



Peter O Ngoge T/A OP Ngoge Associates v Ammu Investment Company Limited (Civil Application 163 of 2019) [2024] KECA 1690 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1690 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 163 OF 2019
DK MUSINGA, MSA MAKHANDIA & A ALI-ARONI, JJA
NOVEMBER 22, 2024**

BETWEEN

PETER O NGOGE T/A OP NGOGE ASSOCIATES APPLICANT

AND

AMMU INVESTMENT COMPANY LIMITED RESPONDENT

(Being an application for mandatory injunction and contempt of court from the ruling of the High Court of Kenya at Nairobi (Sergon, J.) dated 3rd May 2019 in H.C. Misc. Application No. 745 of 2009)

RULING

1. Before this Court is an omnibus application dated 4th June 2019, which is brought by the applicant under the provisions of rule 5 (2) (b) of the *Rules of this Court*, section 5 of the *Judicature Act*, and Articles 10, 19, 20, 21, 22, 25, 27, 28, 29, 40, 43, 48, 50 and 258 of the *Constitution*. The applicant also invokes the overriding and residual powers of this Court. The orders sought in the application are:

- “i. That in view of the intended appeal from the Ruling and orders of the High Court given by the Honourable Mr. Justice Sergon on the 3rd day of May 2019, the applicant/petitioner herein prays that this Honourable Court be pleased to issue or grant a mandatory interlocutory injunction compelling the respondent herein and/or its directors and the law firm of Wanjama and Company Advocates to obey, honour and satisfy in full the Decree given by the Hon. Lady Justice Khaminwa in the High Court in favour of the applicant on 19th September 2012 considering that the respondent herein and its directors and the law firm of Wanjama and Company Advocates have not appealed against the said Decree and to this Court to-date;



- ii. That further or in the alternative, this Honourable Court be pleased to observe, find and order that the respondent and its directors namely Alan Cleophas Mulango Simu (Architect by profession) and Adam Syngidura Marjan (Quantity Surveyor by profession) be committed to civil jail for a period of time not exceeding 6 months for deliberately disobeying and completely refusing to obey, honour and satisfy the Decree given in favour of the applicant herein in the High Court by the Hon. Lady Justice Khaminwa on 19th September 2012 and thereby completely eroding the dignity and the authority of the High Court and all courts contrary to our national values apart from subjecting the applicant, who is a Barrister to cruel, unlawful and degrading treatment and to economic sanctions contrary to Articles 10, 27, 28, 29, 40 and 43 of the Constitution as read with Article 16 of the United Nations Basic Principles on Role of Lawyers.
 - iii. That the costs of this application be borne by the respondent, its directors and the law firm of Wanjama & Co. Advocates."
2. A brief background is necessary to put this application into context. The applicant, a practicing Advocate, acted for the respondent in Nairobi ELC Case No. 252 of 2008. He lodged a bill of costs dated 16th November 2009, which was taxed at Kshs.788,569.50. The certificate of costs was subsequently adopted as a judgment of the court by Khaminwa, J. on 19th September 2012.
3. The failure to settle the taxed costs necessitated the filing of an application dated 15th January 2019 by the applicant before the High Court. Among the orders sought in the said application included a prayer for the two directors of the respondent, namely, Alan Cleophas Mulango Simu and Adam Syngidura Marjan, to be committed to civil jail for a period not exceeding six months for deliberately disobeying and refusing to honour and satisfy the decree issued in favour of the applicant by the court on 19th September 2012; that the Chief Inspector of Police and OCS Central Police Station be ordered to effect the arrest of the said directors of the respondent; that in the alternative, the court be pleased to observe that by deliberately refusing to honour and satisfy the decree, the respondent and its directors had subjected the applicant to cruel and degrading treatment, apart from discriminating against him by subverting his socio- economic rights contrary to Article 10, 27, 28, 29 and 40 of the Constitution and contrary to Article 16 of the United Nations Basic Principles on the Role of Lawyers; that the court be pleased to award the applicant general awards to redress the violation of his alleged fundamental human rights as against the respondent and its directors; and that the applicant be awarded costs of the application.
4. The application proceeded by way of written submissions, culminating in a ruling that was delivered by Seron, J. on 3rd May 2019 which is the basis of this application. As to whether the said application was *res judicata* in view of a previous application dated 18th October 2012 seeking the lifting of the respondent's corporate veil and for warrants of arrest to be issued against Alan Cleophas Mulango, the trial court (Odunga, J.) (as he then was), vide an earlier ruling dated 16th November 2012, had held that the applicant had not established the proper circumstances to warrant lifting of the corporate veil and that the corporate veil could not be lifted against one director where there were other directors. It was further held that Odunga, J., in his ruling had left it open for the applicant to file a fresh application citing all the directors of the company for contempt upon lifting the corporate veil. Thus, in the circumstances, the application dated 15th January 2019 was not *res judicata*.



