Likoni Mainland Taxi Service Group v Yooshin Engineering Corporation (Civil Application E060 of 2024) [2024] KECA 1567 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1567 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E060 OF 2024

AK MURGOR, JW LESSIT & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

AIA ARCHITECT LIMITED .... APPLICANT

AND

YOOSHIN ENGINEERING CORPORATION .... RESPONDENT

(Being an application for stay of execution and injunction against the Ruling of the High Court of Kenya at Mombasa (Magare, J.) delivered on 24th May 2024 in HC. Misc. Comm. App No. E013 of 2023)

RULING

1. AIA Architect Ltd by an application dated 30th May 2024 brought pursuant to inter alia rule 5 (2)(b) of the Court of Appeal Rules (the Rules), seeks:

   > "an order of injunction against the respondent, their personal representative, employees, agents or any other person acting under their instructions barring them from interfering in anyway whatsoever with the applicant's goods arising from any purported execution of the decree arising from the decree passed on the 21st December 2023."

2. Brief background of the matter is that the applicant filed an application dated 29th February 2024 before the High Court at Mombasa in Misc. Application No. E013 of 2023 seeking review of the ruling of the court dated 20th December 2023. He sought that the same be set aside or vacated on grounds that the applicant only learnt of the existence of those proceedings when they were served by the auctioneer with warrants of attachment and notice of proclamation of the applicant's goods with an aim to settle a purported debt of Kshs.1,185,209/- arising from the decree of the High Court. It was contended that the applicant was never served with the application; that he was not heard before the impugned ruling,

and further that taxation proceedings were conducted in the Court of Appeal, which proceedings were supposed to have been initiated under the Civil Procedure Rules, 2022.

3. Magare, J. in his ruling of 20th December 2023 had entered judgment for the respondent against the applicant on the basis of the respondent's application dated 19th July 2023 which sought for judgment against the applicant as follows:

   i. Kshs.113,605/- being the sum taxed and certified in Civil Application No. 89 of 2019 as stated in the Certificate of Costs dated 5th December 2022;

   ii. Kshs.1,067,604/- being the sum taxed and certified in Civil Appeal No. 147 of 2019 as stated in the Certificate of Costs dated 27th February 2023; and,

   iii. The respondent shall have interests on the mentioned at court rates effective the date of judgment herein.

4. It is that ruling that the applicant sought, in his application dated 29th February 2024, to set aside on grounds it was heard ex parte without service upon him. The instant application is premised on the grounds as set out on the face of the application and amplified in the supporting affidavit of Mohammed Munyanya, one of the directors of the applicant sworn on even date. The applicant avers that upon filing its application for review (29th February 2024), the High Court at the ex parte stage granted an interim order staying the execution of the impugned decree, and set down the application for directions on 12th March, 2024 before Macharia, J. On 12th March 2024 the said Judge gave directions, among others, that the respondent files a response to the application and thereafter parties to file their submissions and appear before her to confirm compliance on 25th April 2024. The applicant avers that unfortunately 25th April 2024 fell on Easter vacation and that parties were informed that the matter would be granted another date for compliance. The applicant contends that surprisingly the matter appeared in court on 23rd May, 2024 before Magare, J. who was not in conduct of the matter. The Judge nevertheless proceeded virtually and indicated that he was going to dismiss the applicant's application. That he then fixed the matter for ruling on 24th May, 2024 on which date he dismissed the said application.

5. By his ruling issued on 24th May 2024, Magare, J. found that there was no legal basis on which to exercise his discretion in favor of the applicant to set aside the ruling of 20th December 2023 and thus dismissed it. The dismissal of the said application effectively discharged the interim orders which had been issued in the matter, thereby exposing the applicant to execution.

6. Aggrieved and dissatisfied with the entire ruling of 24th May 2024, the applicant lodged an appeal to this Court as evinced by the notice of appeal dated 29th May 2024.

7. On arguability of the intended appeal, the applicant avers that its intended appeal raises triable issues. In its draft memorandum of appeal dated 29th May, 2024 annexed to the affidavit in support of this application, the applicant faults the learned Judge on six (6) grounds: that he erred in law and in fact by taking up a matter that was before another court and proceeding to determine the same; by having a preconceived mind and proceeding to determine the application dated 29th February 2024 based on his preconception; by applying the principles of review of an order/judgment to an application for setting aside a judgment and/or order obtained ex parte; by failing to analyze the applicant's evidence that it had not been served; by failing to consider the applicant's submissions and evidence as presented; and, for being biased as against the applicant in the ruling delivered on 24th May 2024.

