



National Oil Corporation of Kenya v Great White Investment Limited (Civil Application E071 of 2024) [2024] KECA 1825 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KECA 1825 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E071 OF 2024
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
DECEMBER 20, 2024**

BETWEEN

NATIONAL OIL CORPORATION OF KENYA APPLICANT

AND

GREAT WHITE INVESTMENT LIMITED RESPONDENT

(An Application for Stay of Execution of the Judgment of the High Court of Kenya (Commercial and Tax Division) at Mombasa (F. Wangari, J.) delivered on 22nd April 2024 in HCCOM No. E029 of 2021)

RULING

1. National Oil Corporation of Kenya, the applicant, has brought this Notice of Motion dated 19th June, 2024 pursuant to rule 5(2) (b) of the Court of Appeal Rules, 2022 and Section 3A and 3B of the [Appellate Jurisdiction Act](#) (Cap. 9) seeking an order to stay execution of the Judgment and Decree delivered on 22nd April 2024 in Mombasa High Court Commercial Case No. E029 of 2021 - Great white Investments Limited vs National Oil Corporation of Kenya, pending hearing and determination of the intended appeal.
2. The applicant's Motion is brought on several grounds set out on the face thereof, which are that, on 22nd April 2024, a judgment was entered against the applicant which ordered payment to the respondent of: a) special damages of Kshs. 19,703,4741 plus interest at court rates from the date of filing suit until payment in full; b) general damages for breach of contract assessed at Kshs. 3,000,000 together with interest from the date of judgment until payment in full; and c) the applicant's counterclaim was dismissed.
3. Aggrieved by the judgment, the applicant applied for a 45-day stay of execution of the Judgment, which the trial court granted, but which has lapsed on 14th June 2024; that, on 3rd May 2024, the applicant filed a Notice of appeal intending to appeal against the entire decision of the High Court.



4. In the Motion, the applicant contended in the attached draft Memorandum of appeal that it has an arguable appeal with a high probability of success as the learned Judge misinterpreted and misapplied the contractual clauses governing the relationship between the parties by erroneously relying on sub-clause 12:1 of the Contract relating to the Transporters obligation during operation instead of Clause 12.1 on Termination; in failing to consider the KPMG report which formed part of the court's record, and which was prejudicial to the applicant and contrary to section 35(1) (b) of the *Evidence Act* on the admissibility of documentary evidence; in stating that the termination was oral when the applicant produced exhibits 2 and 3 being the written notice of termination dated 31st May 2019 and the Demand letter dated 17th June 2019, amongst other grounds.
5. The application was supported by the affidavit of Robai Shiakhutsa, the Corporation Secretary of the applicant, in which he reiterates the grounds on the face of the application, save to add that, unless the stay of execution is granted, the appeal will be rendered nugatory; that execution of the decree will prejudice the applicant if compelled to pay the colossal sum of money to the respondent as this would place it under financial strain.
6. As a brief background to the application, sometime in October 2016, the applicant and the respondent signed an agreement for the provision of Transport and site management services. The respondent's obligation under Clause 5.1 of the agreement included: transportation of automotive diesel (AGO) from the applicant's depots to Kenya Ports Authority (KPA) sites; Offloading into the storage tanks provided by the fuel purchaser (KPA); Ensuring safety and preservation of quality until the title and risk passes to the fuel purchaser at the designated billing meter. The respondent failed to fulfil its obligations and, on 31st May 2019, the applicant terminated the contract by giving 30 days' notice from the date of the termination notice. The reason for the termination related to the loss of products at Kenya Ports Authority sites between October 2016 to the time of termination in 2019.
7. On 17th June 2019, upon reconciliation of Kenya Ports Authority Cash Account 1D 24542 between the applicant and the respondent's representative, the applicant demanded Kshs. 9, 248,671 from the respondent being the unexplained variance. Subsequently, KPMG conducted a forensic audit on the stock value on site where it was discovered that there were losses of Kshs. 187,352,876 attributable to the respondent.
8. Aggrieved by the termination, the respondent filed a claim against the applicant for: a) Special damages of Kshs. 19,703,474 for unpaid monies by the applicant; and b) General Damages for breach of contract.
9. In response by an amended Statement of Defence and Counterclaim dated 18th February 2022 filed by the applicant against the respondent, the applicant claimed Kshs. 190,716,876 for the value of products unaccounted for following the grave anomalies discovered during the respondent's tenure as site manager and the cost of the forensic audit carried out. Upon considering the dispute, the High Court at Mombasa delivered a Judgment against the applicant which provoked this Motion now before us.
10. In a replying affidavit sworn on 4th July 2024, James Mwangi, the director of the respondent deposed that despite the applicant filing a Notice of appeal, it is yet to file the appeal before this Court, and that stay orders cannot be granted in perpetuity waiting for an appeal to be filed; that 60 days have since lapsed, and the applicant has not filed its appeal within the stipulated time frame; and, further, that the applicant has not satisfied the conditions for stay of execution to be granted since it was not demonstrated that there is an arguable appeal that would be rendered nugatory if stay is declined.



