



Astonfield Solesa Solar Kenya Limited v Sunfunder INC & another (Civil Application E021 of 2022) [2023] KECA 139 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 139 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E021 OF 2022
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA
FEBRUARY 17, 2023**

BETWEEN

ASTONFIELD SOLESA SOLAR KENYA LIMITED APPLICANT

AND

BEYOND THE GRID SOLAR FUND, LLC 1ST RESPONDENT

SUNFUNDER INC 2ND RESPONDENT

(Being an application for stay of execution of the ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 22nd December, 2021 in H.C.C.C. No. E205 of 2021)

RULING

Background

1. Before us is a notice of motion dated January 24, 2022, in which Astonfield Solesa Solar Kenya Limited (the applicant) seeks in the main an order of stay of execution of the ruling of the High Court of Kenya (Majanja, J.) in H.C.C.C. No. E205 of 2021 delivered on December 22, 2021 pending the hearing and determination of the appeal. The application is expressed to be brought under section 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 5(2)(b) of this [Court Rules](#). Sunfunder Inc and Beyond the Grid Solar Fund, LLC are the 1st and 2nd respondents respectively.
2. The grounds upon which the notice of motion is based are inter alia that there is a large loan amount in dispute, and the applicant has an undoubted right of appeal by virtue of order 43, rule 1(b) of the [Civil Procedure Rules](#), 2010.
3. From the record, a brief background to this application is that the respondents are corporations incorporated and duly existing under the laws of the State of Delaware in the United States of America whereas the applicant is a private limited liability company duly incorporated in Kenya. The 1st respondent, in its capacity as an Arranger/Facility Agent/Security Trustee entered into a Loan



Agreement with the applicant dated May 12, 2017 (the Loan Agreement) to which the 2nd respondent as the lender advanced a term loan facility up to the principal sum of USD 2,500,000.00 to the applicant on the terms set out in the Loan Agreement.

4. The respondents averred that the applicant had breached the terms of the Loan Agreement by failing to make payments of the required instalments as per the Loan Agreement. By a letter dated 15th May, 2018 the respondents notified the applicant of the said default and called for payment of the outstanding arrears. The respondents further claimed that the applicant failed to comply with the notice and persisted in the breach prompting the 1st respondent to instruct its appointed advocates to commence the process of recovery of the total amount outstanding which stood at USD 3,384,927.73 as at 21st September, 2020 when their advocates issued a demand. When the applicant failed to honour the demand, the respondents filed suit in the High Court on April 22, 2021 seeking judgment against the applicant for the sum of USD 3,584,563.86 due as at 7th April, 2021, interest and default penalty on this amount at the contractual rates until the date of payment in full, costs of the suit and interest.
5. In response to the suit, the applicant filed a statement of defence dated May 30, 2021 and denied that any event of default had occurred. Further, that there were various force majeure occurrences such as: the interest rate cap that affected the applicant's clients' ability to access financing; the electioneering period that rendered to waste the economy; and the Covid 19 Pandemic that crippled the applicant's business.
6. In the impugned ruling dated December 22, 2021, the learned Judge allowed the respondents' application and stated as follows:

“I find that the issues raised in the defence are hopeless, do not raise any substantive triable issue or reasonable ground of defence. The fact of the Loan Agreement is not disputed, the date for repayment of the loan under the Agreement was on March 31, 2019 and payment has not been made to date. The issues raised by the defendant in defence are illusory and moonshine and do not deserve to go to trial.

Disposition

I allow the plaintiffs' application dated July 26, 2021 and order as follows:

1. The defendant's statement of defence dated May 30, 2021 be and is hereby struck out and judgment be and is hereby entered for the plaintiffs and as the (sic) against the Defendant for:
 - a. The sum of USD 3,584,563.86 together with interest at 10.75% p.a from the date of filing suit until payment in full.
 2. The Defendant shall bear the cost of the application and the suit.”
7. Aggrieved by that ruling, the applicant lodged an appeal and the instant application supported by an affidavit sworn by Mr. Ameet Shah, a director of the applicant company, in which it was averred inter alia:- that the applicant has a meritorious appeal with a high probability of success as it raises serious and arguable factual, evidentiary and legal issues; that the applicant is reasonably apprehensive that unless the orders sought are granted, the respondents may proceed to execute the decretal sum of US \$3,584,563.86 together with interest at 10.75% per annum from the date of filing suit until payment in full which will cause the applicant substantial and irreparable loss; and that the application has been brought timeously without inordinate delay and in the interest of justice.