8. On nugatory aspect, the applicant avers that unless stopped by the order of this Court, the respondent who is of unknown means and does not have any abode in Kenya shall execute and cart away the

applicant's goods, thus having an effect of rendering its entire appeal overtaken by events and nugatory as the substratum of the appeal shall have been lost. The applicant in the supporting affidavit deposed that the respondent was of unknown means, and further had no known abode, was a foreigner and, that he may execute against the applicant and cart away the applicant's property then leave the country. That such act will render the appeal nugatory.

9. Lastly, the applicant avers that no prejudice shall be visited upon the respondent if the application is allowed.

10. The respondent filed its response through the replying affidavit of Mary Njagi, advocate for the respondent, sworn on 14th June 2024. She avers that the application is misconceived and/or misplaced, vexatious, frivolous and an abuse of court process and that the allegations made are falsehoods. The respondent avers that the alleged debt arose from costs awarded in Civil Appeal No. 147 of 2019 and Mombasa Civil Application No. 89 of 2019 which were heard, determined and rulings delivered, and that these two taxation matters were subject of the Commercial Miscellaneous Application No. E013 of 2023. It is averred that the matter was properly before Magare, J. as per the directions of Macharia, J. who on 12th March 2024 directed that the matter be mentioned on 25th April 2024 before the trial court and that was before Magare, J. The respondent confirms that unfortunately the matter did not proceed on 25th April 2024 but averred that upon perusal of the court file it was found that the matter was on 17th May 2024 issued with a mention date for 23rd May 2024 at the registry, and that the advocate proceeded to issue a mention notice to the applicant. Further, that on 23rd May 2024 the court having confirmed compliance by the parties, set the matter for ruling on 24th May, 2024 and on that date proceeded to issue its ruling.

11. In addition, the respondent avers that the applicant's intended appeal does not raise any triable issues; that the alleged bias and pre-conceived mind are issues which have not been substantiated; that the issues in respect to lack of service were addressed by the court where the respondent provided evidence of service, facts which were not rebutted by the applicant.

12. Lastly, it is averred that the application is malicious, and similar to the other previous applications, is prejudicial, lacks merit and is meant to stifle the respondent's recovery of costs that was duly awarded.

13. At the virtual hearing of this matter on 1st July 2024 learned counsel Mr. Ochieng appeared for the applicant whereas learned counsel Miss Tonui appeared for the respondent. Both counsel expressed their wishes to fully rely on their written submissions.

14. Mr. Ochieng for the applicant in his written submissions relied on the case of Cabinet Secretary Ministry of Health vs. Aura & 13 Others 2024 KESA 2 (KLR) for the proposition that: "the jurisdiction to grant stay lies with the discretion of the Court which is exercised on the basis of sound and settled principles and not arbitrarily or capriciously on a whim. ..." And in that authority the principles set are that an applicant must show he has an arguable appeal, secondly that the appeal is likely to be rendered nugatory unless stay is granted in the interim. The applicant's submission is that the learned Magare, J., did not consider the principles of setting aside an ex parte order when he considered the applicant's application dated 29th February 2024 in his ruling dated 24th May 2024. Counsel relied on the draft memorandum of appeal by the applicant which raises grounds based on same.

15. In the applicant's written submissions dated 21st June 2024 the applicant contends that the learned Judge did not consider any of the principles applicable for setting aside an ex parte order. According to the applicant, the learned Judge's decision was premised on an assumption that the applicant was receiving messages from the Judiciary of Kenya. The applicant averred that hence that was a triable issue

whether the learned Judge was justified in referring to the CTS as proof that the applicant should have known the existence of the application and do away with the requirement of service. It is submitted that the issue requires interrogation of this Court.

16. On the nugatory aspect, the applicant submits that dismissal of the application dated 29th February, 2024 by the trial court denied him the right to fair hearing, and that if the respondent is allowed to proceed with the execution of the contested decree, then that will have the effect of overriding his rights to be heard, rendering the appeal nugatory. Counsel urged the Court to grant the orders sought to preserve the substratum of the appeal. For that proposition he relied on the Supreme Court decision of Teachers Service Commission vs. Kenya National Union of Teachers [2015] eKLR where the Court observed that rule 5 (2)(b) of the Court of Appeal Rules is a tool for preservation of the substratum of the appeal.