5. As regards the issue whether there was proper service, the trial court cited the provisions of section 101(1) of the Companies Act No. 17 of 2015 on service against a corporation, but noted that where the corporation is represented by an advocate, the practice is that such advocate is served on behalf of the corporation, as happened in the present circumstances where the law firm of Wanjama & Co. Advocates was served with the application on behalf of the respondent. However, since the applicant was seeking to lift the corporate veil to enable him make the directors personally liable, the trial court was of the view that it was necessary for him to effect personal service upon each of the directors.
6. Lastly, as regards the order for the directors of the respondent to be cited for contempt of court, the trial court noted that no appeal had been lodged against the decree issued by Khaminwa, J. and that the respondent was at all times aware of the existence of the said decree. However, there was evidence that the applicant had previously taken out warrants of attachment and sale of the respondent's assets, the outcome whereof had not been clearly explained. In addition, the applicant had not provided any information on its investigations regarding the assets, if any, of the respondent. The trial court held that no evidence had been adduced to indicate that the applicant had exhausted all the available modes of execution and that he had not provided evidence that the directors of the respondent had thwarted his efforts in executing the decree in order to warrant the lifting of the corporate veil. In the circumstances, the orders sought could not be granted, so the application was dismissed with costs.
7. The ruling by Serгон, J. precipitated the filing of this application, which is anchored on a notice of appeal dated 8th May 2017 and lodged on 14th May 2019.
8. The grounds in support of this application are borne on the face thereof and in the affidavit in support sworn by the applicant.

The applicant contends that despite not appealing against the decree issued in his favour, the respondent and/or its directors have refused to honour or satisfy the said decree and are, by their actions, eroding the dignity and authority of the court, hence the prayer that they be committed to civil jail. It is further contended that in matters of compliance with court orders, the liability of directors is not separate from that of limited liability companies.

9. Regarding the prayer anchored on rule 5(2)(b) of the Rules of this Court, we note that the applicant has not annexed a draft memorandum of appeal to his affidavit. However, the grounds in support of the arguability limb can be gleaned from his affidavit in support of the application. He faults the decision on grounds, inter alia, that the learned judge erred in law and in fact in finding that: the directors of the respondent ought to have been personally served with the extracted copy of the decree; the law firm of Wanjama & Co. Advocates was not acting for the respondents and its directors in the matter and yet the said firm filed and argued grounds of objection to the applicant's contempt application; the applicant did not demonstrate that the respondent and its directors had continued to disobey the decree issued by Khaminwa, J. to warrant the lifting of the corporate veil; and finding that the applicant should have exhausted all the other available modes of execution whereas that was not a mandatory prerequisite before commencing contempt of court proceedings.
10. As regards the nugatory aspect, it is contended, firstly, that the respondent and/or its directors have never disclosed to the trial court why they do not want to obey the court order and that they have never disclosed to the court and to the applicant which of their assets they would want the applicant to attach in execution of the decree. In addition, it is impossible to attach the assets of the respondent as the respondent shares the same offices with Mutiso Menezes International, an architectural firm owned by Alan Cleophas Mulango Simu, one of the respondent's directors. On this basis, it is contended that unless the orders sought are granted, the respondent may wind up or be declared insolvent before the intended appeal is heard and determined, thereby rendering it nugatory.



