Kenya Railways Corporation & another v Milly Glass Works Limited (Civil Application E071 of 2022) [2023] KECA 90 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 90 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E071 OF 2022

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

FEBRUARY 3, 2023

BETWEEN

KENYA RAILWAYS CORPORATION .... 1ST APPELLANT

PAMELA JOY OUKO T/A SADIQUE ENTERPRISES AUCTIONEERS .... 2ND APPELLANT

AND

MILLY GLASS WORKS LIMITED .... RESPONDENT

(An application for stay of execution of the Judgment of the Environment and Land Court at Mombasa (Munyao Sila J) delivered on 4th November, 2021 in ELC Case No.135 of 2012)

RULING

1. The Appellants who are the applicants herein have filed a Notice of Motion dated October 19, 2022. The said application is expressed to be brought under rules 5(2)(b) and 49(1) of the *Court of Appeal Rules, 2022*. It seeks that this Court orders for stay of execution of the Judgement of Hon Justice Munyao Sila delivered on November 4, 2021, the resulting decree of February 11, 2022 and any other subsequent order pending the hearing and determination of the application and/or the appeal. They also seek an order as to payment of costs.

2. A brief summary of the matter is that the 1st Appellant who was the 1st Defendant before the trial court, was the registered proprietor of land parcel No Mombasa/Block XLVIII. Vide a lease dated January 16, 1980, the 1st Appellant leased the suit property to Kenya Glass Works Ltd for a term of 81 years with effect from January 1, 1977 at an annual rent of Kshs 22,000.00. The said lease was subsequently transferred to Respondent, then known as Bawazir Glass Works Limited. It was a term of the said lease that at the expiry of each period of 30 years, the 1st appellant would be at liberty to revise the rent upwards to an equivalent of 1/20th part of the unimproved value of the land as at the time of the revision. It appears that the said rent was revised and increased to Kshs 146,000.00 in January, 1994.

3. It was contended that though the revision date ought to have been January 1, 2007, the 1st Appellant did not exercise that right. According to the Respondent, this constituted a waiver and therefore the 1st Appellant had no right to revise the rent till the year 2037. However, on September 30, 2011, the 1st Appellant purported to revise the rents from Kshs 146,000/- to Kshs 10,200,000/- with effect from January 1, 2012 and appointed the 2nd Appellant, who was the 2nd Defendant, to demand for the said new rent.

4. On its part the 1st appellant maintained that it had the right to demand the rents as revised and the mere fact that it did not revise the rent immediately on the expiry of the 30 years did not constitute a waiver. It was its case that it could revise the rents any time after the expiry of the said period.

5. The following orders were therefore sought by the Respondent in the suit in the lower court:

   a. A declaration that the 1st Defendant had no right under the terms of the lease dated January 16, 1980 to raise the rent payable for the suit property;

   b. A declaration that the revision of the annual rent for the suit property from Kshs 146,000/- to Kshs 10,200,000/- is unlawful, null and void and of no effect;

   c. An order for permanent injunction against the defendants to stop them from interfering with the plaintiff's possession of the suit property and restrain them from charging any annual rent higher than Kshs 146,000/- until January, 2037;

   d. Costs of and incidental to the suit;

   e. Any other or further relief deemed fit.

6. In his judgement delivered on December 4, 2021, the Learned Trial Judge found that the Appellant had no right to demand for an increment in 2011 since 30 years had not lapsed from the last increment in January, 1994. While appreciating that with the disposal of that issue, that ought to have been the end of the matter, the Learned Trial Judge proceeded to hold that the sum of Kshs 10,2000,000.00 which the 1st Appellant demanded from the Appellant and which the Respondent paid was under coercion. It was his finding that the said demand was contrary to a consent order issued on March 14, 2013. In what the Learned Trial Judge considered the exercise of discretion, he ordered the 1st Appellant to refund to the Respondent all sums paid in excess of the annual amount of Kshs 146,000/- per year with interest. He also awarded costs of the suit to the Respondent payable by the 1st Appellant.

7. Aggrieved by the said decision the 1st Appellant on November 17, 2021, lodged a Notice of Appeal against the said judgement. Though unclear to us, it would seem that somehow the Respondent was able to quantify what was due to it under the said decree and commenced execution by way of garnishee proceedings by attaching the sums held to the credit of the 1st Appellant in Kenya Commercial Bank Limited.

8. According to the Appellants, the Learned Trial Judge made an award that was not pleaded; that the Court has no jurisdiction to try the matter in light of an existing arbitration clause; that the suit was caught by limitation; and that the Learned Judge erred in failing to quantify the specific money awarded to the Respondent.

9. In the submissions made on behalf of the Applicants through their learned counsel Mr. Ndegwa, it was noted that in its submissions, the Respondent conceded that the appeal is not frivolous. According to the Applicants, that the mode of execution unlawful and contrary to section 88(a) of the *Kenya Railways Corporation Act* which prohibits any form of execution or attachment of any nature against the Corporation or against any of the Corporation's properties. It was noted that the judgement did

not award the alleged Kshs 127,464,047/- or any specific quantum to be paid by the Applicants to the Respondents and that the said sum, being demanded is a personal determination by the Respondent.

10. It was submitted that though the amount involved is colossal, the Respondent had not indicated that it has the means to refund the same in the event that the appeal succeeds. According to the Appellants the payment of such an amount is likely to affect the operations of the 1st Appellant and its ability to render services to the public.

11. Through Learned Counsel, Mr Gikandi Ngibuini, the application was opposed.In a replying affidavit sworn by Mohamed Rashid it was deposed that the application is fatally defective as it offends Paragraph 3(f)(ii) of the *Court of Appeal Practice Directions 2015* given the concession that there is Civil Appeal No E083 of 2022 in existence; that the Notices of Appeal dated November 17, 2021 and November 3, 2022 are by Kenya Railways Corporation only hence the two (2) Applicants cannot jointly seek a stay of execution of the decree which they are not jointly appealing against; that the application is founded on grounds beyond the Notice of Appeal dated November 17, 2021since by the time that notice was filed, no issue had arisen as to the effect of section 88 of the *Kenya Railways Corporation Act* Cap 397; that the issue of objection to execution has been decided in a separate ruling delivered on November 1, 2022 which is the subject of a separate Notice of Appeal dated November 3, 2022; that the application for stay, founded on the earlier Notice of Appeal, cannot be resolved using a subsequent Notice of Appeal; that in light of the foregoing, the illegality or otherwise, of the intended execution in light of section 88 of Cap 397, is not an arguable point as far as the Notice of Motion dated October 19, 2022 is concerned.

12. It was further deposed that the amount is quantified and there is no allegation that paying the same would financially destabilize the applicants; that there is no allegation that the Respondent is impecunious; that the Applicants' conduct is contumelious, high-handed, oppressive and plainly unreasonable; and that the Respondent had made a proposal for refund of the rents.

13. The Respondent also filed written submissions in which the foregoing was reiterated. In his oral address before us on November 21, 2022, learned counsel, Mr Gikandi, while appreciating that the grounds of appeal are not frivolous, submitted that the application, instead of focussing on the memorandum of appeal, which is directed against the judgement delivered on November 4, 2021, is challenging the legality of the execution which was the subject of a ruling delivered on November 1, 2022. It was noted that the two notices of appeal are directed at two different decisions. Whereas the complaint is against the mode of execution, the Notice of Appeal against that ruling was, according to learned counsel, filed without leave of the Court.

14. Based on the case of *Ann Wanjiku Nduati v Fredrick Oogo Oyuoya* [2019] eKLR, it was submitted that the issues raised, however potent, cannot be deemed arguable when one is addressing an application that predates those issues. Mr Gikandi took issue with section 86 of *Kenya Railways Corporation Act* as entrenching impunity by the 1st Appellant, in so far as it bars execution against the 1st Appellant.