17. In the respondent's written submissions dated 28th June 2024 the respondent submits that the applicant has failed to meet the threshold for grant of an injunction as established and derived from the case of Giella vs. Cassman Brown & Co. Ltd [1973] E.A 358.

18. It is argued that the applicant has failed to demonstrate a prima facie case with a probability of success. The respondent submits that the decree issued in favor of the respondent is a valid and binding court order and the applicant has not provided any substantial grounds or evidence to challenge its validity or execution. Further, it is contended that the applicant has not shown that it will suffer irreparable harm which cannot be compensated through damages. It is submitted that the decretal amount to be executed by the respondent is Kshs.1,185,209/-, hence can be recovered through damages. Lastly, the respondents submits that the balance of convenience heavily favours the respondent, who is merely seeking to enforce a lawful decree and that granting the injunction would unjustly impede the respondent's right to enforce the decree and would reward the applicant's non- compliance with court orders.

19. The respondent submits that the application is an abuse of the court process as the subject matter of the application is pending hearing and determination before the High Court and between the same parties and therefore apparent that the said application is intended to delay the execution of a valid decree and avoid compliance with lawful court orders.

20. In conclusion therefore, the respondent emphasizes that the applicant has not met the threshold for grant of injunction orders as against the respondent and that contrary to the applicant's allegations, the matter was properly before Magare,

    J. who proceeded to determine it. In the circumstances, the respondent prays that the applicant's application dated 30th May 2024 be dismissed with costs.

21. We have carefully considered the application together with the supporting affidavit, the replying affidavit, written submissions by the parties and the authorities relied thereon as well as the applicable law. We cannot put more emphasis than for this Court to grant orders of stay of execution, an injunction or a stay of any further proceedings as envisaged under rule 5(2)(b) of this Court's Rules, the applicant must demonstrate these two (2) limbs to the satisfaction of the Court. One; that the intended appeal is arguable, which is to say that the same is not frivolous and two; that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

    See. Stanely Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR, an applicant need not show a multiplicity of grounds, even one arguable ground of appeal will suffice. See Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004 and Somak Travels Ltd vs. Gladys Aganyo [2016] eKLR.

22. We noticed that the respondent in its written submissions relied on wrong principles of Geilla vs. Cassman Brown & Co Ltd 1974 EA 358 in its submissions in answer to the applicant's submissions. That means the principles that apply to an application under rule 5 (2)(b) of this Courts Rules were not discussed.

23. On the arguability of the applicant's intended appeal, from the record, this matter involves stay of execution for costs following taxation carried out in the absence of the applicant, and stay of sale of properties attached following lifting of earlier injunction. The amount involved is about Kshs.2,109,000/-. The applicant urges that the learned Judge did not consider the principles for setting aside an ex parte ruling, thus failed to consider the merits of his application dated 29th February 2024. That is an arguable appeal, but we say no more in order not to embarrass the bench that will consider the appeal.

24. On the nugatory aspect, in his supporting affidavit the applicant deposed that the respondent was of unknown means, and further had no known abode, was a foreigner and, that he may execute against the applicant and cart away the applicant's property then leave the country. The amount involved is about Kshs.2,109,000/-.

25. It is trite that once an issue of impecuniosity of the respondent to refund decretal amount if the stay is not granted and the appeal succeeds is raised, the burden shifts to the respondent in person to show that they have the ability to refund. Not only is the issue raised impecuniosity, but it is also urged that he has no known abode, and is a foreigner who could leave the country any time. The respondent did not controvert the allegations by the applicant that it would not be able to compensate them in the event that the intended appeal is successful. Indeed, the respondent did not even file affidavit in response to the application. The only response was that of its advocate on record.

26. We find that the applicant has demonstrated that unless an order of stay of execution is granted, his intended appeal, if successful, shall be rendered nugatory.

27. In conclusion, we find that the applicant has satisfied the twin principles which the Court considers in an application brought under rule 5 (2)(b) of its Rules. Consequently, we order that:

    i. The notice of motion dated 16th April 2024 has merit and is allowed.

    ii. An order of injunction do issue against the respondent, their personal representative, employees, agents or any other person acting under their instructions, barring them from interfering in anyway whatsoever with the applicant's goods arising from any purported execution of the decree arising from the decree passed on the 21st December 2023 pending the hearing and determination of the intended appeal.

    iii. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR