



Assets Recovery Agency v Kuria & 3 others (Civil Application E389 of 2022) [2023] KECA 63 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 63 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E389 OF 2022
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

PETER MWANGI KURIA 1ST RESPONDENT

BONIFACE WEGESA 2ND RESPONDENT

NJUGUNA WANJIKU 3RD RESPONDENT

FAMILY BANK LIMITED 4TH RESPONDENT

(Being an application for stay of execution pending appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (E.Maina, J.) dated 6th October 2022 in ACEC Misc. Application No. E005 of 2022)

RULING

1. On January 19, 2022, the 1st and 2nd respondents, Peter Mwangi Kuria and Boniface Wegesa, were arrested along Kehancha-Lolgorian Road in the Transmara Division in the Narok County while driving motor vehicle Registration No KDC 125X Toyota Prado, which was ferrying material suspected to be narcotic substances.
2. Following the arrest, the motor vehicle was seized and the two respondents charged on January 20, 2022 before the Principal Magistrates' Court at Kilgoris in PMCC No E034 of 2022 with the offence of trafficking in narcotic drugs contrary to section 4(a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act, 1994](#).
3. On February 17, 2022, the applicant, the Assets Recovery Agency, filed an Originating Motion in the High Court of Kenya at Nairobi in ACEC Misc App No E005 of 2022 praying for a preservation order in respect of the motor vehicle aforesaid. By an order issued on February 17, 2022, the High Court (E



N Maina, J) allowed the application thereby granting preservation orders prohibiting the respondents from dealing in any manner with the motor vehicle; directing the 1st 2nd and 3rd respondents to surrender to the applicant the original logbook within 7 days; ordering that the motor vehicle be surrendered to the applicant's custody; and the orders to remain in force for a period of 90 days.

4. On March 15, 2022, the 3rd respondent, Peter Njuguna Wanjiku, filed a Notice of Motion in the High Court ACEC Misc App No E005 of 2022 seeking, *inter alia*, the setting aside of the preservation orders of E N Maina, J; release to him of the motor vehicle; and an injunction to prevent the applicant from publishing the preservation orders in the Kenya Gazette.
5. In his supporting affidavit sworn on March 14, 2022, the 3rd respondent claimed that he owns the motor vehicle jointly with the 4th respondent; that he entered into an agreement for self-driven vehicle hire services with Ace Rental Services; that Ace Rental Services carries on the business of car hire; and that he was not involved in the events leading to the seizure of the motor vehicle.
6. On May 25, 2022, the 4th respondent, Family Bank Limited, applied to be joined in the High Court proceedings aforesaid, and for orders that the motor vehicle be released to it on the grounds that it was registered as joint owner of the motor vehicle as deposed by the 3rd respondent; that, as financier for the purchase by the 3rd respondent of the motor vehicle, it has legal and equitable right over the vehicle, which right is slowly being diminished, and extinguished if the motor vehicle continues to lie in the applicant's possession.
7. The applicant opposed the two Motions vide two replying affidavits of CPL Frederick Muriuki sworn on March 24, 2022 and June 20, 2022. According to the deponent, the motor vehicle in issue could not be released before final determination of the criminal proceedings in the lower court. However, the applicant conceded the 4th respondent's application for joinder.
8. Upon hearing the applicant and the 3rd and 4th respondents, the learned Judge delivered her ruling on October 6, 2022 vacating her preservation orders issued on February 17, 2022, and granting stay thereof for 7 days to enable the Director of Public Prosecutions to apply for preservation orders in the trial court. In this regard, the learned Judge had this to say:

“It is my finding therefore that in view of the doctrine of exhaustion the application for preservation of the motor vehicle ought to have been made in the trial court which ultimately is the court seized of the case where the issue of whether the motor vehicle was in fact used in the commission of that crime, shall be determined.”
9. Dissatisfied with the decision of E N Maina, J, the applicant moved to this Court on appeal on the 7 grounds set out in its Memorandum of Appeal dated October 21, 2022. In summary, the applicant faults the learned Judge for: finding that the applicant's Originating Motion was not properly before the court; in holding that the motor vehicle in issue was a “conveyance” in relation to the offence charged, and within the meaning of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, and hence liable to forfeiture under section 20(2) of the Act; in directing that the application for preservation be made before the trial court; by failing to appreciate that the said motor vehicle, having been used to facilitate trafficking in narcotic substances, was realisable property within the meaning of section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*; for directing the Director of Public Prosecutions to file an application for forfeiture while the DPP was not party to the proceedings; for vacating the preservation orders; and for applying the wrong principles of law.
10. Before us is the applicant's notice of motion dated October 21, 2022 seeking stay of execution of the ruling of E N Maina, J dated October 6, 2022 pending hearing and determination of the intended



appeal. The motion is anchored on 8 grounds, and is supported by the annexed affidavit of CPL Frederick Muriuki sworn on October 21, 2022, the content of which we need not reproduce here. In essence, the applicant contends that it has an arguable appeal because it touches on the interpretation of section 82(2) (b) as read with section 2 of the [Proceeds of Crime and Anti-Money Laundering Act](#). According to the applicant, if the orders of the learned Judge are executed, the appeal would be rendered nugatory. It prays that its Motion be granted as prayed.

11. In support of the applicant’s Motion, the learned Principal State Counsel, Stephen Terrel, filed his written submissions dated November 9, 2022. Counsel cited this Court’s decision in [Kenya Tea Growers Association and Another v Kenya Planters and Agricultural Workers Union](#) [2001] eKLR, submitting that the applicant’s intended appeal is arguable even though it need not succeed; and that there is at least one issue upon which the Court should pronounce its decision. On the authority of [Butt v Rent Restriction Tribunal](#) [1979] eKLR, counsel sought to invoke the jurisdiction of this court to grant stay pending the intended appeal.
12. The 4th respondent opposes the applicant’s motion vide the replying affidavit of Wambani Deya, the 4th respondent’s legal officer, sworn on November 7, 2022. According to Mr Deya, the applicant’s intended appeal is not arguable. On the nugatory aspect, he states that the court granted the applicant “a second bite at the cherry” by directing that it moves the appropriate court for appropriate relief. They urge us to dismiss the Motion with costs.
13. In opposition to the applicant’s motion, learned counsel for the 4th respondent, M/s Orende and Associates, filed their written submissions dated December 9, 2022. Counsel cited the case of [Trust Bank Limited and Another v Investtech Bank Limited and 3 Others](#) [2000] eKLR and submitted that for stay of execution to issue, the applicant must show that he or she has an arguable appeal; and that the appeal, if successful, would be rendered nugatory absent stay.
14. On the nugatory aspect, learned counsel cited this Court’s decision in [Kenya Industrial Estate Limited and Another v Matilda Tenge Mwachia](#) [2021] eKLR and [Masai and Another v Masai and Another](#) [2021] eKLR.
They urged us to find that the applicant has not demonstrated that the intended appeal would be rendered nugatory if the orders sought are not granted.
15. On the other hand, the 1st 2nd and 3rd respondents have not filed any affidavits or written submissions in reply to the applicant’s motion.
16. The principles that apply in applications under Rule 5(2) (b) of the [Court of Appeal Rules](#) for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this court, including those cited by the parties, and to which we now turn.
17. On the first limb of this twin principle, this court held in [Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC](#) [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.



18. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v A A Kawir Transporters & 4 Others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.

19. That brings us to the second limb of the twin principle
– whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted.
The term

“nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA p227 at p232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

20. On our reading of the grounds on which the applicant’s Motion is founded, the affidavit in support thereof, the replying affidavit, and of the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicant’s intended appeal is arguable. That satisfies the first limb of the twin principle for grant of orders under Rule 5(2) (b) of this Court’s Rules.

21. As to whether the intended appeal, if successful, would be rendered nugatory absent stay, we say this: First, the motor vehicle sought to be preserved is liable to seizure and forfeiture at any time pursuant to an order of the court properly made in the criminal proceedings before the trial court. Secondly, vacation of the impugned orders does not in any way stand in the way of the applicant’s right to obtain appropriate orders of preservation in the appropriate court.

Thirdly, the trial court has power to impose any penal sanctions on the respondents or any of them in the event of failure to surrender the motor vehicle to the applicant’s custody if so ordered. In view of the foregoing, we are not persuaded that the applicant’s intended appeal, if successful, would be rendered nugatory if the orders sought are not granted. Accordingly, the applicant’s notice of motion dated October 21, 2022 fails and is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

