



**Jomo Kenyatta University of Agriculture & Technology v Higiro (Civil Appeal (Application) E368 of 2024) [2024] KECA 1668 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1668 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E368 OF 2024  
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA  
NOVEMBER 22, 2024**

**BETWEEN**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY ..... APPLICANT**

**AND**

**MARTIN HIGIRO ..... RESPONDENT**

*(Being an application for a stay of execution against the Ruling and Order of the High Court of Kenya at Nairobi (Mulwa, J.) delivered on 26th April 2024 in HC Comm. Civil Case No. E244 of 2023)*

**RULING**

1. Before the court is the applicant’s notice of motion dated 22<sup>nd</sup> May 2024, brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 5(2) (b) and 49 of the Court of Appeal Rules 2022, seeking a stay of execution of the order of the High Court at Nairobi (Mulwa, J.) that was delivered on 26<sup>th</sup> April 2024, pending the hearing and determination of the appeal.
2. We find it necessary to summarize the case to contextualize the dispute. The matter emanates from a judgment of the Commercial Court at Kigali, in the Republic of Rwanda in RCOM 00586/2018/TC (EX RCOM 00017/2018/TC/NYGE that was delivered on 31<sup>st</sup> July 2018 (Kigali Judgment), and upon such delivery the respondent approached the High Court at Nairobi to recognize and adopt the judgment in a notice of motion dated 9<sup>th</sup> May 2023. The application recognizing and adopting the Kigali judgement was allowed and the judgment was registered as a judgment of the Court on 28<sup>th</sup> July 2023. The applicant thereafter filed a chamber summons dated 14<sup>th</sup> August 2023 seeking to have the court set aside, review, and/or vary the orders of 28<sup>th</sup> July 2023, as well as the costs of the application on grounds that; it was not served with the court process in the recognition proceedings and only learnt of



the same upon service of the order issued on 4<sup>th</sup> August 2023, adopting and registering the impugned Kigali judgment as a judgment of the High Court of Kenya.

3. The application before us is supported by the grounds on the face of it which include that; the applicant has filed an appeal; the appeal is arguable and has a high chance of success; the applicant paid the entire sum due to the respondent and should execution proceed the respondent will be unjustly enriched as he will have received double payment; the applicant is apprehensive that unless this Court grants an order for stay of execution, the respondent will proceed with execution against it and the intended appeal is likely to be rendered nugatory.
4. Richard Kariuki, the applicant's Chief Legal Officer, filed an affidavit sworn on 22<sup>nd</sup> May 2024 on behalf of the applicant in support of the application. He rehashed the grounds on the face of the application and in addition deposed that; the respondent's application was heard ex-parte and a ruling rendered on 25<sup>th</sup> July 2023 allowing the Kigali judgment to be registered; and thereafter a notice of judgment was issued by the respondent's advocate demanding for payment of Kshs. 44,079,224.77; necessitating the applicant to file the application dated 14<sup>th</sup> August 2023 seeking to set aside the order.
5. The respondent opposed the application in a replying affidavit dated 4<sup>th</sup> September 2023. First, asserting that the applicant's affidavit is incompetent as the person who commissioned it did not have a valid practicing certificate; the applicant attached strange documents that did not form part of the record; and further that the applicant's sole purpose is to deny the respondent the chance to enjoy the fruits of his judgment and decree issued by a court of competent jurisdiction.
6. When the matter came up for plenary hearing before us it was canvassed by way of written submissions, with brief highlights by learned counsel for each party. Learned counsel for the applicant submitted that the court ought to consider whether the appeal is arguable and whether if successful it is likely to be rendered nugatory. On whether the appeal is arguable, it was submitted that the High Court erred in law and fact in failing to set aside registration of the Kigali judgment despite having acknowledged the fact that the respondent did not furnish the court with a certified, sealed, and signed copy of the certificate from the original court, which is a prerequisite for the registration of foreign judgments; by failing to acknowledge the fact that the applicant has already made good the amount claimed by the respondent and that execution of the impugned order would mean double payment of the amount; and by failing to find that the respondent's application was not properly before the court. Learned counsel relied on the cases of *Royal Media Services Limited vs. Veronica Chepkemoi* [2015] eKLR & *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR in support of the proposition that to succeed in an application such as the one before us, an applicant has to prove that he has an arguable appeal, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
7. On the nugatory aspect, learned counsel submitted that the respondent failed to disclose to the court that he had already received the amount being claimed; the applicant is funded by public funds being a public university; the respondent is a foreigner; the amount in question is colossal and the respondent may not be able to refund the same should the appeal be successful, in which event the appeal will be but an academic exercise. Learned counsel in support of this argument relied on the case of *Stanley Kang'ethe (supra) & Nation Media Group Ltd vs. Chirau Ali Mwakere* [2010] eKLR.
8. On the part of the respondent's learned counsel, in his submissions dated 7<sup>th</sup> June 2024, he cited extensively the requirements of Order 42 rule 6 of the Civil Procedure Rules, which are not applicable in this Court; although equally acknowledging the two principles necessary in granting of the orders being sought. Further, learned counsel contended that the issue of double payment ought to have been ventilated in the High Court where the applicant ignored the summons; further that the respondent



is a person of means and able to refund the amounts should the need arise. Learned counsel relied on the case of *Dennis Mogambi Mang'are vs. Attorney General & 3 Others* [2012] eKLR, urging that the grounds contained in the draft memorandum of appeal are a sham and are not arguable.

9. To succeed in an application under rule 5(2) (b) of this Court's Rules, an applicant has to satisfy the twin principles that are enumerated in many decisions of this Court namely:
  - i. An applicant must demonstrate that the appeal is arguable; and
  - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, or the proceedings (as the case may be) are not stayed.
10. Regarding the first limb on arguability, the applicant in its memorandum of appeal, asserts, inter alia that; the High Court erred in law and fact in failing to set aside registration of the Kigali judgment despite having acknowledged the respondent's failure to furnish a certified, sealed, and signed copy of the certificate from the original court which was a prerequisite for the registration of a foreign judgment; the court failed to acknowledge the fact that the applicant had made payment for the amount claimed by the respondent and execution of the impugned order means double payment of the amount; and by failing to find that the respondent's application was not properly before the court.
11. This Court held in the case of *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR that for an order of stay to be issued, 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 absent stay, be rendered nugatory.
12. Regarding the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in the case of *Yellow Horse Inns Ltd vs. A. A Kawir Transporters & 4 others* [2014] eKLR, observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point would succeed, as this Court held in *Kenya Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR.
13. We have considered the intended grounds of appeal, and do not find the same to be frivolous. We hold the view that the said grounds need to be ventilated further before the bench that will be hearing the appeal.
14. On the nugatory aspect, we note that both parties acknowledge that the applicant is a public university funded by taxpayers and the amount involved is colossal. We also take note of the assertion by the applicant that the respondent being a foreign national may not be available for recovery of the sum should the appeal succeed, against the respondent's position that he has a judgment in his favour and ought to enjoy the fruits thereof and the need to balance the competing interests of the parties.
15. In the case of *International Laboratory for Research of Animals vs. Kinyua* [1990] eKLR, this Court, in a case where the impecuniosity of the respondent was in issue, stated as follows:

“In this application, it has been deponed that there was a reasonable and justifiable apprehension of it being unlikely to recover the money from the respondent who may have squandered the whole sum. This allegation in our view called for rebuttal evidence from the respondent which was not forthcoming. Indeed, nowhere in the 12 paragraphs constituting the replying affidavit sworn by Mr Sehmi on 17th April, 1990, and the replying affidavit sworn by him on 7th February, 1990, in the Superior Court which forms an annexure is there evidence of the respondent's means. Mr Sampson's affidavit in support of the application has in fact been deposed to that effect. In the case of *Kenya Shell Ltd*



the respondent produced evidence of his financial means and position which evidence was accepted by the court.”

16. The respondent simply denied the allegation that the amount being claimed may not be recoverable in the event of a successful appeal. The respondent in rebutting the allegation did so casually and failed to place before us some evidence negating the allegation, for example, his financial statement. Indeed, the allegation required to be rebutted by evidence.

17. In the much-quoted case of Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] (supra) this Court stated:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

Further, this Court in the case of Permanent Secretary Ministry of Roads & Another vs. Fleur Investment Limited [2014] eKLR referred to the holding in the case of Reliance Bank Limited vs. Norlake Investment Ltd [2002] E. A. where the Court stated:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

The court went further to state that; -

“A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

18. In the circumstances therefore, we are satisfied that the applicant has satisfied both principles and we grant stay of execution of the High Court order as prayed, pending hearing and determination of the appeal.

19. Costs of the application will abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**L ALI-ARONI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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



Signed

**DEPUTY REGISTRAR**

