



Ihura & another v Hagos Birikirti Tewoldenrehen De La Torre & Ramirez Nelly Victoria (Suing as the Personal Representatives of the Estate of Mendoza Lop Az Aquilina - Deceased) (Civil Appeal (Application) E093 of 2022) [2023] KECA 59 (KLR) (3 February 2023) (Reasons)

Neutral citation: [2023] KECA 59 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E093 OF 2022
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
FEBRUARY 3, 2023**

BETWEEN

EVANS IHURA 1ST APPLICANT

EVANS IHURA NJOROGE 2ND APPLICANT

AND

HAGOS BIRIKIRTI TEWOLDENREHEN DE LA TORRE & RAMIREZ NELLY VICTORIA (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF MENDOZA LOP AZ AQUILINA - DECEASED) RESPONDENT

(Application for stay of execution of the Judgment/Decree of the High Court of Kenya at Nairobi (JK Serгон, J) dated July 10, 2020 in Milimani High Court Civil Appeal No 519 of 2018)

REASONS

Rasons for determination of the court

1. By a notice of motion dated April 22, 2022, brought under rule 5(2)(b) of the [Court of Appeal Rules](#), the applicants Evans Ihura and Evans Ihura Njoroge, seek orders that pending the hearing and determination of their appeal against the judgment of the High Court (Serгон, J), in Milimani High Court Civil Appeal no 519 of 2018, this court grants an order of stay of execution of the judgment and decree, and all consequential orders and proceedings.
2. The application is anchored on grounds stated on the face of the motion and an affidavit sworn by Evans Ihura Njoroge (Njoroge). In brief, the applicants are aggrieved by the judgment particularly the award on quantum. They believe they have an arguable appeal, that the delay in filing the motion was not deliberate but inadvertent as the applicants' previous advocates left the bar and moved to the bench, and that if the orders are not granted, the court will proceed to execute the judgment, and this will render the applicants' intended appeal nugatory.



3. In the affidavit sworn by Njoroge, the applicants relying on the grounds set out on its memorandum of appeal, reiterate that they have an arguable appeal. The applicants indicate that their insurer is willing and able to furnish the court with a bank guarantee as security, pending the hearing and determination of the appeal.
4. The application is opposed through a replying affidavit sworn by Onsando Osiemo, the advocate handling the matter on behalf of the respondent. The advocate deposes that the applicants had previously filed an application for stay of execution pending appeal, which application was denied, and that a second similar application was also dismissed for being *res judicata*. Counsel maintains that the applicants have failed to explain the delay in filing their application, and that the application contravenes rule 77(1) of the [Court of Appeal Rules](#); that the respondents were not served with the applicants' letter applying for court proceedings, and therefore the certificate of delay that they seek to rely on, is not valid.
5. The respondents have also filed written submissions in which they state that the suit arises from an accident that happened on September 13, 2013, and that the matter has been pending since February 6, 2015 when the suit was filed. The respondent maintains that if the court is inclined to grant the application, it should order the appellant to deposit a decretal amount in an interest earning account in the joint names of the parties' advocates.
6. During the hearing of the motion, only Mr Onsando for the respondent was present in court. The applicants though duly served, were absent.
7. We have carefully considered this application. Under Rule 5(2)(b) of the Court of Appeal Rules, an applicant has to satisfy the twin principles of arguability and the nugatory aspect by demonstrating that they have an appeal which is arguable and not frivolous, and that absent an order of stay, the intended appeal will be rendered worthless. (See [Housing Finance of Kenya Limited vs Sharok Kher Mohammed Ali Hirji & Anor](#) [2015] eKLR; [Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others](#) [2013] eKLR).
8. We take cognizance of the fact that one single arguable issue is sufficient and it does not have to be one that must succeed. With this low threshold, we are inclined to accept that the intended appeal is arguable at least on the issue of quantum. However, the decree which is sought to be stayed is a monetary decree. The applicants have not shown in what way their intended appeal would be rendered nugatory as the money paid can easily be refunded if they are successful. The applicants have not alleged nor demonstrated that the respondent will not be able to repay the decretal sum, if required to do so. In the circumstances, the applicants have failed to satisfy the nugatory aspect.
9. In addition, although the applicants have indicated that their insurer is ready and willing to deposit the decretal sum, there is nothing to demonstrate this. In the circumstances, there is no justification for denying the respondent the fruits of the judgment. As the applicants have failed to prove the nugatory aspect and were required to prove both the arguability of the appeal and the nugatory aspect if orders are not issued, this application fails.

It is accordingly dismissed with costs.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME



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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

