



Shah v Azim Sameja t/a Business 2000 & another (Civil Application E426 of 2022) [2023] KECA 368 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 368 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E426 OF 2022
DK MUSINGA, JM MATIVO & WK KORIR, JJA
MARCH 31, 2023**

BETWEEN

JITENDRAKUMAR LAKHAMSHI SHAH APPLICANT

AND

AZIM SAMEJA T/A BUSINESS 2000 1ST RESPONDENT

**LAKHAMSHI VIRPAL SHAH KAMLABEN LAKHAMSHI SHAH
SURESHCHANDRA LAKHAMSHI SHAH ASHOKKUMAR LAKHAMSHI
SHAH HARSHA LAKHAMSHI SHAH PRATIMA LAKHAMSHI SHAH T/A
HIGH PARK INVESTMENTS 2ND RESPONDENT**

((Being an application for stay of sale and auction and stay of execution pending the lodging, hearing and determination of an intended appeal from ruling of the High Court at Nairobi (J. K. Sergon, J.) dated 17th May, 2022 in HC Civil Case No. 689 of 2001.))

RULING

1. The Notice of Motion before us is brought under rules 5(2)(b), 39(b), 42 and 43 of the [Court of Appeal Rules, 2010](#). Through the Motion, the applicant seeks to stay the sale and/or auction of Nairobi LR No 206/5802 (hereinafter the 'suit property') which intended sale arises from the orders of Sergon, J in Nairobi High Court Civil Case No 689 of 2001. The applicant also prays that he be granted leave to appeal against the said orders. The final prayer seeks costs attendant to the application.
2. The grounds upon which the application is premised are captured both on the face of the application as well as in the affidavit sworn by the applicant on November 10, 2022. The applicant's case is that he filed objection proceedings in Nairobi High Court Civil Case No 689 of 2001 seeking to revoke the attachment orders issued in respect of the suit property. The attachment orders had been issued in execution of the judgment in that matter. It is the applicant's averment that his application was dismissed, and the 1st respondent was allowed to dispose of the suit property. The applicant asserts that



his intended appeal is arguable with high prospects of success based on the grounds of appeal disclosed in the application and the supporting affidavit. The applicant also points out that despite being the registered proprietor of the suit property, he was not a party to the suit and no decree has thus been entered against him. The applicant deposes that there is a high likelihood that the property will be auctioned if stay orders are not granted thus rendering his intended appeal nugatory. The applicant argues that the suit property is valued at Kshs 400,000,000 while the decretal sum is Kshs 25,000,000, hence if the property is sold, he would suffer loss that cannot be compensated by damages. Lastly, the applicant avers that owing to the fact that the property is already attached, no prejudice will be suffered by the 1st respondent if the orders sought are granted.

3. The 1st respondent, Azim Sameja, swore a replying affidavit in opposition to the application. It is the 1st respondent's position that the application is unmerited, unjustified, untenable, an afterthought and merely intended to bar him from enjoying the fruits of his judgment. He also contends that the application is incompetent, ambiguous and fatally defective thereby amounting to an abuse of the court process. The 1st respondent avers that the applicant's claim that he was not aware of the proceedings before the trial court is unfounded as he has all along been aware of this case and even participated in the proceedings before the superior court. The 1st respondent contends that this Court lacks jurisdiction to entertain the application because the applicant was denied leave by the superior court to appeal to this Court. The 1st respondent also avers that since the applicant's objection was dismissed by the trial court, he lacks the locus standi to file pleadings before this Court. Further, that the orders of the trial court were negative in nature and no order of stay of execution can ensue against such orders.
4. The 1st respondent additionally avers that the applicant's supporting affidavit raises new issues not canvassed before the trial court and that some averments are based on false and forged documents. The 1st respondent deposes that the applicant is not truthful and is litigating on two fronts; as an applicant and as a director of the 2nd respondent. The 1st respondent takes the view that since the applicant has not deposited any security, no orders of stay should be granted. According to him, the intended appeal is frivolous and has no prospects of success.
5. The applicant swore a further affidavit averring that he had lodged a Notice of Appeal within time. According to him his application for leave to appeal has been brought within the timelines provided by the Rules of this Court since the refusal of leave to appeal was made on November 11, 2022 and the instant application filed on November 17, 2022. The applicant reiterates that he has the requisite locus standi to lodge the appeal as he is the registered proprietor of the suit property and that the 2nd respondent is not a company as alleged by the 1st respondent.
6. Mr Mboya who appeared for the applicant set off the submissions by stating that the impugned ruling dated May 17, 2022 determined two applications, namely, the applicant's application objecting to the attachment of the suit property, and the 1st respondent's application seeking an order to auction the same property. According to Counsel, the High Court allowed the 1st respondent's application and dismissed the applicant's objection. Counsel acknowledged that grant of orders under rule 5(2)(b) of the Rules of this Court is discretionary. He also appreciated that for an application for stay of execution to succeed, the applicant must disclose an arguable appeal and demonstrate that the intended appeal would be rendered nugatory if orders are not granted. It was submitted for the applicant that issuance of a stay order will not prejudice the 1st respondent's interests since an attachment order has already been registered against the suit property. The applicant's Counsel also submitted that because the market value of the suit property is in excess of Kshs 400,000,000, the decree is fully secured. Further, that the order of stay sought does not extend to the lifting of the attachment orders registered against the title.



7. Counsel for the applicant further submitted that the Notice of Appeal was filed within the timelines provided in the rules and it was not compulsory to obtain leave to appeal prior to the filing of the Notice of Appeal. In order to demonstrate compliance with the rules, Counsel pointed out that the Notice of Appeal was lodged on May 20, 2022, which was three days after the delivery of the impugned ruling of May 17, 2022. Further, that the present application was filed on November 17, 2022, which was only six days after the High Court, on November 11, 2022, rejected the applicant's application for leave to appeal.
8. Turning to the prayer for leave to appeal the decision of the superior court, Counsel submitted that the application is merited because the applicant has demonstrated that he has an arguable appeal. Further, that leave to appeal should only be denied where the applicant's appeal has no realistic prospects of success. Counsel placed reliance on the cases of *Sango Bay Estates Ltd v Dresdner Bank AG [1971] EA 17* and *Machira T/A Machira & Company Advocates v Mwangi & Another [2002] 2 KLR 391* to buttress the arguments.
9. The 2nd respondent filed submissions dated December 12, 2022 and supported the application. According to the 2nd respondent, judgment in Nairobi HC Civil Case No 689 of 2001 was delivered in default of the appearance of the defendants named therein. Although the 2nd respondent conceded that they sought to set aside the said judgment to no avail, it was submitted that the applicant's intended appeal raises arguable points of law and fact that warrants this Court's determination. It was therefore the 2nd respondent's position that the stay orders are warranted to preserve the suit property.
10. The 1st respondent did not file submissions in the matter. At the hearing of the application, Mr Omondi for the 1st respondent briefly submitted that the ruling of May 17, 2022 which the applicant seeks to appeal is no longer in existence as the same was reviewed by the trial court on January 26, 2023. Further, that the property which was the subject of the High Court decision is different from the one cited in the applicant's motion. Counsel closed his submissions by stating that he was also relying on the 1st respondent's replying affidavit.
11. In response to the 1st respondent's submission that this application is in respect of a different property, Mr Mboya stated that the error in regard to the land parcel number was carried to this application from the decree that had been extracted by the 1st respondent's Counsel. Further, that the error was corrected through the review at the High Court alluded to by the 1st respondent.
12. Perhaps before we delve into what we perceive to be the issues for our determination in this matter, there is a prudential call for us to briefly rehearse the historical background of this matter as can be gleaned from the record. In 2001 the 1st respondent filed a suit against the 2nd respondent claiming special and general damages as a result of alleged wrongful eviction and demolition of his business premises. Judgment was entered in favour of the 1st respondent against the 2nd respondent on April 6, 2016 for Kshs 15, 083,303.18. The 1st respondent then began the process of realizing the fruits of his judgement through a firm of auctioneers. It is during the process of execution that two applications were lodged; one by the applicant dated December 20, 2019 seeking the lifting of the attachment of the suit property and another one dated October 30, 2019 by the 1st respondent praying for the settlement of the terms of the sale of the suit land. In a ruling delivered on May 17, 2022 the High Court allowed the application by the 1st respondent and dismissed the one by the applicant.
13. Subsequently, the applicant lodged another application before the High Court on May 23, 2022 where he sought stay of execution against the ruling dated May 17, 2022 and leave to appeal that decision. On November 11, 2022 the application was dismissed in its entirety. In dismissing the motion, the learned Judge pointed out that the applicant had not met the threshold for the grant of an order of



stay pending appeal. As for the prayer for leave to appeal, the Court held that the applicant had not demonstrated sufficient cause for grant of the order.

14. The applicant is now before us seeking leave to appeal the decision dated May 17, 2022 allowing the 1st respondent to sell the suit property. He is also praying that the execution of that decision be stayed pending the hearing and determination of his intended appeal. We have considered the notice of motion, the supporting affidavit, the replying affidavit, the further affidavit as well as the submissions of the parties. The question as to whether the instant application is in respect of the property that was the subject of the proceedings before the trial court was adequately addressed by Counsel for the applicant, who pointed out that he lifted the parcel number from the decree and that the error had since been rectified. We are therefore satisfied that the property identified in the application before this Court is one and the same with the property that was the subject of the proceedings before the High Court.
15. The 1st respondent has questioned this Court's jurisdiction to handle this Motion on the ground that the applicant is yet to obtain leave to appeal against the impugned decision of May 17, 2022. In answer to the challenge to our jurisdiction, it is important to observe that under rule 77 as read with rule 5(2)(b) of the Court of Appeal Rules, 2022, this Court can only be seized of an application for stay of execution once a Notice of Appeal has been lodged. The reach of this Court's jurisdiction under rule 5(2)(b) was aptly summarized in [*Safaricom Limited v Ocean View Beach Hotel Limited & 2 others \[2010\] eKLR*](#)
thus:

' It is clear from all the provisions of Rule 5 that their basic aim is to provide an interim relief where the superior court has determined a matter and the party against whom the determination is made has either appealed or intends to appeal. If there is no appeal or no intention to appeal, this Court would have no jurisdiction to meddle in a decision made by the superior court.'
16. It therefore follows that for this Court's jurisdiction to be invoked under rule 5(2)(b), an applicant ought to have lodged a Notice of Appeal. From the pleadings before us, the applicant lodged a Notice of Appeal within the requisite 14 days from the date of the decision he intends to appeal. The 1st respondent's insinuation that the said Notice of Appeal is defective because the applicant had been denied leave to appeal against the impugned decision is misplaced considering that rule 77(4) of the Court of Appeal Rules, 2022 allows for the lodging of a Notice of Appeal prior to the obtaining of leave where an appeal lies only with such leave. The applicant's Notice of Appeal dated May 20, 2022 is therefore properly before this Court and the argument by the 1st respondent that this Court is bereft of jurisdiction cannot lie in the circumstances.
17. We note that the 1st respondent has correctly pointed out that the applicant is yet to obtain leave to appeal the impugned ruling as his application for leave to appeal was dismissed by the superior court. Therefore, the next issue to be determined is whether the applicant's prayer for leave to appeal has merit. As pointed out by the High Court in the ruling dated November 11, 2022, an automatic right of appeal lies with respect to the 1st respondent's application of October 30, 2019 which was allowed. This automatic right of appeal emanates from the provisions of Order 43 Rule 1(1)(k) of the [*Civil Procedure Rules*](#). The prayer for leave to appeal is therefore with regard to the dismissed application dated December 20, 2019 lodged by the applicant under Order 22 Rule 51 of the Civil Procedure Rules.
18. Our discussion on the issue of leave to appeal will therefore be limited to the fate of the applicant's dismissed application. Under rule 41(1)(b)(ii) of the Court of Appeal Rules, 2022, where an appeal



lies with leave, and the High Court has declined to grant leave, as is the case in this matter, the applicant is required to approach this Court within 14 days from the date of the refusal of leave to appeal. In this case, the applicant had until November 25, 2022 from the date of the ruling on November 11, 2022 to lodge his application. The present application was filed on November 17, 2022 and was therefore filed within the time specified in the Rules. Further, under rule 55(2)(a) of the Rules of this Court, an application for leave to appeal is to be determined by a panel of three judges of this Court. This bench is therefore possessed of the prerequisite jurisdiction to hear and determine this matter.

19. An applicant seeking leave to appeal where the right of appeal lies with leave is under an obligation to convince the Court that the intended appeal raises issues which require proper judicial consideration. This principle was restated by this Court while addressing the requirement for leave under the [*Law of Succession Act*](#) in [*Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another \[2014\] eKLR*](#) as follows:

' Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration.'

This was also the position taken in *Sango Bay Estates Ltd (supra)* and *Machira T/A Machira & Company Advocates (supra)*.

20. We note that the gist of the applicant's case before the superior court concerns his proprietary rights in relation to the suit property which the 1st respondent seeks to auction in satisfaction of a decree issued in proceedings to which the applicant alleges, he was not party to. As we have already stated in this ruling, the applicant's intended appeal is arguable therefore calling for judicial consideration by this Court. In other words, the applicant's intended appeal cannot be said to be without realistic prospects of success. We are of the view that granting leave to the applicant to appeal against the decision declining to lift the attachment on the suit property will give the judges who will hear the applicant's intended appeal an opportunity to render themselves on the whole ruling of May 17, 2022. In any case, a perusal of the replying affidavit of the 1st respondent discloses no opposition to the application for leave to appeal. The application for leave to appeal against the decision dated May 17, 2022 dismissing the applicant's application dated December 20, 2019 is therefore allowed as prayed.

21. Having established that we have jurisdiction, and having granted leave to the applicant to appeal the impugned ruling, we now turn to the issue as to whether the applicant has demonstrated a case warranting grant of stay of execution pending appeal. It is now well established that for an order of stay to issue, an applicant ought to satisfy two limbs, namely, that the intended appeal is arguable, and that if the orders for stay are not granted, the intended appeal will be rendered nugatory. The key parameters for examining whether an application satisfies the dual limbs were laid down by this Court in [*Stanley Kangethe Kinyanjui v Tony Ketter & 5 others \[2013\] eKLR*](#) as follows:

' From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:'

- i. ...
- ii. ...
- iii. ...
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar



circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No Nai 189 of 2001.*

- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd & 2 others, Civil Application No 124 of 2008.*
- viii. ...
- ix. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227* at page 232.
- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.*

22. In light of the principles stated in Stanley Kangethe Kinyanjui (supra), the first question is whether the intended appeal is arguable. We have considered the six grounds of appeal as enumerated in the application and the supporting affidavit. We note, and this makes the issue worth determining on appeal, that the applicant claims ownership of the suit property and questions whether the same can be auctioned in satisfaction of a judgment obtained in proceedings in which he was not party to. Much as the judgment entered in favour of the 1st respondent is currently not the subject of any appeal, the applicant is entitled to challenge any attempt to dispose of his property in execution of that judgment. We need not say more in order to reach the conclusion that this ground of appeal alone raises an arguable point that calls for this Court's determination. We say so cognizant of the legal principle that an arguable appeal ought not to be one which will necessarily succeed but should also not be a frivolous one. The applicant has therefore convinced us that he has an arguable appeal.
23. Having satisfactorily established that he has an arguable appeal, the applicant is also required to demonstrate that unless an order of stay is granted, his intended appeal, if successful, will be rendered nugatory. The question therefore is whether the intended appeal is likely to be rendered nugatory if the orders sought are not granted. The applicant's case is that an attachment order has already been registered against the suit property. He also avers that its market value exceeds Kshs 400,000,000 while the decretal sum is Kshs 25,000,000. The 1st respondent on his part does not dispute the applicant's averments and instead deposes that the applicant has not offered any security and is thus not deserving of any orders. We only need to point out that unlike an order of stay of execution under the Civil Procedure Rules, 2010, an order of stay pending appeal under rule 5(2)(b) of the Court of Appeal Rules, 2022 is not dependent on the provision of security by the applicant.



24. In order to determine whether failure to grant stay of execution is likely to render the appeal nugatory, we need to consider if the order sought to be stayed can be reversed once executed. Even where the decree cannot be reversed once executed, an order of stay will not issue where it is found that damages can adequately compensate the party seeking stay. However, where it is determined that an impugned decision once implemented is irreversible and damages cannot reasonably compensate the applicant, then it can be said that the appeal is likely to be rendered nugatory and an order of stay is desirable.
25. As averred by the applicant, and the averment is not disputed, the value of the suit property is estimated to be in excess of Kshs 400,000,000 while the decretal sum is Kshs 25,000,000. The question is whether damages would adequately compensate the applicant if the suit property were to be auctioned during the pendency of the appeal, and the appeal eventually succeeds. It goes without saying that once the property is sold to a third party at an auction, it may be impossible to reverse the transaction. An auction might not yield the market value of the property and at the end of the day the applicant may not be adequately compensated by damages. We are therefore of the view that the intended appeal, if successful, will be rendered nugatory if orders of stay of execution are not granted.
26. Before we conclude on this issue, we state that even as we uphold the interests of the applicant, we also need to consider whether the respondent will be prejudiced by orders of stay of execution. The applicant is correct that the stay order to be issued in this matter is not meant to reverse the existing attachment of the suit property. What the order aims to achieve is to bar the 1st respondent from continuing with the execution process. The 1st respondent will therefore not lose sight of the property as it is already attached, and no prejudice can occur in such circumstances. Considering the facts of the application before this Court, we find that the prayer for stay of execution pending appeal has merit as the dual limbs have been satisfied.
27. Consequently, these are the final orders of this Court:
 - i.) That leave is hereby granted to the applicant to appeal against the ruling of the superior court dated May 17, 2022 in regard to the applicant's notice of motion dated December 20, 2019;
 - ii.) That there be stay of sale and/or auction of the property known as Nairobi LR No 206/5802 or Nairobi LR No 209/5802 pending the hearing and determination of the applicant's intended appeal; and
 - iii.) That the costs of this application abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023

D. K. MUSINGA, (P).

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