8. The respondents opposed the application and filed a replying affidavit sworn by Samuel Malaki, the 1st respondents' Head of Finance and averred: that the applicant is only concerned with the loss it may suffer and fails to appreciate the loss suffered by the respondents who advanced the sum of money totalling to US\$.2,500,000 and that the applicant having received the said amount for its own benefit; and being obligated to repay the same has not repaid a single cent of the said amount, which fact is not in dispute.
9. The application was heard by way of submissions with oral highlights.
At the hearing, learned counsel, Mr. Rutere appeared for the applicant while learned counsel Mr. Maondo, appeared for the respondent. Both counsel had filed their written submissions which they relied on with oral highlighting.
10. The applicant submitted that it has an arguable appeal as demonstrated by the memorandum of appeal raising ten(10) grounds inter alia: that the learned Judge misdirected himself by finding that there were no triable issues, despite the fact that the applicant had pleaded that a material adverse effect had occurred; that the learned trial Judge also proceeded to make various blanket statements about the defence such as the fact that the material adverse effects did not affect the business of the applicant; that the learned trial Judge through his ruling made various assumptions that he could only have determined in the case where both parties had a chance to produce evidence and provide testimonies; and that it should be noted that the applicant had only filed its defence and was yet to put in its witness statements and bundle of documents to support its claim. Reliance was placed on [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR.
11. On the nugatory aspect it was submitted that failure to issue the orders sought will allow the respondents to compel the applicant to make a colossal payment of US\$ 3,000,000 which will in effect leave the applicant insolvent. Reliance was placed on the authorities of [Nyaboke v NCBA Bank Kenya PLC & another](#) [2021] KECA 323 (KLR), [Kihagi & another v Jamii Bora Bank & 2 Others](#) [2021] KECA 265 (KLR).
12. The respondent opposed the application. On the question whether the appeal is arguable it was submitted that this court should find that the grounds of appeal relied on by the applicant are only designed to vex the respondents and in as much the applicant may be at liberty to pursue the same as being reasonable grounds of appeal, the same should however not be a basis for the grant of a stay of execution. Reliance was placed on the authorities of [Kivanga Estates Limited v National Bank of Kenya Ltd](#) [2017] eKLR, [Delphis Bank Limited v Caneland Limited](#) [2014] eKLR, [Margaret Njeri Mbugua v Kirk Mweya Nyaga](#) [2016] eKLR.
13. On the nugatory aspect it was submitted that the fact that what is due is a money decree is not in dispute; that the money decree arises from a loan facility advanced by the respondents to the applicant is equally not in dispute; that the respondents are financial institutions who would have no difficulty in paying the amount ordered by the court; and that the intended appeal will therefore not be rendered nugatory if the orders sought are not granted.
14. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The jurisdiction under rule 5(2)(b) of this [Court's Rules](#) is discretionary and guided by the interests of justice. In the exercise of this discretion, the court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
15. The principles for granting a stay of execution, injunction or stay of proceedings under rule 5(2)(b) of this [Court's Rules](#) are well settled. This Court in the case of Trust Bank Limited and Another v



Investech Bank Limited & 3 Others [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“ 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...”

16. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this court, both limbs must be demonstrated to the court’s satisfaction.

17. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this court. See *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (supra) where this court described an arguable appeal in the following terms:

“ 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.

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.”

18. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, the intended appeal is arguable inter alia whether the defence raised any triable issue. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

19. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. It has not been demonstrated or contended by the applicant that the respondents, being financial institutions would not be in a position to pay any damages that may be ordered or that damages would not be a sufficient remedy.

20. On the nugatory aspect, we note from submissions by counsel for the respondents and which was not disproved by counsel for the applicant that the respondents are sound financial institutions that would have no difficulty if required to refund the decretal amount. In *Integrated Wood Complex Ltd & another v Kenya National Corporation Ltd* [2005] eKLR this court stated as follows:

“In dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted, we consider the fact that the respondent is an established financial institution and would have no difficulty if required to pay back the full decretal amount.”

In the circumstances, we find that the appeal will not be rendered nugatory, if stay is not granted.

21. From the circumstances of the application before us, the applicant has failed to demonstrate the existence of both limbs as required by rule 5(2)(b) of this *Court’s Rules* and in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* (supra). The upshot is that we decline to grant a stay of execution pending the hearing and determination of the appeal.



The notice of motion dated January 24, 2022 is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

HELLEN OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

