



Oyoo t/a Crosslink Services v Esther & another (Civil Application E220 of 2022) [2023] KECA 95 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 95 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E220 OF 2022
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

SAMUEL ONYANGO OYOO T/A CROSSLINK SERVICES APPELLANT

AND

KAVIRA MALONGA ESTHER 1ST RESPONDENT

BANK OF AFRICA KENYA LIMITED 2ND RESPONDENT

(eing an application for stay of execution pending determination of intended appeal from the Ruling of the High Court of Kenya at Nairobi (Commercial & Tax Division) (A. Mshila, J.) dated 17th June 2022 in HCCC E466 OF 2019)

RULING

1. The application dated 24th June 2022 and supported by the affidavit of even date sworn by Samuel Onyango Oyoo is made pursuant to Rule 5(2) (b) of the [Court of Appeal Rules](#) seeking orders that, pending hearing and determination of this appeal, there be stay of execution of the Decree given on November 12, 2021 and issued on November 23, 2021 and the garnishee order absolute issued on June 17, 2022 in Nairobi High Court Civil Case No. E455 of 2019 - Commercial and Tax Division.
2. The genesis of this matter stems from the point when the respondent filed a suit, Nairobi High Court Civil Case No. E455 of 2019 - Commercial and Tax Division, seeking to enforce a foreign judgment obtained from the Commercial Court of Goma (in the Democratic Republic of Congo) against the applicant. The applicant entered appearance but failed to file a defence and, consequently, the High Court Deputy Registrar (C. Wanyama) entered default judgment in the sum of Usd. 277,014.00 and on 12th November 2021, issued a decree on November 23, 2021. On November 28, 2021, Mshila, J. finally issued a garnishee order nisi based on the decree.
3. The applicant sought to set aside the default judgment through a motion dated December 20, 2021, contending that it was secretly obtained, but was dismissed by Mshila, J. vide a ruling on June 17, 2022,



and allowed the respondent's motion dated November 25, 2021 which sought to make the garnishee order nisi absolute and, in effect, directed the garnishee bank to release the funds held by the bank to the respondent in satisfaction of the decree. The applicant laments that taxation of party to party costs was never done, and that the certificate of costs issued before execution by way of garnishee undertaken by the respondent, and its right of appeal can only be meaningfully realized if execution of the garnishee order absolute is stayed pending appeal. The applicant maintains that the appeal is arguable and has high chances of success as the High Court had issued garnishee order nisi before the foreign judgment was recognized and adopted in Kenya in a normal suit. According to the applicant, the court lacked jurisdiction, and, accordingly, the second application was seeking setting aside of default judgment due to delay in obtaining critical documents from a foreign country, the Democratic Republic of Congo (DRC), and that the 18 days delay in filing was not inordinate.

4. The applicant contends that there is no prejudice likely to be occasioned that there would be no need for security for the decretal amount since the funds sought to be accessed are held by the garnishee, that the respondent will be able to access them without challenges in the unlikely event the appeal is unsuccessful; and that, even if stay is granted, the funds would be safe in the garnisheered account until the appeal is heard and determined.
5. The application was opposed through the replying affidavit sworn by Kavira Malonga Esther dated July 11, 2022, who states that the grounds of appeal set out in the draft Memorandum of Appeal are not arguable at all as the application dated December 20, 2021 which is impugned herein was properly dismissed by the High Court on account of inter alia, being resjudicata since the issues had been earlier canvassed and determined by the Court in the application dated February 10, 2020; That the application to set aside default judgment was inordinately delayed for two years, and this disentitled the applicant from enjoying any indulgence by the court; and the appeal would not be rendered nugatory given that this is a money decree, which can be compensated or reimbursed in the unlikely event the appeal succeeds.
6. The respondent is categorical that the applicant has not met the conditions for granting stay of execution that the application before this Court is a ruse to delay the respondent from enjoying the fruits of the judgment, an abuse of the court process with the aim of delaying justice; that the garnishee bank has already released the garnisheered fund to the respondent in partial satisfaction of the decree and, as such, the application has been overtaken by events; and that, in any event, the applicant would need to provide security, as the garnisheered funds were less than a fifth of the total decretal sum exempting costs and interest.
7. It is further submitted that the applicant has not shown that he has the resources to satisfy the decretal sum should the appeal fail, taking into account the applicant's behavior in changing bank accounts and relocating to Kenya to avoid enforcement of the foreign judgment; and that the respondent will suffer great prejudice if stay is granted as the respondent had been denied the fruit of his judgment since 2019 when he obtained foreign judgment until when the intended appeal may be determined.
8. This Court has stated that, whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under rule 5(2) (b), the applicant has to establish that:
 - i. the appeal is arguable;
 - ii. the appeal is likely to be rendered nugatory if stay is not granted and the appeal succeeds.
9. We have considered this application, the affidavit in support, and the contending submissions filed by the parties. The application before us is one under rule 5(2) (b), and the principles upon which such



an application is granted are well known, having been laid out in various decisions of this Court. This Court in *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR held that the jurisdiction of the Court under rule 5(2) (b) is original and discretionary, that it is trite law that to succeed an applicant had to show that his appeal is arguable, and, secondly, that the appeal would be rendered nugatory should stay not be granted. In *Housing Finance Company of Kenya Limited vs Sharock Kher Mohamed Ali Hirji & Anor* [2015] eKLR, this Court stated:

“ 10. The principles governing the exercise of the court’s jurisdiction under rule 5(2) (b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus: -

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely: -

1. That the appeal or intended appeal is an arguable one, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

10. An arguable appeal is one that is not idle and/or frivolous and that at least a single bonafide issue needs to be raised by the applicant. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.

Both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).

11. Having considered the grounds set out in the motion, we find that they are not frivolous. The appeal is arguable and raises the issue of whether or not there was a justifiable and excusable reason for not filing a defence in a timely fashion.

12. On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the court is bound to consider the conflicting claims of both sides.

13. In the case of *African Safari Club Limited vs Safe Rentals Limited*, [2010] eKLR this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

14. In short, the court is to decide which party’s hardship is greater. With that in mind, this Court is persuaded that if the applicant’s prayer for stay of execution is denied and the appeal eventually



succeeds, the applicant will be adequately compensated by an award of damages, as this is a money decree.

15. The applicants have raised the issue that the appeal will be rendered nugatory because the garnisheed funds will be transferred to the respondent. We take note of the fact that the respondent obtained a default judgment in DRC, and that, for a very long time, the applicant never responded by filing a defence. The application was made after the garnishee funds had been remitted, and the respondent has satisfactorily persuaded the court that the said funds have already been released to her and, in any event, the said funds do not satisfy the entire decretal amount. We thus concur with the respondent that the application has since been overtaken by events, the monies having been disbursed to the respondent in partial satisfaction of the decretal amount.
16. This Court has on several occasions stated that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party. It is our finding that the applicant has not persuaded us that the appeal will be rendered nugatory should the application be denied. In any event, we are of the view that should the appeal succeed, this being a money decree the applicant can be well and fully be compensated for by way of damages.
17. Consequently, the applicant having failed to establish both limbs to satisfy the requirement under Rule 5(2) (b) of this *court's rules*, we hold that the notice of motion dated June 24, 2022 lacks merit and the same is hereby dismissed with costs to the respondent.

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

H. A. OMONDI

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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

