



**Humming Healthcare Limited v Asterisk Limited (Civil Appeal (Application)  
E586 of 2022) [2023] KECA 168 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 168 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E586 OF 2022  
DK MUSINGA, F SICHALE & PM GACHOKA, JJA  
FEBRUARY 17, 2023**

**BETWEEN**

**HUMMING HEALTHCARE LIMITED ..... APPLICANT**

**AND**

**ASTERISK LIMITED ..... RESPONDENT**

*(Being an application for stay of execution of the orders arising from the  
Ruling of the High Court, Commercial and Tax Admiralty Division at Nairobi  
(Mabeya, J.) delivered on 28<sup>th</sup> July 2022 in Civil Suit No. 107 of 2014)*

**RULING**

1. Before this Court is an application dated August 29, 2022 filed by the applicant and brought under Articles 159 of the Constitution of Kenya, 2010, sections 3, 3A and 3B of the Appellate Jurisdiction Act, and rules 5 (2)(b), 42 and 47 of the Court of Appeal Rules, 2010, seeking stay of execution of the orders arising from the ruling of Mabeya, J delivered on July 28, 2022 in Civil Suit No 107 of 2014 pending the hearing and determination of an intended appeal.
2. In the impugned ruling, the learned judge allowed the applicant's application dated September 17, 2022 and granted the applicant extension of time within which to appeal against the decision of July 1, 2021. Likewise, he granted the applicant conditional stay for 30 days and ordered the applicant to pay to the respondent 50% of the amount due and the 50% balance thereof to be deposited in an interest-bearing account in the joint names of the advocates of the parties within 30 days of the payment of the first 50%. In default of the foregoing conditions, the stay was to lapse and execution to issue.
3. A precis of the relevant facts is that the respondent filed a claim against the applicant seeking the lifting of the veil of the applicant's company and for the court to hold some of the applicant's shareholders and/or directors liable for a debt that had accumulated to approximately Kshs 17,295,668 incurred by the applicant's company.



4. In his ruling delivered on July 1, 2021, Mabeya, J lifted the corporate veil of the applicant's company and held its shareholders and/or directors namely, Nazmina Popat, Nawaz Popat, Nadeem Popat and Narina Popat personally liable for a debt to the tune of Kshs 17,295,668.00 incurred by the applicant's company against the respondent and excluded Rohit Reddy and Dropa Sandhu, holding that the two had earlier resigned and that they could not be held liable for any debts incurred subsequent to their resignation.
5. Aggrieved and dissatisfied with the two (2) separate rulings of Mabeya, J, the applicant preferred an appeal to this Court by filing two notices of appeal both dated August 11, 2022.
6. The application is supported by the grounds set out on its face and those advanced in the supporting affidavit sworn on August 29, 2022 by Nawaz Popat, a non-executive director of the applicant on behalf of Nazmina Popat, Nadeem Popat and Narina Popat. It was averred that as a result of the impugned ruling delivered on July 28, 2022, the directors of the applicant were condemned to pay 50% of the amount owed by the applicant to the respondent which they are incapable of fulfilling within the stipulated 30 days as the amount is very punitive and very substantial by all standards.
7. The applicant has not attached to its application a draft memorandum of appeal setting out the grounds upon which its appeal will be premised. The applicant however argues in a general manner that it has an arguable appeal that is meritorious and with a high prospect of success. On nugatory aspect, the applicant stated that the impugned ruling of July 1, 2021 had crystalized the respondent's claim and therefore it is apprehensive that the respondent will commence execution, which event shall render its appeal nugatory as the respondent will already have auctioned personal assets and property of Nazmina Popat, Nawaz Popat, Nadeem Popat, and Narina Popat and no amount of compensation will cure the damage occasioned; and that the said directors are from the same family and have invested heavily in the applicant's company, incurring personal debt, mortgaging their own homes in order to maintain the business which eventually came into insolvency. Lastly, the applicant stated that it was ready to provide a security.
8. In conclusion therefore, the applicant averred that it will be in the interest of justice that this Court grants the applicant a stay of execution against the ruling and order of July 28, 2022 as sought.
9. In response, the respondent filed its replying affidavit sworn on September 14, 2022 by Dipen Rajani, Director of the respondent, and deponed that the applicant has not demonstrated that it has an arguable appeal as it has not attached a memorandum of appeal hence, it's impossible to discern the grounds of appeal in the circumstances. On nugatory aspect, that the respondent is able to reverse the 50% payments in the unlikely event that the applicant's appeal is successful. In addition, it was argued that the applicant did not serve upon them its notice of appeal within seven (7) days of filing as required by law. The respondent therefore urged this Court to dismiss the applicant's application with costs.
10. At the hearing hereof, Ms. Mukuna appeared for the applicant while Ms. Ithondeka appeared for the respondent. Counsel made brief oral highlights of their written submissions dated November 22, 2022 and November 24, 2022 respectively. The written submissions were to a large extent a reiteration of the grounds appearing in the motion itself and in the replying affidavit. Ms Mukuna stated that they served the applicant's notice of appeal in time. Ms. Ithondeka on the other hand maintained that the respondent was served late with the applicant's notice of appeal and without leave from the Court. She also submitted that the applicant has not attached a draft memorandum of appeal.
11. We have considered the application and the affidavit in support, the replying affidavit as well as the written and oral submissions by the counsel on record for both parties. The purpose of an application such as this is to preserve the subject matter in dispute so that the rights of an applicant who is exercising



- his or her undoubted right to appeal are safeguarded and the appeal, if successful, is not rendered nugatory.
12. This Court has expressed itself in a plethora of decisions that for grant of orders of stay under rule 5(2) (b), an applicant has to satisfy this Court on two grounds. Firstly, that the applicant has presented an arguable appeal or intended appeal. However, it does not mean that the appeal must be one which will necessarily succeed, but one which is not frivolous. Secondly, the extent to which the appeal, if successful, would be rendered nugatory should the Court decline to grant the stay orders. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR; and Multimedia University & Another v. Professor Gitile N. Naituli [2014] eKLR.
  13. Before delving into the merits of this application, we feel inclined to address the issue raised by the respondent on service of the notice of appeal. Whereas the applicant states that it duly filed and served the notice of appeal upon the respondent within the prescribed timeline, the respondent states that it was served outside the stipulated timeline. The issue therefore is not whether there is a notice filed by the applicant, but whether service upon the respondent was done within the prescribed timelines. What is before this Court is an application for stay orders. The respondent, if desirous of having the notice of appeal on record struck out on account of late service, ought to have brought a separate application under the provisions of rules 79 and 86 of the Rules of this Court. Nothing therefore turns on this issue.
  14. On the question whether the intended appeal is arguable, we have perused through the motion and the supporting affidavit and we are unable to glean the grounds upon which the applicant states that its intended appeal is arguable. In addition, the applicant has not attached a draft memorandum of appeal for this Court to consider if indeed it has an arguable one. For this reason, we find that this limb has not be established.
  15. On nugatory aspect, we re-state what has been summarized by this Court in Stanley Kangethe Kinyanjui v Tony Ketter (*supra*), that whether or not 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. This Court notes that this is a monetary decree where the directors of the applicant's company were held personally liable for the debts due to the respondent to the tune of approximately Kshs.17,295,668,00. In the impugned ruling, the applicant was given stay of 30days on the condition that the applicant pays to the respondent 50% of the amount due and the balance of the 50% to be deposited in an interest-bearing account in the joint names of the advocates of the parties herein within 30 days of the payment of the first 50%. The applicant has, in our view, not demonstrated to the satisfaction of this Court how its appeal, if successful, would be rendered nugatory if stay is not granted. We are of the view that if execution takes place and the applicant's appeal succeeds, any loss to the applicant can sufficiently be compensated by way of damages.
  16. In view of the foregoing, and noting that the applicant has not satisfied the two limbs for grant of orders of stay under rule 5 (2)(b), the notice of motion dated August 29, 2022 fails and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 17<sup>th</sup> day February, 2023.**

**D K MUSINGA (P)**

.....

**JUDGE OF APPEAL**

**F SICHALE**



.....

**JUDGE OF APPEAL**

**M GACHOKA, CIArb, FCIArb**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

