



**China Wu Yi Co Ltd v Belgo Holdings Ltd (Civil Application  
E239 of 2021) [2023] KECA 190 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 190 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E239 OF 2021  
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**CHINA WU YI CO LTD ..... APPLICANT**

**AND**

**BELGO HOLDINGS LTD ..... RESPONDENT**

*(Application for stay of execution and further proceedings pending the hearing and determination of appeal against the Ruling and Orders of the Environment & Land Court at Nairobi (Komingoi, J.) dated 18th March 2021 in ELCC No. 362 of 2017)*

**RULING**

1. This ruling determines the notice of motion dated April 27, 2021 by the applicant, China Wu Yi Co. Ltd. The application seeks stay of execution of the consent orders recorded by the parties in Environment & Land Court (ELC) Suit No. 362 of 2017 on 16<sup>th</sup> and June 22, 2017. There is on record another application by the respondent, Belgo Holdings Ltd., dated May 12, 2022, seeking to strike out the applicant's notice of motion dated April 27, 2021 and the record of appeal. As neither of the parties appeared during the online hearing of the application, though they were duly served with the hearing notice, we take it that the applicant's application for stay of execution and proceedings is the one to be determined because both parties have filed submissions for that application. None of them has filed any submissions on the respondent's application.
2. To put the application in context, it is apposite to briefly set out its background and antecedents. On June 16, 2017 the applicant and the respondent, through their advocates, recorded a consent order in the ELC. By the consent order ELCC No. 362 of 2017 was marked as settled on the following terms:
  1. Subject to the issue of additional rent being agreed:-
    - i. An order as per prayer No. 2 of Belgo's application dated April 12, 2017 in ELC 263/17 is granted until further orders of the court.



- ii. China Wu Yi will be allowed by Belgo to enter into the portions of the land measuring 1094 square metres as identified in the report of Belgo's surveyor dated May 2, 2017 for the purpose of:-
    - a. Erecting a foundation for the link road.
    - b. Erecting an inter section on Peponi Road junction with a link road
    - c. For temporary diversion of traffic on Peponi Road.
  - iii. Upon completion of construction works, China Wu Yi will restore the land on its original condition.
  - iv. Belgo to withdraw notice of termination of tenancy dated March 24, 2017 given to China Wu.
  - v. Costs in the cause.
  - vi. Mention on July 22, 2017.
3. week later, on June 22, 2017, the parties recorded a further consent order in the following terms:
1. Rent payable for additional area will be Kshs 607, 500/- per month from March 1, 2017.
  2. This rent will only be payable by the plaintiff to the defendant if the ELC Court holds in ELC 545/2012 that Belgo Holdings Limited is the owner of the entire land and that the road corridor has not been acquired by the government.
  3. If the rent becomes payable, the plaintiff will pay interest on the accrued rent at 14% p.a.
  4. The suit is marked as settled. Each party will bear its own costs.

The consent orders, which were signed by counsel for both parties, were duly adopted as orders of the court.

4. On November 16, 2020, more than three years after the last consent order, the applicant changed its advocates and filed an application in the ELC to set aside the consent orders, and for stay of further proceedings pending appeal from the judgment delivered by the court in a different suit, namely ELCC No. 454 of 2012, between the respondent and the Kenya Urban Roads Authority and another. The grounds upon which the said orders were sought were, inter alia, that the consent orders in ELCC No. 362 of 2017 were entered into without the knowledge, consent, authority or instructions of the applicant; that the consent orders were contingent upon the outcome of ELCC No. 454 of 2012 where the subject matter was the same parcel of land as in ELCC No. 362 of 2017; and that although the court had ruled in favour of the respondent in ELCC No. 454 of 2012, the defendants in that suit had preferred an appeal to this court.
5. The respondent opposed the application and, by a ruling dated March 18, 2021, the ELC dismissed the application holding that the applicant's previous advocates had ostensible authority to enter into the consent orders; that, in a previous affidavit the applicant had admitted full knowledge of the consent orders; and that the orders sought in regards to ELCC No. 454 of 2012 could not issue because what was before the court was not an application for stay of the judgment in that suit. On the same day, the applicant filed a notice of appeal, followed by the application now before us. The notice of appeal was specific that the intended appeal was against the ruling of the ELC dated March 18, 2021 in ELCC No. 362 of 2017.



6. As far as is relevant, the applicants' notice of motion seeks "stay of execution of the orders recorded in ELC No. 362 of 2017 on 16<sup>th</sup> and June 22, 2017" or, in the alternative, stay of proceedings, in particular the notice to show cause dated 3rd November 2020 pending the hearing of CA No. 536 of 2021, Kenya Urban Roads Authority v. Belgo Holdings Ltd. & Another. That appeal arises from ELCC No. 454 of 2022, and not from ELCC No. 362 of 2017 where the consent orders were recorded.
7. In support of the application, learned counsel for the applicant submitted in his written submissions dated May 11, 2021 that the appeal against the ruling of March 18, 2021 is arguable. He relied on five grounds in the draft memorandum of appeal where he contends that the learned judge erred by: failing to find that ELCC No. 545 of 2012 has a direct bearing on whether or not the additional rent of Kshs 607,500 was payable by the applicant to the respondent; failing to hold that the applicant, though not a party in ELCC No. 545 of 2012, was adversely affected by it to warrant an order of stay of execution of the consent orders; failing to stay execution while aware of the existence of an appeal against the judgment in ELCC No. 545 of 2012; dismissing the application whilst the two suits involved the same subject matter; and by failing to adjudicate the dispute fairly, thus perpetrating an injustice.
8. It was the applicant's further submission that it was only liable to pay to the respondent the additional rent if the court held that the entire suit property belonged to the respondent. Although the court had so found in ELCC No. 545 of 2012, that decision was subject to appeal and, if the appeal succeeded, it would mean that the additional rent was not payable to the respondent.
9. On whether the appeal would be rendered nugatory, the applicant submitted that failure to grant an order of stay of execution will occasion a miscarriage of justice, and that its intended appeal will be rendered nugatory.
10. The respondent opposed the application for stay of execution vide a replying affidavit sworn on May 17, 2021 by Mr. James Ochieng Oduol, Advocate and written submissions dated May 19, 2021. The respondent contended that the intended appeal is not arguable and that, in any event, the applicant did not deserve an equitable and discretionary remedy because the application to set aside the consent order was founded on perjured evidence. Counsel noted that Mr. Liu Quing Hua, who swore the affidavit in support of the application, alleged that the consent orders were obtained fraudulently and without the applicant's knowledge and authority, yet he had earlier sworn another affidavit on July 26, 2018 stating that the consent orders were reached as a result of negotiations between the parties and with the full knowledge of the applicant. Counsel relied on *Orian East Africa v. Ecobank* [2016] 1 EA 441 in support of the submission that, due to the applicant's failure to do equity, it was not entitled to an equitable remedy.
11. The respondent further relied on a host of other grounds to oppose the application, which dwell on the defects and shortcoming of both the applicant's notice and record of appeal. We think that those grounds are relevant to the application to strike out the notice and record of appeal, which, as we have indicated, is not now before us.
12. On whether the appeal by the Kenya Urban Roads Authority arising from ELCC No. 545 of 2012 risked being rendered nugatory, the respondent submitted that there was no chance because the applicant had already offered to pay the due rent into an escrow account. In addition, it was contended that the applicant had not even suggested that the respondent would be unable to repay the additional rent if the appeal succeeded. The respondent maintained that in the event of the appeal by the Kenya Urban Roads Authority succeeding, it is able and willing to refund the rent.
13. As regards the alternative prayer for stay of proceedings, the respondent submitted that the pending appeal does not arise from the impugned ruling of the learned judge and that this Court cannot stay



proceedings in those circumstances. Further, it was contended that, the suit having been compromised by consent, there were no more pending proceedings to stay.

14. We have anxiously considered this application. To say the least, the application before us is rather convoluted. To invoke the jurisdiction of this Court under rule 5(2) (b) of the Court of Appeal Rules, a party must have a notice of appeal on record. (See Safaricom Ltd. v. Ocean View Beach Hotel Ltd. & 3 others, [2010] eKLR and Equity Bank Ltd v. Westlink Mbo Ltd [2013] eKLR). It is the notice of appeal that gives the Court jurisdiction to entertain an application for stay of execution, stay of proceedings, or injunction, pending appeal. In the application before us, there is absolutely no correlation between the notice of appeal on record and the appeal that the applicant claims is arguable and stands to be rendered nugatory.
15. The applicant’s notice of appeal is dated March 18, 2021 and seeks to appeal the ruling of Komingoi, J. delivered on March 18, 2021 in ELCC No. 362 of 2017. The appeal that the applicant claims is arguable and stands to be rendered nugatory arises from a decision of the same judge dated January 30, 2020 in ELCC No. 545 of 2012. That appeal is not even by the applicant. It is by the Kenya Urban Roads Authority, on whose coattails the applicant probably hopes to ride. As a matter of fact, from the record, the applicant is not even a party to that appeal. To the extent that the appeal in respect of which the applicant seeks stay of execution is not based on the notice of appeal dated 18<sup>th</sup> March 2021, which notice of appeal is the basis of our jurisdiction in this application, we are not properly seized of the matter. We simply have no jurisdiction in the matter because the notice of appeal and the appeal in question arise from two different decisions, one a ruling, the other a judgment, and at that, in two different suits that were neither consolidated nor heard together.
16. But that is not the end of the applicant’s confusion. Even assuming this application was properly before us, the ruling of Komingoi, J. dated March 18, 2021 is a negative order to the extent that it merely dismissed the applicant’s application to set aside the consent orders. It is not a positive order capable of being stayed. As the Court has said time and again, there is nothing to stay in a negative order. In Western College of Arts & Applied Sciences v. Oranga & others [1976] eKLR, the predecessor of this court reasoned thus:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs...In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, to enforce or retrain by injunction.”

(See also Co-operative Bank of Kenya Ltd v. Banking Insurance & Finance Union (Kenya) [2015] eKLR).

17. For the foregoing reasons, we are satisfied that we have no jurisdiction in this matter and the applicant’s notice of motion dated April 27, 2021 is bereft of merit. The same is hereby struck out with costs to the respondent. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023**

**K. M’INOTI**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**



.....

**JUDGE OF APPEAL**

**M. GACHOKA, CIARB, FCIARB**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

