



REPUBLIC OF KENYA



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Taib A Taib Advocates v Nanji (Legal Representative of the Estate of Shamsudin Gulamhusein Nanji (Deceased)) (Civil Appeal (Application) E139 of 2023) [2024] KECA 1581 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1581 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E139 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 8, 2024**

BETWEEN

TAIB A TAIB ADVOCATES APPLICANT

AND

FARRAH NANJI RESPONDENT

**LEGAL REPRESENTATIVE OF THE ESTATE OF SHAMSUDIN
GULAMHUSEIN NANJI (DECEASED)**

(Being an application for an order of stay of execution under Rule 5(2)(b) of the Court of Appeal Rules, pending the logging, hearing and determination of the appeal from the Ruling and Order of the Environment and Land Court (ELC) at Kisumu (E. Asati, J.) dated and delivered on the 5th day of October, 2023)

RULING

1. By a Notice of Motion dated October 27, 2023, the applicant, a firm of advocates, seeks orders as follows:
 - i. Spent.
 - ii. An interim stay of execution order be issued, staying the enforcement/implementation of the ruling and order of Hon. Justice E. Asati, of 5th October, 2023 allowing the firm of Owiti, Otieno & Ragot Advocates, to come on record in place of the firm of Taib A. Taib Advocates, pending hearing and determination of the present application.
 - iii. A stay of execution order be issued, staying the enforcement/implementation of the ruling and order of Hon. Justice E. Asati, of 5th October 2023 allowing the firm of Owiti, Otieno &



Ragot Advocates, to come on record in place of the firm of Taib A. Taib Advocates, pending the lodging, hearing and determination of the intended appeal.

- iv. An interim stay of proceedings order do issue, staying the proceedings in Kisumu ELC No. 261 OF 2013: Nizar Hasham Virani -v- Shamsuddin Gulamhussein Nanji, pending the hearing and determination of the present application.
 - v. A temporary stay of proceedings order, do issue, staying the proceedings in Kisumu ELC No. 261 of 2013: Nizar Hasham Virani -v- Shamsuddin Gulamhussein Nanji, pending the hearing and determination of the intended appeal.
 - vi. Costs of this Application be provided for.
2. The background to the motion as per the grounds stated on the face of the motion, and an affidavit sworn in support of the motion, by Taib Ali Taib Bajaber, SC., MBS (Taib), are as follows: The applicant was on record for Shamsudin Gulamhusein Nanji (Shamsudin), who was the defendant, in ELC No. 261 of 2013 (ELC suit), a suit filed against him by the plaintiff, Nizar Hasham Virani (Virani), in a dispute over a property known as Kisumu/Kogony/2642 – Kisumu Beach Resort Hotel (the suit property).
 3. The applicant filed a defence and counter claim on behalf of Shamsudin, and acted for Shamsudin, during the plenary hearing, when the parties and their witnesses testified in the ELC suit. Subsequently the applicant filed written submissions, after which judgment was delivered on 24th October, 2017, in which both Shamsudin and Virani, each partly succeeded.
 4. Taib, an advocate in the applicant’s firm, engaged with the advocate for Virani in the ELC suit, and a consent was agreed upon, whose compliance by the parties was to finally settle the dispute. The consent which involved survey and subdivision of the suit property into two equal portions was adopted by the ELC. The applicant took all the necessary steps to have the terms of the consent complied with, but Virani failed and or refused to sign the mutation forms in accordance with the consent.
 5. On 16th June, 2019, Shamsudin passed on, and the applicant successfully applied to have Shamsudin’s legal representatives, Farrah Nanji (Farah) and Shabin Nanji (Shabin) substituted in the ELC suit his place. In the meantime, the applicant forwarded the original mutations forms to the respondents for execution as the administrators of the deceased, as well as an unsigned application for resealing of the grant obtained by them in Canada, but the respondents failed and or refused to sign the mutation forms or to respond to correspondences from the applicant.
 6. Meanwhile, the applicant on behalf of the respondents moved the ELC for orders that Virani complies with the consent order dated 7th July 2018. However, by a ruling dated 28th February 2020, the application was dismissed and the consent order set aside. The applicant became suspicious when the land registry could not trace the file for the suit property. It, therefore, took action to enforce the retainer agreement that it had entered into with Shamsudin, by forwarding its fee note for Kshs. 55,839,294.60/ to the respondents. The applicant followed up the matter with several letters to the respondents, but the same were not responded to. Consequently, the applicant filed Civil Suit No. E006 of 2023 in Kisumu High Court seeking to recover his fees.
 7. It is at this stage that the firm of Owiti, Otieno & Ragot Advocates moved to the ELC by an application dated 23rd August, 2023, seeking leave under Order 9 Rule 9 of the Civil Procedure Rules, to come on record in the ELC suit, on behalf of the respondents, in place of the applicant, on the grounds that the relationship between the estate of Shamsudin and the applicant, had irretrievably broken down and,



- therefore, the estate required Owiti, Otieno & Ragot Advocates to represent them until the full terms of the judgment in the ELC suit are realized.
8. By a ruling dated 5th October, 2023, Asati J., allowed the application for Owiti Otieno & Ragot advocates, to come on record in the ELC suit. The applicant firm, being aggrieved by that ruling, sought leave of the ELC to appeal the order of Asati, J. as well as an order for stay of execution of the ruling for a period of 30 days. This application was granted by Asati, J. Consequently, the applicant filed a notice of appeal against the ruling of Asati, J. together with the motion now before us.
 9. The applicant believes that they have an arguable appeal, and have annexed a copy of the draft memorandum of appeal in which it has raised seven grounds of appeal including inter alia that the learned Judge erred in failing to appreciate Order 9 Rule 9 of the Civil Procedure Rules, 2010, and the mischief that it intended to avert in a party instructing a new advocate after judgment.
 10. In support of the motion, the applicant filed written submissions in which it relied on Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others, [2013] eKLR; and Kombo -vs- County Assembly of Kisii & 2 Others, [2021] KECA 327 (KLR). The applicant argued that its intended appeal raises an important and arguable point of law, of whether courts ought to allow an application brought pursuant to Order 9 Rule 9 of the Civil Procedure Rules, as a matter of course. In addition, that the learned Judge failed to consider that the existing remedies for recovery of fees were available to the applicant prior to the enactment of Order 9 Rule 9, and even after such enactment, and, therefore, the basis for the learned Judge's decision was erroneous.
 11. The applicant further submitted that although the firm of Owiti, Otieno & Ragot Advocates have filed a notice of change of advocate, and are now on record for the respondents in the ELC suit, the matter remains in limbo since the passing of Virani's advocate; and that it is in the interest of justice for the court to allow the application dated 27th October, 2023 and to stay the proceedings in the ELC suit, pending the substantive hearing of its appeal, that has already been filed.
 12. The respondents have opposed the applicant's motion through a replying affidavit which was duly sworn by Otieno David (Otieno), a partner in the firm of Owiti, Otieno & Ragot Advocates. Mr. Otieno swears on information from the respondents, that although it is true that the applicant was retained by Shamsudin as his counsel, it was not true that the relationship was based on a retainer agreement dated 6th June, 2014. In addition, that the applicant's allegations that there was a written consent dated 5th March, 2021, in the ELC suit is untrue, but that there was a consent dated 5th June, 2018, filed in court on 4th July, 2018, and endorsed on 5th July, 2018.
 13. This consent was to implement and realize the judgment in the ELC suit, and settle the dispute with finality, but the applicant and the respondent fell out, when the respondent questioned the authenticity of the alleged retainer agreement for the services rendered by the applicant in the ELC suit. Consequently, the applicant became very belligerent, and threatened to stop representing the respondents. This is what led the respondents to instruct the firm of Owiti, Otieno & Ragot Advocates to take over their representation in the ELC suit. Otieno maintained that there was complete breakdown of the relationship between the applicant and the respondents.
 14. During the plenary hearing, Ms. Gathoni Ibrahim appeared for the applicant, while Ms. Achieng Omollo, appeared for the respondents.
 15. In support of the motion, Ms. Gathoni submitted, that the appeal has raised an arguable issue with regard to the applicability of Order 9 Rule 9 of the Court of Appeal Rules; in particular, whether such an application can be allowed as a matter of course. On the nugatory aspect, Ms. Gathoni conceded that the application had been overtaken by events to the extent that the firm of Owiti, Otieno & Ragot



have already come on record for the respondents in the ELC suit. Nevertheless, she argued that there was still room for the Court to stay the proceedings in the ELC suit, as the proceedings may otherwise proceed. She noted that the only reason the matter has not proceeded, is because Mr. Kimanga, the Virani's erstwhile advocate, had passed on and the matter was, therefore, in limbo.

16. Ms. Gathoni argued that the issue of recovery of fees and the avenues available to an advocate in recovery of fees, were available well before Order 9 Rule 9 of the Civil Procedure Rules was enacted. So, the mischief that Order 9 Rule 9 was intended to cure, was not specifically related to the recovery of fees. She maintained that Order 9 Rule 9, was specifically intended for ensuring that an advocate is not bumped off the proceedings after judgment, where there is only one signature remaining. Counsel urged that the hearing of the appeal be fast tracked so that the appeal is not rendered nugatory or the parties prejudiced because the matter is in limbo.
17. In response, Ms. Omollo submitted that the application was premised on an appeal which was frivolous and, therefore, the Court has no reason to stay the proceedings. She pointed out that the dispute between the applicant and the respondents was actually the retainer agreement for recovery of the applicant's fees of about Kshs. 55,000,000/; that the relationship between the parties had clearly broken down; and that the respondents were justified in seeking alternative representation. She maintained that the applicant has not demonstrated how the appeal would be rendered nugatory if the stay is not granted, and urged that the application be dismissed.
18. We have carefully considered the motion before us, the contending submissions, and the law. The motion is brought under Rule 5(2)(b) of the Court of Appeal Rules, under which, this Court has discretion to issue an order of stay of execution, and or, order a stay of any further proceedings, pending the determination of an appeal.
19. The principles under which such an order may be granted are now well settled, having been stated in many decisions of this Court. In *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others* [2013] eKLR, the Court summarized the principles as follows:
 - “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory, the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001*.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.



- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.*
 - viii. In considering an application brought under Rule 5 (2) (b), the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227* at page 232.
 - 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.
 - ii. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.*”
20. Simply put, in order to succeed, the applicant herein must satisfy the Court that he has an arguable appeal, and that unless the order of stay of execution or stay of proceedings is issued, the appeal will be rendered nugatory. In the first place, we take note of the fact that the applicant’s advocate Ms Gathoni, conceded that the application for stay of execution of the order subject of the intended appeal, is overtaken by events, as the firm of Owiti, Otieno & Ragot Advocates, have already come on record for the respondents in the ELC suit. This means that the applicant’s prayer for stay of execution of the ruling of Asati J, has fallen by the wayside, as the court cannot stay what has already taken place.
21. Secondly, Ms. Gathoni now pursues prayers (iv) and (v) in the motion, which prayers seeks to stay the proceedings in the ELC suit which is a suit between the respondents and Virani. Nevertheless, an order for stay of proceedings has serious ramifications, one of which is effectively stalling the proceedings in the suit. As stated in Halsbury’s Laws of England, 4th Edition, Vol. 37 at p. 330:
- The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity.
22. We are in agreement with the following dicta by Ringera J in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000 UR)* as cited by Joel Ngugi J (as he then was) in *Turbo Highway Eldoret Limited vs Dominic Njenga Miniu (Civil Appeal No. E040 of 2021) – [2022] KEHC 10197 (KLR)*:
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from, is a matter of judicial discretion to be exercised in the



interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously

23. In the circumstances before us, the applicant's appeal relates to the order concerning the representation of the respondents in the ELC suit. Essentially, the appeal is anchored on an advocate-client fees dispute arising from representation in the ELC suit, in regard to which the applicant filed a separate suit for recovery of its fees, which suit this court was informed has been struck out, and there is no good reason why proceedings relating to the ELC suit in which judgment has been rendered, should be stayed, when there is no appeal against that judgment. In addition, Virani is not a party to the suit concerning recovery of the applicant's fees, nor is Virani a party to the applicant's appeal that has been filed before us.
24. The applicant has not demonstrated that his appeal will be rendered nugatory. In effect the applicant's apprehension, as we discern it, is really recovery of its fees, which is a monetary claim. He has not demonstrated that if he were to succeed on the appeal, he would not be able to recover his fees or any damages. Moreover, it would be neither fair nor just, to prevent Virani from proceeding with his suit due to a dispute which he is not party to. Nor are we persuaded that this is an exceptional case deserving of orders of stay of proceedings.
25. For all the afore stated reasons, we come to the conclusion that the applicant's motion dated October 27, 2023 must fail. It is accordingly dismissed. Costs shall be in the appeal.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

