Kenya Bureau of Standards v National Bank of Kenya & 4 others (Civil Application E017 of 2024) [2024] KECA 1181 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1181 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E017 OF 2024

PO KIAGE, M NGUGI & P NYAMWEYA, JJA

SEPTEMBER 20, 2024

BETWEEN

KENYA BUREAU OF STANDARDS .... APPLICANT

AND

NATIONAL BANK OF KENYA .... 1ST RESPONDENT

CENTURION ENGINEERS & BUILDERS LIMITED .... 2ND RESPONDENT

THE CO-OPERATIVE BANK OF KENYA LIMITED .... 3RD RESPONDENT

KENYA COMMERCIAL BANK .... 4TH RESPONDENT

SAFARICOM LIMITED .... 5TH RESPONDENT

(An application for stay of execution of the Ruling of the High Court of Kenya at Nairobi (Mabeya, J.) dated 21st December, 2023 in Misc. Application No. 506 of 2012)

RULING

1. By its motion dated 15th January, 2024 and brought under Rule 5(2)(b) of the Court of Appeal Rules, Kenya Bureau of Standards, the applicant, seeks, in the main, the following orders;

    2. That pending the hearing and determination of this application inter-parties there be a stay of the Ruling of Mabeya J. made on 21st December 2023 in High Court Commercial Suit Number: 506 of 2012, Centurion Engineers & Builders vs. Kenya Bureau of Standards. For the avoidance of doubt, the orders of garnishee absolute issued against the Kenya Bureau of Standards be stayed pending the hearing and determination of this application inter-parties.

    3. Pending the hearing and determination of the intended appeal there be a stay of Ruling of Mabeya J. made on 21st December 2023 in High Court Commercial Suit Number: 506 of 2012, Centurion Engineers & Builders vs. Kenya Bureau of Standards. For the avoidance of

doubt, the orders of Garnishee Absolute issued against the Kenya Bureau of Standards be stayed pending the hearing and determination of this application inter parties."

2. The motion is founded on grounds on the face of it and is supported by an affidavit sworn on 15th January 2024 by Miriam Kahiro, the Corporation Secretary of the applicant. It is deposed that enforcement of the impugned ruling would require the applicant to halt its statutory mandate as set out in section 4 of the *Standards Act*, Chapter 496 of the Laws of Kenya. The applicant accuses the 1st respondent of abuse of court process for the reason that it made numerous applications before the trial court seeking garnishee orders namely, applications dated 9th November 2023, and 23rd November 2023, an amended application dated 29th November 2023 and application dated 13th December 2023. It is alleged that the trial court failed to determine the applicant's application for stay of execution dated 14th of November 2023. The basis for that application was that the applicant had filed an application at this Court seeking leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No. 398 of 2021, Centurion Construction & Builders Limited vs. The Kenya Bureau of Standards.

3. It is contended that the decretal sum is inordinately high and should the application for certification and the intended appeal be successful, and the Supreme Court directs the 1st respondent to refund part of the decretal sum, the 1st respondent has not demonstrated that it will be in a position to refund the said sum. Further, the decretal sum would have a negative macro-economic effect on the applicant's budget yet the applicant, being a state corporation, is under a public duty to protect the interests of the public and payment of the decretal sum would be injurious to the national and economic interests of the country as taxpayer's funds would be used to settle the award. It is also urged that settlement of the decretal sum would be tantamount to unjust enrichment by the 1st respondent and would defeat the principle of cost effectiveness in procurement; the applicant would be forced to defer to the national government for allocation of Ksh. 584, 492, 094.20 which had not been factored in the budgetary allocation for the financial year 2023- 2024 and, absence of a stay of execution would sanction an illegality that the applicant seeks to challenge at the Supreme Court.

4. In asserting that the intended appeal is arguable, the applicant sets out the grounds of the appeal. It is averred that the learned judge erred by not interrogating the 1st respondent's ability to repay the decretal sum should the intended appeal succeed; allowing the 1st respondent's application dated 13th December 2023 given that it was premature and the applicant had already lodged an application for certification; prioritizing the 1st respondent's applications seeking garnishee orders, and failing to consider public interest in the matter. It is contended that unless this Court grants a stay of execution of the impugned ruling, the 1st respondent will garnishee the applicant's accounts, rendering the appeal nugatory.