11. It was further deponed that the applicant intends to appeal on grounds that the KPMG report was not taken into consideration, yet it was not tendered in evidence during the trial, and that the respondent being a successful litigant, ought not to be deprived of the fruits of its judgment. The respondent further asserted that, for a stay of execution to be granted, the applicant ought to demonstrate that the applicant is ready to provide security in the event that it loses the appeal; that deposit of the decretal amount would advance the ends of justice and ensure that, if the intended appeal is unsuccessful, the applicant shall settle the decree; and, in the alternative, an order for stay of execution pending appeal can be granted on condition that the appellant provides a Bank Guarantee from a reputable bank as security for the decretal sum pending hearing and determination of the appeal.
12. Both parties filed written submissions. When the application came up for hearing on the Court's virtual platform on their written submissions, Mr. Ondago learned counsel holding brief for Mr. Wanyama for the applicant submitted that the application sought to preserve the subject matter, and that the applicant's application had met the well-established twofold test to warrant the grant of the orders sought. On whether the appeal was arguable, counsel submitted that the learned Judge misinterpreted and misapplied the contractual clause governing the relationship between the parties, and failed to take into account the written notice of termination dated 31st May 2019 and a demand letter dated 17th June 2019 but, instead, wrongly concluded that the termination of the contract by the applicant was oral. Further, it was submitted that the trial court overlooked the breaches of sub-delegation of the contract by the respondent without the applicant's consent, and failed to consider the KPMG report that was the basis of the applicant's counterclaim, and which formed part of the court's record.
13. On the nugatory aspect, it was submitted that, unless a stay of execution order is granted, the respondent will execute the decree, which will cause the applicant to suffer substantial loss which will not be reparable by way of damages, particularly as the applicant's trading business would be crippled by payment of the sums ordered.
14. On their part, Ms. Abdulla, learned counsel for the respondent reiterated that the applicant had not demonstrated that it had filed an appeal and that, in the absence of an appeal, stay of execution pending appeal will render the stay as an order existing in perpetuity and deny the respondent the fruits of its judgment. Relying on the case of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another* [2006] eKLR, counsel argued that, without an appeal having been filed, there was no basis upon which this Court could grant stay of execution.
15. On the nugatory aspect, counsel submitted that the applicant has not proved that the appeal shall be rendered nugatory, as it did not clearly state what loss (if any) it stood to suffer and that, therefore, the application was speculative. Counsel relied on the case of *Ole Kilelu & 10 Others vs Moses K.Nailole* [2009] eKLR where the court opined that, where the decree appealed against is a monetary decree, the applicant has to show that, either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds, or that the decretal sum is so large vis a vis his status or business that the execution would in itself ruin his business or threaten his very existence; that it was not sufficient to merely state that Kshs. 22,703,474 is a lot of money, and that the applicant would suffer loss if the money is paid.
16. In the alternative, counsel asserted that, in the event that this Court was inclined to grant the stay of execution sought, it should be conditional upon depositing into court, as security, the entire decretal amount or alternatively into a joint interest earning account in the name of both the applicant's and respondent's advocates.



17. As set out above, the applicant is seeking a stay of execution of the judgment of the lower court under Rule 5 (2) (b) of this Court's rules. The principles that guide this Court in the determination of an application under rule 5(2) (b) of this Court's Rules are well settled. These principles are summarised in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR to wit; an applicant must demonstrate that the appeal or intended appeal is arguable; and that, unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.
18. As restated in the case of *Trust Bank Limited and Another vs Investech Bank Limited & 3 Others* [2000] eKLR:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
19. On whether the arguable aspect has been satisfied, the applicant's complaint against the judgment of the trial court is that the learned Judge misinterpreted and misapplied the contractual clause governing the relationship between the parties and failed to take into account the written notice of termination dated 31st May 2019 and a demand letter dated 17th June 2019; that, instead, the court asserted that the termination by the applicant was oral; that, further, the trial court overlooked the breaches of sub delegation by the respondent without the applicant's consent and failed to consider the KPMG report which formed part of the court's record and the basis of the applicant's counterclaim.
20. At the outset, we observe that the respondent also claims that, although the applicant has filed a Notice of appeal, it failed to lodge the substantive appeal within 60 days as required by the rules of this Court; and that, therefore, there is no appeal before this Court. At this juncture, we would point out that the applicant having filed a Notice of appeal, which is a prerequisite to the seizure of jurisdiction by this Court, grants us the necessary jurisdiction to entertain the applicant's motion for stay of execution. We need say no more on this issue.
21. On the question of whether the applicant has an arguable appeal, in our view, it would seem that the applicant's dissatisfaction with the judgment arises from its contention that the trial Judge failed to properly evaluate the evidence before the court and, in so doing, reached the wrong decision. It is trite that evaluation of documentary and oral evidence is a fundamental duty of the trial court and, therefore, a complaint that the court failed to properly evaluate the evidence, if indeed this was the case, is sufficient grounds on which to lodge an appeal. As such, we consider this to be an arguable issue.
22. On the nugatory limb, the respondent has argued that the applicant has not provided any reasons as to why the execution should be stayed, or in what way this would render the appeal nugatory. For their part, the applicant asserts that, in the event stay is not granted, the respondent will proceed to execute against it to recover the sums ordered, which sums, if paid, would result in the disruption of its trading operations.
23. A consideration of the applicant's reasons as to why the appeal will be nugatory in the event stay is not granted leads us to conclude that, if the immediate and precipitous payment of such sums would ground the applicant's operations to its detriment, then such reasons sufficiently satisfy the second aspect for grant of an order of stay of execution.



24. Consequently, the applicant has satisfied the threshold and the requirements for grant of orders to stay execution under rule 5(2) (b). The Notice of motion dated 19th June 2024 is merited and is hereby allowed. Costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

A. K. MURGOR

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.. JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

