent pending the hearing and determination of the intended appeal.”
2. The motion is founded on grounds on the face of it and is supported by an affidavit sworn on 28th December 2023 by a Director of the applicant, Vladimir Hristov Stanev. It is averred that the High Court dismissed the applicant’s case on two principal grounds namely, the agreement relied on was not executed by or on behalf of the 10th respondent company, and hence the applicant does not have a cause of action; the money claimed is in possession of the 7th respondent for the benefit of the 10th respondent and, the agreement itself provided that the applicable law is Singaporean. The applicant faults the learned judge for holding that the funds held in the subject accounts belong to the merchants who entered into contracts with the 7th respondent, without, allegedly, interrogating the evidence before him in order to arrive at the correct factual finding, that it entered into a valid contract as a Merchant with the 7th respondent. The applicant explains that the net effect of the orders in the impugned judgment is that the respondents are now free to proceed and withdraw funds, and dissipate the said accounts, rendering the intended appeal academic.
3. The application is opposed by the 6th respondent through a replying affidavit sworn on 31st January 2024, by John Wambugu, its Senior Legal Officer, contending that enforcement of the impugned judgment has been overtaken by events. It is deposed that the trial court’s jurisdiction to hear and determine the matter was ousted by clause 19 of the agreement which obligated each party to consent to the exclusive venue and jurisdiction of the court in Singapore for any dispute that arose out of or related to the agreement in issue. Further, the main finding of the learned judge that is connected to the operations of the 6th respondent was that, the bank acted within the properly given mandate and there was no breach of its fiduciary duty to the company. The proper mandate and/or resolution is the one dated 25th June 2021, and the same is lawful and in force. The 6th respondent avers that post-delivery of the impugned judgment, it was served with an extracted decree together with repeated demands for restoration of the account operation mandates, in line with the aforementioned resolution. Upon authentication of the impugned judgment and decree, it proceeded to restore the account operation mandates on the subject bank accounts which allowed the 10th respondent to carry out transactions. The 6th respondent states that as at 10th January 2024, the 10th respondent had transferred funds in the



subject accounts leaving the following balances; account number 668200xxxx, Ksh.510, 190; account number 6682003xxx, USD 488, 632.37 and account number 66820xxxx8, Nil.

4. It is asserted that the amount held in account number 668200xxxx is subject to a subsisting court order in Milimani HCCOMM E005 of 2023; Conrad Law Associates LLP vs. Kiwipay Kenya Limited and Ecobank Kenya Limited, which allowed Conrad Law Advocates LLP to hold as lien the sum of USD 487, 094.68 for unpaid legal fees pending determination of an application dated 10th January 2023. That application is still pending determination and therefore the lien orders are still in force. Next, it is averred that there is presently a status quo order against the said bank accounts issued by Mshila, J. on 9th January 2024 in Kiambu HCCR MISC. APPL. E130 of 2023; Kiwipay Kenya Limited vs. The Republic & Ecobank Kenya Limited (IP), pending inter parties hearing of an application that was scheduled to take place on 15th January 2024. Consequently, the 6th respondent reiterates that the instant application, seeking a stay of execution of the impugned judgment, has been overtaken by events because the sum of money now available in the bank accounts, is not sufficient to meet the applicant's claim against the 10th respondent to the tune of USD 13,473,110.44. In the end, we are urged to dismiss the application with costs to the 6th respondent.
5. In further opposition to the application, was lodged a replying affidavit sworn on 7th March 2024, by Gregory Schmidt, the 8th respondent and a Director of Kiwipay PTE Limited, the 7th respondent and majority shareholder of Kiwipay Kenya Limited, the 10th respondent. The 7th respondent associates himself with the replying affidavit of the 6th respondent as well as their written submissions. He contends that while the purpose of an application for stay is to preserve the subject matter in dispute, the subject matter in the dispute herein which was the funds in the 10th respondent's accounts, has abated by virtue of it having already been withdrawn. The 8th respondent states that he is advised that on 14th February 2024, while dealing with several matters touching on the 10th respondent, Mong'are, J., issued a blanket order of status quo on the 10th respondent's accounts, with the consequence that no transaction can be carried out on those accounts. Further, it is argued that in so far as the trial court determined that the proper forum for any dispute resolution would be the jurisdiction provided in the contract, the intended appeal has low chances of success.
6. During the hearing, learned counsel Mr. George Ogembo appeared for the applicant while Mr. Chris Gichangi appeared for the 6th respondent. Mr. Gichangi chose to rely on the replying affidavit and written submissions filed on behalf of the 6th respondent. Mr. Ogembo also sought to rely on his written submissions, although they were not before us, possibly because as he indicated, he filed them the morning of the hearing. There was no appearance for the rest of the respondents.
7. Before hearing the parties submissions, and having read the contending averments in their lodged submissions, we inquired from Mr. Ogembo what his view was given the respondents' assertions that the application had been overtaken by events. He answered that prior to the filing of the application, there were funds in the accounts in question which the respondents took away upon sighting the application. He contended that in any case what the applicant was seeking were preservative orders with respect to the funds in those specific accounts, which had been preserved through other parties. To counsel, therefore, the application had not been overtaken by events. We drew Mr. Ogembo's attention to the 6th respondent's averments that, the amount held in account number 668200xxxx was subject of a subsisting court order which allowed Conrad Law Advocates LLP to hold as lien the sum of USD 487, 094.68 for unpaid legal fees pending determination of an application dated 10th January 2023. We inquired from counsel whether in his view those funds were free for this Court to make orders over them. Further, we pointed out that since the trial court had made status quo orders on the same subject matter, we could not possibly interfere with those orders unless on appeal. Mr. Ogembo insisted that



- what the applicant was seeking were preservative orders in its favour just like what the rest of the parties obtained at the High Court. We enquired of him whether his client should not seek to be joined at the trial court in the proceedings where the preservative orders were issued as courts abhor multiplicity of proceedings over the same subject matter, happening at the same time and at different levels of courts.
8. We even gave counsel time to reflect on his application for a while as we dealt with other matters on the cause list. On his return, Mr. Ogembo indicated that even though he had considered all factors and our sentiments on the application, he nevertheless preferred that we proceed to consider the application and make our determination. And so we shall.
 9. We have given due consideration to the application, the affidavit in support thereof, the respondents' replying affidavits, the contending submissions and the law. It is trite that a stay of execution or a restraining order of injunction lies at the discretion of the Court, to be exercised on a case by case basis, with a view to attaining the ends of justice. To merit an order of stay or an injunction, an applicant must satisfy the Court that; first, he has an arguable appeal, which means one that raises a bona fide point worthy of consideration, though it need not necessarily succeed and; second, that if the stay or injunction is not granted the appeal would be rendered nugatory, which is another way of saying useless or of no effect, due to harm having been suffered in the intervening period. See, Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others [2013] Eklr And Kieni Plains Co. Ltd & 2 Others Vs. Ecobank Kenya Ltd [2018] eKLR.
 10. On whether the intended appeal is arguable, the central contention of the applicant, according to the draft memorandum of appeal, seems to be the nature of relationship that existed between it and the respondents, which entitled it to have a cause of action against the 10th respondent. We think, that is an arguable point.
 11. Turning to the second prerequisite, whether the intended appeal will be rendered nugatory if we do not grant an order of stay of execution or an injunction, the applicant deposes that the net effect of the impugned judgment is that the respondents are now free to proceed and withdraw the funds in the subject accounts to its prejudice. Essentially, the applicant seeks to forestall the execution of the judgment and decree with the aim of preserving the funds in the bank accounts in issue. However, it is common to parties herein that the funds in those accounts have already been withdrawn to a certain extent. To support that submission, it is urged that, upon delivery of the impugned judgment, the 10th respondent regained access to the bank accounts and transacted the available funds leaving behind USD 488,632.37 and Ksh.510, 190, which amounts are subject of preservation orders including, status quo orders which were issued on 14th February 2024 by Mong'are, J. We are implored to adopt the ruling of this Court in Charles Ndiritu Wanjohi & 4 Others Vs. Lawrence Maina Mwangi & Another [2012] eKLR which cited with approval the case of Erick Makokha & 4 Others Vs. Lawrence Sayani & 2 Others [1994] eKLR as follows;

“An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, “equity, like nature, will do nothing in vain”. On the basis of the maxim, courts have held again and again that it cannot satisfy itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it.”
 12. Despite our spirited efforts to urge counsel for the applicant that the application had been overtaken by events, counsel was hell-bent on proceeding with the application. We hold the view that the orders



sought by the applicant are not grantable, being moot, which essentially negates not just the nugatory aspect, but the entire application. We restate the sentiments of Mativo J., as he then was, in Republic Vs. Kenya Maritime Authority & Another; Zam Zam Shipping Limited (Interested Party) (Judicial Review 10 of 2020) [2021] KEHC 309 (KLR). The learned judge stated;

“23. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity. [See Plateau State v AGF. [2006] 3 NWLR (Pt 967) 346 at 419 paras. F-G]”

13. Similarly, we are guided by the Supreme Court’s pronouncement on the issue of mootness in Dande & 3 Others Vs. Inspector General, National Police Service & 5 Others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR). The Court observed;

“66. [...] An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”

14. In the result, while the intended appeal may be arguable, it is merely academic and the application does not succeed on the nugatory aspect. The application therefore fails in toto and we dismiss it with costs to the 6th, 7th, 8th and 10th respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