11. In conclusion, it is contended that by dint of the provisions of rule 5(2)(b) of the [Rules of this Court](#) and section 5 of the [Judicature Act](#), this Court has original jurisdiction to grant all the prayers sought in the application in order to protect and promote the dignity and authority of the court and to uphold the rule of law.
12. There was no written response to this application. Indeed, at the hearing hereof, learned counsel Mr. Githaiga, who held brief for Mr. Wanjama for the respondent, confirmed that no written response had been filed on behalf of the respondent. Counsel did not make any oral submissions, as he indicated that he was not familiar with the file. On his part, the applicant, who appeared in person, elected to rely entirely on his written submissions.
13. In his written submissions dated 31st March 2021, the applicant reiterates that this Court has original jurisdiction to grant the prayers sought in the application; and that the respondents, its directors and the law firm of Wanjama & Co. Advocates are all in contempt of the orders and/or the decree issued by the trial court in his favour.
14. As regards the jurisprudence on contempt of court orders, the applicant cites several decisions of various courts such as [Johnson v Gant](#), 1923 SC 789 at 790, [Econet Wireless Kenya Ltd v Minister For Information & Communication of Kenya & Another](#) (2005) KLR 828, [Hadkinson v Hadkinson](#) (1952) ALL ER 567, [Attorney General v Times Newspaper Limited](#) (1974) AC 273 and [A.B & Another v R.B](#) Civil Application No. 4 of 2016 (2016) eKLR, for the proposition that courts do not make orders in vain and that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law.
15. We have considered the application, the submissions, as well as the applicable law. The applicant seeks several orders which are anchored on different provisions of the law. We shall address our minds first to the application premised on rule 5(2)(b). It is trite law that in an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See [Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others](#) [2013] eKLR.

Even one arguable ground of appeal will suffice. See [Damji Pragji Mandavia v Sara Lee Household & Body Care \(K\) Ltd](#), Civil Application No. Nai 345 of 2004.
16. Looking at the issues which the applicant intends to raise in his intended appeal, it is our view that they are not idle. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal. The applicant has, therefore, established that his intended appeal is arguable.
17. On the nugatory aspect, the applicant contends that the respondent may wind up or be declared insolvent before the intended appeal is heard and determined, rendering it nugatory. However, save for alleging this, he has not provided any evidence to show that the respondent is on the brink of winding up and/or being declared insolvent. Against this backdrop, we note that no evidence of investigations as to the assets of the respondent was tendered before the trial court. Therefore, whether or not the respondent has any assets as well as their existing state is all speculative. In the circumstances, and in the absence of evidence, we are unable to agree with the applicant's assertion that the respondent is likely to wind up and/or be declared insolvent before the intended appeal is heard and determined. In essence, therefore, we are not satisfied that the intended appeal shall be rendered nugatory if we decline to grant the orders sought. In any case, and without prejudice to the foregoing, even if we were to, peradventure, issue the mandatory interlocutory injunction, we fail to see how the same could be issued against the firm of Wanjama & Co. Advocates, who were on record for the respondent in the taxation



proceedings. The said firm was unnecessarily dragged into this matter as the taxation proceedings were not against it but the respondent.

18. Turning to the prayer for the directors of the respondent to be committed to civil jail for disobeying the orders issued by Khaminwa, J, while we appreciate that the decree has never been challenged by way of an appeal and the fact that the respondent and its directors have at all times been aware of the said decree, we fully associate ourselves with the finding of the trial court that the applicant, having commenced execution proceedings under the Civil Procedure Rules, it is only proper that he exhausts all the available modes of execution therein.

We say this fully cognizant of the fact that the applicant has not demonstrated the challenges he has encountered, if any, in the execution process, save for stating that the respondent and/or its directors have not disclosed to the court or to him which of their properties he should attach. The conventional attachment procedure, in our view, commences with an investigation and/or identification of the assets of a judgment debtor which then the decree-holder proceeds to attach with the assistance of an auctioneer. In addition, the applicant has not detailed any actions of the directors of the respondent which could have prevented him from executing the decree. In the circumstances, we are unable to grant an order citing the directors of the respondent for contempt of court. Consequently, the order to commit the said directors to civil jail for a period of six months cannot issue.

19. In the upshot, the applicant having satisfied only one of the two limbs necessary in an application under rule 5(2)(b), and having failed to demonstrate any grounds to warrant the committal order of the directors of the respondent to civil jail, this application must fail. Accordingly, the notice of motion dated 4th June 2019 is not merited and is hereby dismissed. As the respondent did not file any written response to the application, and neither did its advocate make any oral submissions at the hearing hereof, we direct each party to bear its own costs for the application.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

