



**Tetra Pak Limited v Njuguna & another (Civil Application  
E223 of 2024) [2024] KECA 1604 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1604 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E223 OF 2024  
DK MUSINGA, S OLE KANTAI & JW LESSIT, JJA  
NOVEMBER 8, 2024**

**BETWEEN**

**TETRA PAK LIMITED ..... APPLICANT**

**AND**

**JOSEPH NJOGU NJUGUNA ..... 1<sup>ST</sup> RESPONDENT**

**JANE NYAMBURA NJOGU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the judgment and decree of the High Court at Nairobi (Mabeya, J.) dated 30th April, 2024 in Milimani Commercial & Tax Division Civil Suit No. 389 of 2011 (Previously 1661 of 2002) \*\*\*\*\* Consolidated with HCCC No. 422 of 2007))*

**RULING**

1. Before this Court is a notice of motion dated 14<sup>th</sup> May 2024, which is brought by the applicant under Article 159 and 164 of *the Constitution*, sections 3A and 3B of the *Appellate Jurisdiction Act*, and rule 5(2)(b) of the Rules of this Court. The applicant seeks stay of execution of the judgment and orders issued by the trial court on 30<sup>th</sup> April 2024 in Nairobi High Court Civil Suit No. 389 of 2011 pending hearing and determination of an intended appeal, and stay of execution of the judgment and orders emanating from the same proceedings.
2. A brief background of the application is that a dispute arose between the parties in the manner in which a property known as L.R. No. 1/149 (Vol. N46/179) situated off Dennis Pritt Road, Nairobi (hereinafter referred to as “the suit property”) was sold. The suit property was at all times registered in the names of Joseph Njogu Njuguna (Joseph) and his wife, Jane Nyambuara Njogu (Jane), who are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. Jane donated her power of attorney to Joseph to sell, let or hire the suit property. However, by a deed of guarantee dated 29<sup>th</sup> June 2000, Joseph, acting on the said power of attorney, guaranteed a company known as Aberdare Creameries Limited to secure a loan



from the applicant, the security being the suit property. A charge was created. The contention by Jane was that as per the power of attorney, Joseph did not have authority to charge the suit property. That Aberdare Creameries Limited did not repay the loan as required, leading to the sale of the suit property by the applicant to one Pauline Raguz by way of a private treaty. Save for pleading that Joseph did not have authority to charge the suit property, it was contended that the suit property, which had a market value of Kshs.31 million and a forced value of Kshs.24.8 million, was sold at Kshs.14.5 million, which was an under value.

3. On its part, the applicant contended that the power of attorney donated to Joseph gave him authority to deal with the suit property in any manner, including charging it and executing the deed of guarantee.
4. The findings of the trial court vide its judgment dated 30<sup>th</sup> April 2024 were that the power of attorney donated to Joseph did not extend to the guarantee and the mortgage. Regarding the issue whether sale of the suit property was lawful, the trial court held that the applicant sought to create a statutory power of sale which the law did not recognize. In this regard, the court held that the applicant was not a bank; and that it could not purport to advance any money, take security therefor, and exercise the power of a bank as it was not one. Lastly, on the issue of the suit property having been sold at an undervalue, the trial court was persuaded based on the two valuation reports produced by Joseph and Jane and which according to it were not challenged by the applicant that the suit property was sold at an undervalue. In the end, the court issued orders to the effect that the sale of the suit property was unlawful and ordered the applicant to pay Joseph and Jane a sum of Kshs.32,000,000/- plus interest at 12% p.a. from the date of filing the suit until payment in full.
5. The applicant was dissatisfied with the entire judgment and intends to lodge an appeal before this Court as evinced by the notice of appeal dated 6<sup>th</sup> May 2024.
6. The application is supported by the grounds appearing on the face thereof, and the affidavit in support sworn by Jonathan Kinisu, the Managing Director of the applicant. It is averred that the intended appeal is based on various factual and legal grounds which make it not only arguable, but indeed with high chances of success. In this regard, the draft memorandum of appeal annexed to the supporting affidavit contains 18 grounds of appeal. It is averred that the learned judge erred in law and in fact by, inter alia, failing to consider whether the damages sought by the respondents were in the nature of special damages which required to be specifically pleaded and proved; disregarding that a consent order had been entered on 29<sup>th</sup> April 2002 which was binding on the parties and in which the issues regarding the dispute were determined; generally framing issues which did not flow from the pleadings; finding that the applicant did not produce evidence to show that it was authorized to create mortgages; finding that the power of attorney did not extend to the guarantee and the mortgage; and holding that the guarantee and the mortgage was a case of past consideration.
7. Regarding the nugatory aspect, it is averred that the decretal sum now stands at around Kshs.102,280,000, which is a colossal sum. It is contended that in the event the applicant is compelled to pay this substantial amount of money, the respondents may not be in a position to refund it should the intended appeal be successful. To buttress the respondents' inability to refund, it is averred that Joseph is sickly and that Jane is based in Vancouver, Canada, which is outside the jurisdiction of this Court. Therefore, the applicant is convinced that they will not be able to repay, which will render the intended appeal nugatory.
8. Regarding the applicant's ability to pay the decretal sum in the event the intended appeal is not successful, it is averred that the applicant is a reputable multinational corporation operating in more than 160 countries worldwide, and is in a strong financial position to settle the decree and therefore no prejudice would be suffered by the respondents if the orders sought in this application are granted.



9. The application is opposed by the 1<sup>st</sup> respondent by way of a replying affidavit sworn by Grace Mueni Njogu, who holds a Special Power of Attorney No. 1421 donated to her by Joseph. The gist of her response is that the notice of appeal dated 6<sup>th</sup> May 2024 is incompetent, having been filed by a non-existent firm of advocates, and that it is liable to being struck out; that there is no arguable appeal since none can lie from a defective notice of appeal; that this application is premature since a decree is yet to be extracted and no demand has been issued to the applicant; and that contrary to the applicant's allegation of the impecuniness of the respondents, they are not paupers. The 1<sup>st</sup> respondent avers that in the event that this Court is minded to grant the orders sought, then it should direct that the decretal sum be deposited in court, otherwise the entire application should be dismissed with costs.
10. On her part, the 2<sup>nd</sup> respondent, vide her replying affidavit sworn in opposition to the application, avers that from the onset the application is incompetent owing to the applicant's failure to serve her with a notice of appeal. Regarding arguability of the intended appeal, it is averred that all the issues contained in the draft memorandum of appeal were dealt with in a summarized manner by the trial court and the court needed not draft them in any specified format or form. In essence, therefore, she avers that the applicant has not established that its intended appeal is arguable.
11. Regarding nugatory aspect, the 2<sup>nd</sup> respondent contends that although she is based in Canada, she is a Kenyan citizen and that she has assets worth more than the decretal sum which could be attached to refund the applicant in the event the intended appeal is successful. Further, it is averred that the applicant will not be prejudiced if the orders sought are not granted as the applicant has been in continuous possession of the suit property since 2006. On this basis therefore, it is averred that intended appeal shall not be rendered nugatory if the orders sought are not granted.
12. At the hearing of this application, Mr. Katiku appeared for the applicant, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mr. Makau and Ms. Gichui respectively. Highlighting his client's submissions, Mr. Katiku reiterated that the intended appeal is arguable as per the grounds set out in the draft memorandum of appeal. On nugatory aspect, he rehashed the impecunious nature of the respondents and averred that they would not be able to repay the decretal sum if the intended appeal is successful.
13. On his part, Mr. Makau challenged the competence of this application, based on the validity of the notice of appeal and the non-existence of the firm of Musyoka Wambua & Katiku Advocates who filed the notice of appeal and the instant application. He informed the Court that an application seeking to strike out the notice of appeal dated 6<sup>th</sup> May 2024 was pending hearing and determination before this Court.
14. The gist of the submission by Ms. Gichui was that the applicant had not demonstrated that its intended appeal was arguable as the trial court had properly exercised its mind on all the issues raised in the suit. Regarding the nugatory aspect, counsel reiterated that her client had properties which were of greater value than the decretal amount, and was thus in a position to refund the decretal sum if the appeal succeeded.
15. We have considered the application, the replying affidavit and submissions as well as the applicable law. 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 vs Tony Ketter & 5 Others [2013] eKLR. 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.



16. Before we proceed to consider the merits of this application, we deem it necessary to address ourselves, albeit briefly, to the issue relating the competence of the notice of appeal dated 6<sup>th</sup> May 2024. It is trite law that, for a party to invoke the jurisdiction of this Court under rule 5(2) (b), it must first file a notice of appeal in accordance with rule 77 of the Rules of this Court. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, the Supreme Court stated, inter alia, that “A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is one that requires leave or not. It is a jurisdictional prerequisite.”
17. Rule 77 contemplates the filing of a notice of appeal which the applicant has done. Any challenge of a notice of appeal based on its competence and/or any other relevant consideration is provided for under rule 86 of the Rules of this Court. For purposes of this application, we are satisfied that the applicant has complied with the provisions of rule 77(2) of the Rules of this Court. If the respondents believed that the notice of appeal is defective, they should have moved the Court appropriately under the provisions of rule 86.
18. Turning to the merits of this application, looking at the issues which the applicant intends to raise in its 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 established that their intended appeal is arguable.
19. On nugatory aspect, we are cognizant of the fact that whether an appeal will be rendered nugatory depends on whether 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. The applicant contends that the decretal sum is colossal and that the respondents may not be in a position to refund it in the event the intended appeal is successful.
20. This Court in *International Laboratory for Research on Animal Diseases vs. Kinyua* [1990] eKLR, held that where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondents’ impecunity, the onus shifts to the latter to rebut the allegation. The Court further held that such allegation calls for rebuttal evidence from the respondents. In this case, save for stating that he is not a pauper, the 1<sup>st</sup> respondent has not provided any proof of his financial ability to refund the decretal sum if the appeal is successful. On her part, the 2<sup>nd</sup> respondent contended that she has assets of a higher value than the decretal sum. However, she did not tender any evidence in form of title and valuations of the same.
21. In essence, therefore, the respondents did not disprove the applicant’s allegation of their inability to refund the decretal sum if the intended appeal is successful. In the circumstances, we are inclined to agree with the argument by the applicant that the decretal sum being substantial, the respondents may not be in a position to refund in the event the intended appeal is successful. The applicant has therefore satisfied the two limbs required in an application of this nature.
22. Accordingly, we grant stay of execution of the judgment and orders of the High Court dated 30<sup>th</sup> April 2024 pending hearing and determination of the intended appeal. The costs of the application shall abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI OF DAY 8<sup>TH</sup> OF NOVEMBER 2024.**

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

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**JUDGE OF APPEAL**



**S. ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

