



Pride Inn Hotel & Investments Limited & 3 others v Sai Holdings Limited (Civil Appeal (Application) E118 of 2024) [2024] KECA 1910 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1910 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E118 OF 2024
KI LAIBUTA, GWN MACHARIA & DK MUSINGA, JJA
OCTOBER 11, 2024**

BETWEEN

**PRIDE INN HOTEL & INVESTMENTS LIMITED 1ST APPLICANT
SHABBIR MOHAMMED KASSAM 2ND APPLICANT
MOHAMMED HASNAIN SHABIR NOORAINI 3RD APPLICANT
GLORY HOTELS & INVESTMENTS LIMITED 4TH APPLICANT**

AND

SAI HOLDINGS LIMITED RESPONDENT

((Being an application for stay of proceedings pending appeal against the Ruling of the Environment and Land Court at Mombasa (Matheka, J.) dated 24th April 2024 in ELC Suit No. 143 of 2023))

RULING

1. By a Notice of Preliminary Objection dated 7th August 2023, the applicants challenged the jurisdiction of the Land and Environment Court premised on the grounds: that the respondent's suit was time barred by dint of section 4 (1) of the Limitation of Actions Act; and that the trial court was functus officio by dint of section 7 of the Arbitration Act.
2. The learned Judge (Matheka, J.) dismissed the applicants' preliminary objection vide a ruling dated 24th April 2024, after considering two issues. First, on the contention that the amendment of the plaint by the respondent would introduce a new cause of action, the learned Judge held that this was an issue that was previously dealt with by this Court (Gatembu, Nyamweya & Odunga, JJ.A.) vide a ruling dated 28th July 2023 in Mombasa Civil Appeal No. E087 of 2022. Secondly, on the trial court being functus officio in respect of the proceedings before it by dint of section 7 of the Arbitration Act, the



learned Judge held that it was not since the arbitral proceedings collapsed and the parties resorted to resolving the dispute in court.

3. Being aggrieved by the said decision, the applicants filed an appeal to this Court and, contemporaneously, ask us, through a Notice of Motion dated 25th June 2024 brought under the provisions of sections 3 and 3A of the [Appellate Jurisdiction Act](#) and rule 5(2)(b) of the Court of Appeal Rules, 2022, to stay the proceedings in the trial court pending hearing and determination of the main appeal.
4. The application is supported by the annexed affidavit of Mohammed Hasnain Shabir Noorani, the 3rd applicant, sworn on 25th June 2024. He deposes that the applicants have arguable grounds of appeal and that, should the suit before the trial court proceed, they will be greatly prejudiced, and that the pending appeal will be rendered nugatory.
5. In a further affidavit sworn on 26th July 2024, the 3rd applicant contends that the issues being challenged by the applicants in this appeal are different from the ones raised in Civil appeal No. E087 of 2022; that, in Civil Appeal No. E087 of 2022, this Court held that the challenge to the amendment of pleadings was premature, whilst in the present application, the applicants are challenging the ruling on the preliminary objection on grounds of jurisdiction and infringement of the [Limitation of Actions Act](#). To them, the issue of limitation of time was not determined in the ruling in Civil Appeal No. E087 of 2022.
6. Opposing the application, Salim Sultan Moloo, the Director of the respondent, swore a replying affidavit dated 12th July 2024. He contends that the applicants are raising the same issues that they had raised in Civil Appeal No. E087 of 2022 through a Notice of Motion dated 12th October 2022; that the said application was heard and dismissed with costs by this Court in a ruling dated 28th July 2023; that the issues as to whether the trial court is functus officio to the suit and whether the suit is time barred were determined by the learned Judge in her decision of 27th July 2022; and that, therefore, the present appeal and the instant application are res judicata and an abuse of the court process. We were thus urged to dismiss the application with costs.
7. In further support of their respective arguments, the parties filed written submissions and list of authorities. We heard the application on 18th September 2024. Mr. Morara appearing for the applicants highlighted the applicants' submissions dated 26th July 2024, while Mr. Kamundi appearing on behalf of the respondent also highlighted the respondent's submissions dated 23rd August 2024.
8. We have considered the application, the affidavits in support of, and in opposition to, the application, the authorities relied upon, the law and the respective parties' submissions.
9. The applicants have invoked rule 5(2) (b) of this Court's Rules. The principles for granting stay of execution, injunction or stay of proceedings under rule 5(2) (b) are now well settled. An applicant must show that the appeal or intended appeal is arguable, and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. This Court expounded on the foregoing twin principles in the case of *Trust Bank Limited & another vs. Investech Bank Limited & 3 Others (2000) eKLR* as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding



principles but these principles must be considered against facts and circumstances of each case...”

10. On the question as to whether an appeal is arguable, a single bona fide issue is sufficient to warrant grant of stay orders by this Court. An arguable appeal is not one which must necessarily succeed, but one which is not frivolous. In considering this application, we are mindful that we should not make definitive findings so as to not embarrass the Bench that will be tasked with the hearing of the main appeal. See *Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others* (2013) eKLR. Lastly, in determining whether or not an appeal will be rendered nugatory, this Court has to consider the conflicting interests of both parties, and each case has to be determined on its own merits.
11. We have perused the Memorandum of Appeal dated 14th September 2022 and the grounds set out thereon. The applicants seek to challenge the ruling and order of the learned Judge (Matheka, J.) on the basis that she allowed amendments of pleadings, which amendments introduced a new cause of action which was prejudicial to the applicants. They also argue that the court itself is functus officio to the proceedings by dint of section 7 of the *Arbitration Act*. On the part of the respondent, it is argued that the issues which the applicants seek to raise in this appeal were the subject of determination by this Court differently constituted and, hence, the matter is res judicata.
12. A glance at the proceedings in this Court’s Civil Appeal No. E087 of 2022 attests to the fact that the contention therein was on the ruling dated 27th July 2022 by Matheka, J. allowing the respondent to amend its pleadings. In the ruling of this Court (*Gatembu, Nyamweya & Odunga JJ.A.*) dated 28th July 2023, the Court was of the considered view that, even though the intended appeal by the applicants was arguable, they had failed to demonstrate that it would be rendered nugatory for reasons that it was premature at that point to stop the proceedings in the Environment and Land Court. The Court opined that the hearing should proceed to its logical conclusion and that any party who was aggrieved by the outcome of the judgment had the avenue to appeal to this Court.
13. Although learned counsel Mr. Morara contends that the issues being raised in this appeal and the application are different from those that were subject of Civil Appeal No. E087 of 2022, it is apparently clear that the applicants are challenging the issue of amendment of pleadings, not through an application, but by way of a preliminary objection. The issue of amendment of pleadings is no doubt being canvassed in the same lens albeit being crafted through different pleadings. Our conclusion in the circumstances is that the issue of amendment of pleadings was settled by this Court in Civil Appeal No. E087 of 2022; and that the applicants are now formulating fresh claims whilst placing reliance on the same grounds they hinged their erstwhile appeal.
14. On the issue of the trial court being functus officio, it is agreed by both parties that the arbitral proceedings failed. It was stated by counsel for the respondent that the arbitrator recused himself on the ground of want of jurisdiction. Counsel for the applicants did not countenance this submission save to state that the arbitration proceedings failed. Either way, even without the advantage of seeing the order by the arbitrator, once the arbitration proceedings failed, it followed that parties had no recourse but to revert to court to resolve their dispute.
15. Thus, the applicants’ argument that the trial court became functus officio to the proceedings before it by dint of section 7 of the *Arbitration Act* cannot stand. We say so because this provision gives a court the power to issue interim measures to preserve the subject matter pending the hearing of arbitration proceedings. The section does not oust the court’s jurisdiction to determine a matter if arbitration proceedings collapse. No doubt therefore, the argument fronted by the applicants that the trial court became functus officio to its proceedings by dint of section 7 is obviously informed by a misapprehension of the law.



16. Accordingly, we find that there are no arguable grounds on which the appeal herein is hinged worth of consideration by this Court.
17. It is trite that the twin principles under rule 5(2)(b) of this Court's Rules must be satisfied conjunctively. The applicants having failed to satisfy the first limb means that the issue of whether the appeal will be rendered nugatory if the orders sought are not granted falls by the wayside.
18. In the upshot, we find that the application is devoid of merit and is hereby dismissed with costs to the respondent.

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

D. K. MUSINGA (P)

JUDGE OF APPEAL

DR. K. I. LAIBUTA C.ARB, FCIARB.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

