



Njigoru v Liquidator, Kenya National Assurance Limited & 2 others (Civil Application E039 of 2024) [2024] KECA 1386 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1386 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E039 OF 2024
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
OCTOBER 11, 2024**

BETWEEN

FREDRICK MUKUA NJIGORU APPLICANT

AND

**THE LIQUIDATOR, KENYA NATIONAL ASSURANCE LIMITED 1ST RESPONDENT
KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT
KENYA COMMERCIAL BANK LIMITED 2ND RESPONDENT
KUDGETA WAMUGO NJIGORU 3RD RESPONDENT**

(An application for stay orders pending the hearing and determination for an intended appeal from the Ruling of the High Court of Kenya at Embu (Njuguna, J.) dated 11th April, 2024 in H.C.C.C. No. 6 of 2017)

RULING

1. The applicant, Fredrick Mukua Njigoru moved this Court by notice of motion made under Rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#) seeking the following orders from the court:
 1. That a stay order or set aside order do issue suspending a verbal consent order recorded in court on the 11th day of May 2022, pending the hearing and determination of an intended appeal against the Ruling of the High Court dated 11th April, 2024.
 2. That a stay order/set aside order do issue restraining the respondent from implementing the order of the High Court made on the 11th May, 2022 pending the hearing and determination of the intended appeal against the Ruling of the High Court dated 11th April, 2024.”
2. The application is supported by the grounds stated on the face of the motion and the annexed affidavit of the applicant. The applicant states that he was aggrieved by the ruling of the High Court delivered



on 11th April 2024, and intends to appeal against the same. He had lodged the requisite notice of appeal and requested for typed copies of proceedings from the superior court.

3. The applicant states that he has an arguable appeal with a good prospect of success. He is of the firm view that if the order of stay of execution that he craves for is not granted, he shall suffer substantial loss, hardship and irreparable damage. Furthermore, his intended appeal will be rendered nugatory. The applicant is apprehensive that if stay is not granted, the property that is the subject of the appeal may be sold by the respondents to third parties and thus defeat the substratum of the appeal. The applicant insists that the consent judgment that formed the basis of the decision was not made with his participation. He urged the Court to allow the application.
4. The application is opposed. The 3rd respondent, Kudgeta Wamugo Njigoru swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the order that the applicant seeks to stay was a consent of the parties that was adopted as the order of the court on 11th May, 2022. The applicant did not apply to set aside the consent or lodge on appeal against the same until after two years when he filed the present application.
5. The 3rd respondent swears that he had already executed the order of the court by obtaining a decree from the superior court. He accused the applicant of mischief in that he (the 3rd respondent) was the one who was actually paying the loan due and owing to the 1st and 2nd respondents. He pointed out that the applicant had withdrawn the suit against the 1st and 2nd respondents and could not therefore legally challenge the consent of the parties that was adopted as the order of this Court.
6. He deponed that the applicant was abusing the due process of the court in that he had filed another suit being Embu ELC Case No 9 of 2023 (OS) in which he is claiming similar orders to the ones he is seeking before this Court in the intended appeal. The 3rd respondent, therefore, urged the Court to dismiss the application with costs.
7. The 1st and 2nd respondents did not file any papers in support or in opposition to the application. They did not appear in Court during the plenary hearing of the application.
8. The applicant and the 3rd respondent filed written submissions in support of their respective opposing positions. During the plenary hearing, only learned counsel, Mr. Njiru appeared on behalf of the 3rd respondent. There was no appearance for the applicant. This ruling is, therefore, made on the basis of the contesting parties' written submissions.
9. There is an issue that this Court will deal from the onset. Although the applicant included the 1st and 2nd respondents as parties to this application, it was clear from the notice of withdrawal of the suit that the applicant himself filed before the High Court, that the applicant had withdrawn the suit against the 1st and 2nd respondents. The 1st and 2nd respondents were not, therefore, parties to this appeal the suit against them having been withdrawn. Consequently, they are not parties to the dispute that resulted in the lodging of the present application before this Court.
10. This Court, in exercise of its jurisdiction under Rule 5 (a) (b) of the [Court of Appeal Rules 2022](#), must consider the twin principles of arguability of the intended appeal and whether the intended appeal will be rendered nugatory if the order of stay of execution craved for is not granted. In [Nairobi City Council v Tom Ojienda & Associates](#) [2022] KECA 1326 [KLR] this Court held thus:

“On the first limb of the twin principles, this Court held in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR that for an order of stay of execution or proceedings to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is,



it is not frivolous, and that the appeal or intended appeal would in the absence of an order of stay be rendered nugatory...”

11. In the present application, the applicant urged us to determine that his intended appeal raises arguable issues which should be considered by this Court. The applicant argues, inter alia, that the consent that was adopted as the order of the court that he is challenging, was so adopted without his participation. In the circumstances, we hold that the intended appeal is arguable. It has been held severally by this Court that an applicant needs only establish one arguable ground in the intended appeal for this Court to find that he has fulfilled the first principle to be satisfied under Rule 5 (2) (b) of the Rules of this Court. An arguable ground is not the one which must necessarily succeed, but one which the Court finds not to be frivolous.
12. As regards the second limb, whether the intended appeal will be rendered nugatory, we hold that the applicant failed to establish that his intended appeal will be rendered nugatory if the order that he craves for is not granted. Why do we say so? Firstly, the order that the applicant seeks to stay was issued on 11th May, 2022. That was two years before he brought the present application. In the meantime, the said decree pursuant to the said order was extracted and executed. There is, therefore, nothing for this Court to stay because that which was sought to be stayed has already come to pass.
13. Secondly, the applicant is pursuing a similar remedy before the Embu Environment and Land Court in Case No 9 of 2023. The applicant cannot be allowed to pursue his case before several forums.
To do so would constitute abuse of the due process of the court. He clearly must be given the opportunity to exercise his chose in action and litigate the case before the Environment and Land Court.
14. In the circumstances, therefore, the application lacks merit and is dismissed with costs.

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

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