5. The application is opposed through a replying affidavit sworn on 26th January 2024 by Eng. Samay Singh, a director of the 1st respondent. It is asserted that the High Court cannot be faulted for holding that it had no jurisdiction to stay the judgment of this Court. The applicant is criticized for misleading this Court that the trial court prioritized the 1st respondent's application for garnishee orders over its application for stay of execution of the judgment of the Court of Appeal. The 1st respondent avers that the impugned ruling determined simultaneously both applications. Moreover, a successful party in any litigation is entitled as of right to enjoy the fruits of the judgment of the court and that right cannot be denied simply because the dissatisfied party seeks to appeal against the said judgment. It is averred that the orders sought by the applicant cannot issue as they have been overtaken by events since the orders of garnishee absolute issued on 22nd December 2023 have already been executed. The 1st respondent continues that; the impugned ruling cannot be stayed as no positive orders were issued that could possibly be stayed. The applicant's assertions on its incapacity to pay since it is a public

body operating on taxpayer's funds is rejected for the reason that it is still liable to settle a decree of the court issued against it. Moreover, the statute that created it gives it powers to enter into contracts in performance of its duties and consequently, it is liable to meet its obligations arising from those contracts.

6. The 1st respondent asserts that this Court has held time without number that an appeal cannot be rendered nugatory if what is sought to be stayed can be reversed. It argues that if the money decree is executed, it is capable of repaying the same should the Supreme Court ultimately find the intended appeal successful, a fact that was duly considered by the trial court. It is further contended that the applicant has never served the 1st respondent with any notice of appeal. Ultimately, the 1st respondent urges that the application is devoid of merit. By a supplementary affidavit sworn by Eng. Samay Singh on 4th March 2024, the 1st respondent avers that the garnishee order absolute issued by Mabeya, J. was complied with to the effect that all the applicant's funds that were held in the various accounts operated by the garnishees were remitted to the 1st respondent's account. A statement of the bank account of the 1st respondent's advocates is attached as evidence of the same. In effect the 1st respondent contends that the orders sought to be stayed have already been executed.

7. The principles upon which this Court grants relief under Rule 5(2)(b) of its Rules are old hat and have been rehashed by this Court numerous times. For an applicant to succeed, he must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. For an appeal to be considered arguable, it must raise at least one bona fide point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others [2013] eKLR and Kieni Plains Co. LTD & 2 others Vs. Ecobank Kenya LTD [2018] eKLR.

8. During the hearing, learned counsel, Mr. Nura, Mr. Michael Chege and Mr. Issa Mansur appeared for the applicant while Mr. Brian Khaemba appeared for the 1st respondent. There was no appearance for the rest of the respondents.

9. We inquired from counsel for the applicant whether in view of the further affidavit by the 1st respondent indicating that the garnishee orders issued by Mabeya, J. had already been executed, they still wanted to pursue the application for stay of that ruling. Mr. Nura replied that by the time they were filing the application, execution had not been done. Further that, only partial execution had taken place and they wanted to stop execution of the entire decretal amount. We inquired from counsel whether this Court has jurisdiction to stay its own judgment, being the judgment dated 27th October 2023, which the trial court declined to stay for lack of jurisdiction. We advised counsel for both parties to have a discussion on how to proceed with the application and get back to us as we proceeded with other matters. On their return, parties had not agreed on a settlement and we thus allowed them to argue the application before us.

10. Citing the Supreme Court decision in Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR, counsel for the applicant urged that public interest is a critical consideration in determining applications for stay especially in constitutional matters. It was submitted that where public interest is adversely affected by a decision of the High Court, there is sufficient cause for this Court to grant a stay pending appeal. Various issues which were ostensibly raised in the application for certification for leave to appeal to the Supreme Court, were cited to demonstrate that public interest tilts in favour of the applicant. Mr. Chege contended that the application meets the test of arguability based on the grounds of the intended appeal as presented in the motion. To counsel, the learned judge was wrong in holding that he did not have jurisdiction to grant a stay of execution pending certification

of the intended appeal. He argued that pursuant to the provisions of the Civil Procedure Code, the court had inherent jurisdiction to grant the stay. Further, counsel urged that execution of the arbitral award was premature. We inquired from counsel whether, even after this Court rendering itself on the matter, execution of the arbitral award was premature. Mr. Chege insisted that execution of the arbitral award was premature for the reason that, after the decision of this Court, Mr. Khaemba wrote to the arbitrator requesting for clarification on the interest rate that was to be paid and the arbitrator wrote back giving a figure of about 1.9 billion, which was the total amount that was to be recovered from the arbitral proceeding. Counsel contended that Mr. Khaemba had filed an application and extracted a decree for the sum of about Ksh. 500 million but did not indicate whether he intended to execute for the rest of the arbitral award.

11. Mr. Chege faulted the learned Judge for failing to consider that the award of Ksh. 1.9 billion was a colossal sum and Mr. Khaemba had failed to substantiate that in the event the applicant is successful in its appeal, the 1st respondent will be able to refund the money. On whether the intended appeal would be rendered nugatory should the stay not be granted, counsel maintained that there had only been a partial discharge and thus the garnishees had not been discharged. Further, if the applicant is not granted stay but subsequently the certification to appeal to the Supreme Court is granted, the appeal will be rendered nugatory.

12. In response to the submissions made for the applicant, Mr. Khaemba began by addressing us on the notice of preliminary objection dated 26th January 2024. He sought the striking out of the instant application on the basis that it was not supported by an affidavit as required by the Rules of this Court. We informed counsel that there was already a supporting affidavit on record which was before us. Moving on to the substance of the application, Mr. Khaemba submitted that the 1st respondent filed a supplementary affidavit by which he demonstrated by way of a bank statement that following the garnishee order absolute issued by Mabeya, J., the monies held by the garnishees were transferred to their advocates' account. He contended that once a garnishee order has been made absolute, it cannot be that the garnishees have not been discharged. Counsel urged that the orders the applicant was seeking had been overtaken by events.

13. While agreeing with the finding of the learned judge that the High Court has no jurisdiction to stay a decision of this Court. Mr. Khaemba contended that the intended appeal is not arguable. Moreover, this Court has no jurisdiction to stay its own decision. To buttress that argument, counsel cited the Supreme Court decision in Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR in which that court stated that, 'a court's jurisdiction flows from either *the constitution* or legislation or both… and that a court of law cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.' It was submitted that what the applicant presented as arguable grounds of appeal did not relate to the impugned ruling, but to the intended appeal at the Supreme Court and the application for certification for leave to appeal to the Supreme Court.

14. Mr. Khaemba asserted that the 1st respondent had led uncontroverted evidence before the High Court to show that it was a going concern and was thus capable of refunding the decretal sum if at all the intended appeal to the Supreme Court was successful. Counsel contended that the mere fact that the applicant applies public funds in the conduct of its business does not justify it to invoke public interest. He argued that it was also in the public interest that public bodies settle any lawful judgments passed against them and honour legally binding contracts that they enter into with private citizens. The applicant's assertion that it would be incapable of performing its statutory duties were it to pay the decretal sum was discounted. Counsel contended that the applicant had not produced any evidence in form of its budgetary allocation, expenditure, its assets and liabilities, to prove that it would be hampered in the execution of its mandate if it paid the decretal sum. Mr. Khaemba maintained that the

orders sought had already been executed and thus the application was moot. He urged us to dismiss the application with costs.

15. We observe that contrary to the applicant's argument, a perusal of the ruling by Mabeya, J. dated 21st December 2023, whose orders the applicant seeks to stay, reveals that one of the applications before him was the applicant's motion dated 14th November 2023, by which the applicant sought a stay of execution pending the hearing and determination of an application for certification before this Court for leave to appeal to the Supreme Court against the judgment of this Court dated 27th October 2023. In determining that application, the learned judge noted that the applicant did not cite any provision of law under which that application was anchored. Ultimately, he found, and we are in agreement with that finding, that the High Court hierarchically lower, has no jurisdiction to stay an order or judgment of this Court. We are also not aware of any case where this Court has stayed its own decision. Indeed, we invited counsel for the applicant to cite any such decision in vain.They could not cite any jurisdictional anchor for such stay. We are of the considered view that the learned judge having rightly indicated that he had no jurisdiction to grant the orders that the applicant sought, he cannot possibly be faulted based on the grounds the applicant submitted as grounds of its intended appeal. We are not persuaded that the intended appeal is arguable.

16. On the nugatory aspect, (though we need not consider it having found the intended appeal unarguable) evidence was adduced by the 1st respondent to the effect that the garnishee order absolute issued by the learned judge, which the applicant implores us to stay, has been complied with fully. The applicant's funds held in the various accounts operated by the garnishees were remitted to the 1st respondent's bank account. Although the applicant does not contest that fact, it claims that there was only partial execution. The applicant has, however, not substantiated that assertion with any evidence. We, in the circumstances, are of the inclination that execution of the impugned ruling is complete and hence the orders that the applicant seeks have been overtaken by events. Accordingly, we are not prepared to make a determination that will have not practical relevance, being moot.

17. We associate ourselves with 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]"

18. 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);

> 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."

19. In the result, as both limbs of the application have not been met, the application fails and we dismiss it with costs to the 1st respondent.

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

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR