



REPUBLIC OF KENYA



Charles Kerich, County Executive Committee (Member) for Finance and Economic Planning & another v Park Towers Limited (Civil Application E138 of 2024) [2024] KECA 1398 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1398 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E138 OF 2024
S OLE KANTAI, F TUIYOTT & PM GACHOKA, JJA
OCTOBER 11, 2024**

BETWEEN

CHARLES KERICH, COUNTY EXECUTIVE COMMITTEE (MEMBER) FOR FINANCE AND ECONOMIC PLANNING 1ST APPLICANT

THE NAIROBI CITY COUNTY 2ND APPLICANT

AND

PARK TOWERS LIMITED RESPONDENT

(An application for stay of proceedings from the ruling and order of the High Court of Kenya at Nairobi (Chigiti, J.) delivered on 12th February 2024 in Nairobi HC JR No. 282 of 2014)

RULING

1. By Notice of Motion dated 21st March 2024, the application, hinged on the provisions of sections 3 and 3A of the *Appellate Jurisdiction Act* and rule 5 (2) (b) of the *Court of Appeal Rules*, seeks a temporary stay of proceedings in Nairobi HC JR No. 282 of 2014; *Republic v. Nairobi City County Government ex-parte Part Towers Limited* pending the hearing and determination of an intended appeal. The application is supported by the grounds on the body of the Motion and the supporting affidavit of the 1st applicant.
2. The facts giving rise to the application are that by a ruling of the High Court (Chigiti, J.) dated 12th February 2024 in Nairobi HC JR No. 282 of 2014, the court set aside the orders dated 25th September 2023. The said order of 25th September 2023 had inter alia issued a warrant of arrest against the 1st applicant, for failing to pay the respondent an outstanding decretal sum of Kshs. 43,737,390.22 on behalf of the 2nd applicant. The learned judge set aside those orders on condition that the 2nd applicant deposited the decretal sum within 45 days from the date of the ruling.



3. The applicants are dissatisfied with the conditions set by the learned judge for the following reasons: there was no proof of personal service; the proceedings leading up to the issuance of the orders of 25th September 2023 were marred with caricature, falsifications and distortion of facts; the decree was unenforceable as the 1st applicant had no role in the payment process of the 2nd applicant; and the 2nd applicant's budget allocation could not satisfy the decretal sum. Furthermore, the applicants were apprehensive that they will be unable to fulfill the conditions set by the learned judge.
4. The applicants continued that since the 45-day stay period was set to lapse on 28th March 2024, the 1st applicant risked being arrested upon lapse of that period. They lamented that mitigation and sentencing would proceed absent a chance to defend themselves in the Notice to Show Cause application. Finally, the applicants stated that the intended appeal would be rendered a pyrrhic victory or an academic exercise if stay was not granted. They annexed their notice of appeal dated 19th February 2024 and their draft memorandum of appeal dated 21st March 2024 that raised 4 grounds disputing the findings of the learned judge.
5. Through a replying affidavit of David Oyatta, Advocate for the respondent, sworn on 11th April 2024, the application is vehemently opposed. We take the liberty to summarize the rebuttals as follows: the applicants were guilty of material non- disclosure and concealment of material facts; the applicants were in contempt of the consent orders of the court issued on 29th May 2017; the applicants ought to purge their contempt arising from those orders; the judgment of the trial court was entered on 17th February 2015 and has never been appealed against; the 2nd applicant has since settled a portion of the decretal sum totaling Kshs. 10,000,000.00; the applicants only challenged the above proceedings for the first time when seeking a stay of execution against the warrants of arrest orders issued on 25th September 2023; the application for stay of execution dated 10th November 2023 was allowed on conditions that fulfilled the dictates of order 42, rule 6 of the [Civil Procedure Rules](#); the applicants' mere denials did not vitiate their responsibility to fulfill their financial obligations; and service of the Notice to Show Cause was properly effected upon the applicant as expounded in the affidavit of service. For those reasons, the respondent urged this Court to dismiss the application with costs.
6. The application was heard virtually on 13th May 2024. The applicants were represented by learned counsel Mr. Amataru holding brief for Mr. Okatch while learned counsel Mr. Ochieng' was present for the respondent. The applicants relied on their written submissions dated 9th May 2024 while the respondent highlighted its written submissions and list of authorities both dated 9th May 2024. The applicants submitted that their appeal was arguable and would be rendered nugatory if stay was not granted. The respondent on its part submitted that the applicants had failed to meet the threshold set out in rule 5 (2) (b) of this [Court's Rules](#).
7. The principles enunciated in an application under rule 5 (2) (b) of this [Court's Rules](#) for stay of proceedings pending appeal or intended appeal, are settled. To be successful, an applicant must demonstrate the following conjunctive twin limbs; firstly, that the intended appeal or appeal (if any) is arguable and not merely frivolous. Secondly, that the appeal, or intended appeal, if successful, would be rendered nugatory absent stay.
8. On the first limb of the twin principles in [Anne Wanjiku Kibeh v Clement Kungu Waibara & IEBC](#) [2020] eKLR, this Court held that even one single bona fide arguable ground is sufficient to establish that the appeal is not frivolous. We note that the draft memorandum of appeal dated 21st March 2024 raised 4 grounds disputing the findings of the learned judge. The grounds raised mainly deal with the representation of the respondent at the time that the order dated 25th September 2023 was issued, the



ability of the applicants to pay the decretal sum and whether indeed the 1st applicant has any role in the payment of the decretal sum.

9. At this point, we are not called upon to determine whether the grounds of appeal will succeed but a determination as to whether they are arguable. In so doing, we note that the applicant did not appeal against the judgment that is the subject of execution and indeed all that the applicants are seeking for, is more time to settle the decree. It is common ground that the applicants have paid a sum of Kshs 10 million in part payment of the decretal sum. In the circumstances, we are doubtful as to the arguability of the grounds. In our view, where the grounds of appeal appear frivolous, the Court should not hesitate to say so without going into the merits as that is an issue for the bench that will hear and determine the appeal.
10. In light of the foregoing circumstances, we find that the applicant has not satisfied the first limb of the twin principles for a grant of stay of execution and therefore it is not necessary for us to consider the second limb. Suffice to say that this is a monetary decree and the applicants did not even argue that the respondent is not capable of refunding the decretal sum if the intended appeal is successful.
11. Accordingly, we find that the application lacks merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

.....

JUDGE OF APPEAL

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

signed.

DEPUTY REGISTRAR