15. We have considered the Motion, the affidavits both in support of and in opposition thereto and the submissions made both in writing and orally before us. The principles that guide consideration of an application of this nature are now well settled. It is true that the filing of a Notice of Appeal is a pre-requisite to the grant of stay under Rule 5(2)(b) of the *Court of Appeal Rules*. However, at that point the Court is not concerned with the validity or otherwise of that Notice since the Rule does not talk

about a valid notice of Appeal. This was the position in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where this Court expressed itself as hereunder:

> "The applicant filed its notice of appeal against the said decision on May 26, 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that "........... where a valid notice of appeal ....;" the Rule simply provides that: -
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> > 'In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74. '

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered."

16. Accordingly, nothing turns upon the submissions by the Respondent that the Notice of Appeal lodged on November 3, 2022 was filed without leave as the Respondent has not informed us of the steps, if any, that have been taken to have the said Notice struck out or invalidated.

17. The Respondent has also taken issue with the fact that this application was filed contrary to paragraph 3(f)(ii) of the *Court of Appeal Practice Directions, 2015*. We decry the practice of parties filing applications relating to an existing appeal as separate matters from the appeal. Applications which have a bearing on or are related to an existing appeal ought to be made in the existing appeal for good order. However, the current position of this Court is that the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. Therefore, if a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. See *Deepak Chamanlal Kamani & another v Kenya Anti-Corruption Commission & 3 others* [2010] eKLR.

18. In this case, apart from non-compliance with the said Directions, the Respondent has not contended that any prejudice was occasioned by the non-compliance. We, on our part, find none.

19. While we agree with Mr Gikandi that only a party who has filed a Notice of Appeal can benefit from the exercise of discretion under Rule 5(2)(b) of the *Court of Appeal Rules, 2022*, we respectfully, disagree that where two applicants seek stay under that rule and only one of them has filed a Notice of Appeal, the application must fail. The application by the party who has filed a Notice of Appeal may still be considered on its merits while the application by the other party falls by the wayside. In this case, from the manner in which the application is presented, nothing turns on that issue since the order sought can only inure to the benefit of the 1st Appellant.

20. For an applicant to succeed he must, firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. The applicant must in addition show that the appeal would be rendered nugatory absent stay.

21. We have seen the intended grounds of appeal as disclosed in the supporting affidavit. In our respectful view, and as rightly conceded by the Respondent, the appeal cannot be termed as frivolous. The issues

of whether the Learned Trial Judge was justified, in the exercise of his discretion, to make an award that was not pleaded and the fact that the said award was not quantified are not an idle ground. This Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated on this issue as follows:

vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No Nai 345 of 2004.

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. See *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.

22. As this Court held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (*supra*):

> " It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable."

23. On the nugatory aspect, we are of the view that, in considering the ground, the Court ought to take a holistic approach in the exercise of its discretion. In this case, the execution being carried out is consequent to the judgement. What the applicant seeks is the stay of the execution of the judgement. In these circumstances we do not see how the execution of the main judgement can be treated separately from the subsequent garnishee proceedings which are, in effect, a process in the execution of the main judgement. That execution, it is contended is prohibited by law. We have not been told that the particular law has been nullified and we cannot deem it as nullified by analogy, as the Respondent has urged us to do and particularly not in an application of this nature. In light of the allegations that the mode of execution is unlawful coupled with the fact that the amount involved is colossal and the same is to be paid from the public coffers, we find that the Applicants have satisfied the second condition. See *Attorney General v Equip Agencies* [2002] eKLR.

24. In the premises we order that there be a stay of execution of the judgement of Hon Justice Munyao Sila delivered on November 4, 2021, the resulting decree of February 11, 2022 and any subsequent order pending the hearing and determination of Mombasa Court of Appeal Civil Appeal No E083 of 2022.

25. The costs of this application will be in the appeal.

26. It is so ordered.

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

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR