



Milestone Games Limited v Maina & another (Civil Application E399 of 2022) [2023] KECA 107 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 107 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E399 OF 2022
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

MILESTONE GAMES LIMITED APPLICANT

AND

ASENATH MAINA 1ST RESPONDENT

BETTING CONTROL AND LICENSING BOARD 2ND RESPONDENT

(Being an application for stay of the order of the High Court of Kenya at Nairobi (Anthony Ndung'u, J.) delivered on 19th September 2022 in High Court JR E138 OF 2022)

RULING

1. Before us is a notice of motion dated November 1, 2022 brought under rules 5(2) (b), 41, 47, and 53 of the *Court of Appeal Rules*. The applicant seeks the following prayers:
 - a.
 - b. That the honourable court do issue an order of stay of order number 4 made by Justice Anthony Ndung'u on September 19, 2022 in Nairobi HCJR No E138 of 2022 *R v Betting Control and Licensing Board Ex Parte Asenath Maina* pending the hearing and determination of Civil Appeal No E703 of 2022.
 - c.
 - d.
2. The applicant has cited a whopping 37 grounds in support of the application. In addition, a supporting affidavit was sworn by Mr Bernard Chauro, the applicant's operations manager. The 1st respondent, in opposition to the application, has filed a replying affidavit sworn on November 7, 2022. This prompted



the applicant to file a further affidavit sworn on November 10, 2022 by Mr Bernard Chauro. The parties have gone to great lengths to engage in the facts that are in dispute in the high court, but we will only highlight those that are necessary for the determination of this application.

3. By way of background, the parties are engaged in a vicious fight over trademark number 74874 under class 41 known as ‘sportpesa’ which is a well-known name in the betting industry. At the heart of the dispute is who, as between the parties, has the control and authority to use the said trademark, namely ‘sportpesa.’
4. From the record before us, it is apparent that several suits have been filed over the use of the said trademark. The suits are HCCOMM No E162 of 2022 in Commercial and Tax Division of the high court, HCJR Misc No E061 of 2021, HCJR Misc No E091 of 2022 and HCJR Misc No E138 of 2022, all in the Judicial Review Division of the high court at Nairobi. All these cases relate to the same issue of the trademark, but the one that is the subject of this application is Nairobi HCJR Misc No E138 of 2022.
5. On September 9, 2022, Nairobi HCJR Misc E138 of 2022 was placed before Justice Ngaah. The learned judge, in his ruling, noted that there were other pending suits relating to the same subject matter. He certified it urgent, but declined to grant any interim orders. The judge noted that civil suit No E162 of 2022 was pending in the Commercial and Tax Division of the high court and, therefore, there was a possibility that conflicting orders would be issued.
6. The learned judge thus directed that the application be mentioned on September 21, 2022 before Justice Ndung’u. In the meantime, the 1st respondent filed another certificate of urgency in the same file, being Nairobi HCJR Misc No E138 of 2022.
7. On September 19, 2022, the file was placed before Justice Ndung’u, who heard the application *ex-parte* and issued the following order:

“That leave so granted do operate as a stay of implementation and thereby suspend the operation and use of the impugned bookmarks license number 00448 issued to Milestone Games Limited to trade as ‘sportpesa’ pending the hearing and determination of the substantive judicial review application.”

This order triggered the dispute which is now before us.

8. The applicant has filed written submissions dated November 10, 2022 and, relying on the case of *Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union* [2012] eKLR, states that the application raises bona fide issues deserving determination of this court. The applicant also relies on the case of *Butt v Rent Restriction Tribunal* [1979] eKLR in support of its argument that the appeal will be rendered nugatory unless the order for stay is granted.
9. In opposition to the applicant’s motion, the 1st respondent did not file written submissions, but Mr Omollo Advocate made oral submissions. He submitted that the application was bad in law as the notice of appeal did not state whether it was appealing against part or the whole decision as required by Rule 77(3) of the *Court of Appeal Rules*. Mr Omollo further argued that the appeal did not raise any arguable grounds and that, in any event, the applicant had failed to demonstrate that the appeal would be rendered nugatory if the stay sought was not granted.
10. On his part, Mr Munene Wanjohi, state counsel for the 2nd respondent, indicated that he was not opposing the application.



11. We note that the parties have gone to great lengths on factual issues. However, at this stage, it is important to state that the parties are walking on a well-trodden path, and that the applicable legal principles are well settled. To be successful, an applicant must first show that the intended appeal or the appeal (if any filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal or intended appeal, if successful, would be rendered nugatory if execution or further proceedings of the impugned judgment, decree, or order were not stayed. These principles have been enumerated in, among others, the following judicial pronouncements of this court, including those cited by the parties, and to which we now turn.
12. On the first limb of this twin principle, this court held in *Clement Kungu Waibara v Annie Wanjiku Kibeb & IEBC* [2020] eKLR that, for stay orders to issue, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e not frivolous and the appeal or intended appeal would, in the absence of a stay, be rendered nugatory.
13. Concerning the sufficiency of the grounds of appeal to warrant a grant of the stay orders sought, this court in *Yellow Horse Inns Limited & another v AA Kawir Transporters Limited & 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.
14. That brings us to the second principle on whether the appeal, if successful, would be rendered nugatory in the event that the stay order is not granted. The term ‘nugatory’ was defined in *Reliance Bank Ltd v Norlake Investments Limited* [2002] 1 EA 227 on page 232 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.
15. We note that the applicant has annexed a draft memorandum of appeal to the application, and has also filed the substantive Appeal No E703 of 2022. The crux of the appeal can be gleaned from the grounds, and revolves around how the ex-parte order was issued by the high court. Our reading of the grounds, the affidavit in support thereof, the replying affidavit, and the respective written and oral submissions reveal that the crux of the matter is about the use of the trademark.
16. We find that, if the matter is left to proceed as is, it may end up creating more confusion. In the circumstances, this is one of those cases where the maintenance of the status quo pending the hearing of the appeal is appropriate. Indeed, the intended appeal may be rendered nugatory if the high court order is maintained, as it may disrupt the applicant’s business operations with irreversible consequences.
17. Therefore, it is our finding that the applicant has satisfied the twin principles for the grant of orders under Rule 5 (2) (b) of this court’s rules. Accordingly, we allow the applicant’s notice of motion dated November 1, 2022 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, CIArb, FCIArb



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

