



Sojanmi Springfields Limited v Githinji & 4 others (Civil Appeal (Application) E024 of 2022) [2023] KECA 22 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KECA 22 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E024 OF 2022
F SICHALE, FA OCHIENG & LA ACHODE, JJA
JANUARY 26, 2023**

BETWEEN

SOJANMI SPRINGFIELDS LIMITED APPLICANT

AND

JANE WAGATHUITU GITHINJI 1ST RESPONDENT

ISAAC KAMAU KABIRA 2ND RESPONDENT

JACKSON GICHUKI KABIRA 3RD RESPONDENT

**NATIONAL ENVIROMENT MANAGEMENT AUTHORITY ... 4TH
RESPONDENT**

COUNTY GOVERNMENT OF NAKURU 5TH RESPONDENT

(Being an Application under Rule 5 (2) (b) of the Court of Appeal Rules 2010, for Stay of Execution of the Ruling and Orders of ELC at Nakuru (Mutungi J) dated 27th January 2022).IN Nakuru ELC Case No. 405 of 2017)

RULING

1 Sojanmi Springfields limited (the applicant herein), has invoked the jurisdiction of this court pursuant to the provisions of rule 5 (2) (b) of this Court Rules vide a motion dated May 31, 2022 seeking the following orders:

1. Spent.
2. Spent.
3. That there be stay of execution of the ruling of the Environment & Lands Court at Nakuru delivered in Nakuru ELC No 405 of 2019 on the January 27, 2022 and the consequent order



issued on the February 8, 2022 pending the hearing and determination of the intended appeal arising therefrom;

4. That the costs of and incidental to this application be in the cause.”
- 2 The motion is supported by the grounds on the face of it and an affidavit sworn by Beatrice Bokea, the corporate affairs manager of the applicant, who deposed, *inter alia*, that on January 27, 2022, Mutungi, J, delivered his ruling with reference to the 1st to 3rd respondents’ contempt application dated July 23, 2019, making a raft of orders issued on the February 8, 2022, which were not sought for and which have the overall impact of stopping the operations of the applicant and rendering the appeal pending for hearing before this court moot.
- 3 That, the effect of the orders granted on the January 27, 2022, is the implementation of directives not sought for which ultimately implies the closure of the applicant company’s operations despite an existing appeal and that further the 4th respondent had already gone ahead and cancelled all other existing licenses granted to the applicant rendering its operations moot which would have undesirable impact including breach of existing commercial and employment contracts thus occasioning the applicant irreparable loss and damage.
- 4 The motion was opposed *vide* a replying affidavit sworn on June 13, 2022, by Jane Wagathuitu Githinji the 1st respondent herein who deposed *inter alia* that the supporting affidavit in support of the motion was contradictory, argumentative, raises submissions and erroneous content and that some of the averments in the said affidavit were outright lies.
- 5 The motion was further opposed *vide* grounds of opposition dated September 26, 2022, by the 5th respondent who contended *inter alia* that the applicant’s application was misconceived and founded on incorrect and misleading facts which were meant to wrongfully obtain orders from this court to the detriment of the respondents.
- 6 On September 27, 2022, the motion came before us for hearing “via gotomeeting video link”. Mr Opondo learned counsel appeared for the applicant whereas Mr Jaoko appeared for the 1st, 2nd and 3rd respondents. Mr Ngara appeared for the 4th respondent while Mr Karanja appeared for the 5th respondent. Both Mr Ngara and Mr Karanja intimated to court that they were neither supporting nor opposing the motion.
- 7 It was submitted for the applicant that none of the orders sought for in the application for contempt were considered nor did they form part of the orders issued on February 8, 2022 and that in the same vein, the applicant was denied an opportunity to render averments on oath in response to the issues which formed the basis of the impugned ruling and that in the circumstances, the learned judge’s orders were improper. Further, that the appeal before the court raised weighty issues of law as can be discerned in the draft memorandum of appeal.
- 8 It was further submitted that the decommissioning orders granted imply that the remaining green houses will not have a water pan/dam for collecting run off flow which action is irreversible and equally detrimental to the environment and that these irreversible and prejudicial outcomes require the intervention of this court by staying the orders issued on February 8, 2022.
- 9 On the other hand, the 1st-3rd respondents basically reiterated the averments contained in the replying affidavit sworn on June 13, 2022 and submitted, *inter alia*, that it was not true that the judge pronounced himself on issues that were not raised by the 1st to 3rd respondents. Further, that the judge made a finding that the applicant had not obeyed the orders on restoration of the environment and issued directions to ensure compliance with court orders and to protect and conserve the environment.



- 10 On behalf of the 5th respondent, it was submitted that the argument by the applicant that its activities would be halted cannot override the rights of a clean and healthy environment pursuant to article 42 of the Constitution. It was further contended that the applicant had not proved that it would suffer substantial loss.
- 11 We have carefully considered the motion, the grounds thereof, the supporting affidavit, the 1st-3rd respondents replying affidavit, the 5th respondent's grounds of opposition, the rival submissions by the parties, the cited authorities and the law.
- 12 The applicant's motion is brought inter alia under rule (5) (2) (b) of this Court's Rules. Rule 5 (2) (b) of the rules, which guides the court in applications of these nature provides:
- (2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
 - a. ...
 - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”
- 13 The principles for our consideration in the exercise of our unfettered discretion under rule 5 (2) (b) of this Court's Rules to grant or not grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this court (differently constituted), in the case of Stanley Kangethe Kinyanjui v Tony Ketter & others [2013] eKLR 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.
- v. The discretion of this court under rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi. The court becomes seized of the matter only after the notice of appeal has been filed under rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the court on both the twin principles.
 - ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - xi. 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.



- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
- 14 With regard to the first limb, it was submitted by the applicant inter alia that the learned judge issued orders that were not sought by the applicants in the motion dated July 23, 2019 and that as such, the said orders were *ultra vires* as they went beyond the scope of the parties’ pleadings.
- 15 We have carefully perused the annexed draft memorandum of appeal annexed to the application and from a cursory perusal of the same, we are satisfied that the applicant has an arguable appeal worthy of consideration by this court and more so whether the learned judge went beyond the scope of the parties’ pleadings.
- 16 As we had alluded to earlier, an arguable appeal is not one that must necessarily succeed. Of course we are mindful of the fact we will not say more regarding this issue at this stage lest we embarrass the bench that will be eventually seized of the matter. Consequently, the applicant has satisfied this court on this limb.
- 17 On the nugatory aspect, it was submitted for the applicant that the decommissioning orders imply that the remaining green houses will not have a dam/ water pan for a run off which action was irreversible. From the circumstances of this case, we are indeed satisfied that the applicant’s appeal will be rendered nugatory if stay orders are not issued and the applicant will stand to suffer irreparably. Ultimately therefore, we are satisfied that the applicant’s appeal would be rendered nugatory if the orders sought are not issued.
- 18 In view of the above, and the applicant having established the twin principles for consideration by this court in an application under rule 5 (2) (b) of this *Court’s Rules*, the applicant’s motion dated May 31, 2022, is merited and the same is hereby allowed in terms of prayer 3 thereof.
- 19 The costs of this motion shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

