



**Lavington Housing & Investments Limited v Yurub Investments Limited & 5 others
(Civil Application E051 of 2022) [2023] KECA 286 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 286 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E051 OF 2022
S OLE KANTAI, KI LAIBUTA & A MBOGHOLI-MSAGHA, JJA
MARCH 17, 2023**

BETWEEN

LAVINGTON HOUSING & INVESTMENTS LIMITED APPLICANT

AND

YURUB INVESTMENTS LIMITED 1ST RESPONDENT

NEW NYANZA WHOLESALERS LIMITED 2ND RESPONDENT

DIAMOND TRUST BANK KENYA LIMITED 3RD RESPONDENT

LABURNUM COURTS LIMITED 4TH RESPONDENT

DALALI TRADERS AUCTIONEERS 5TH RESPONDENT

ZACHARY SIUMA T/A SIUMA AUCTIONEERS 6TH RESPONDENT

(Being an application for stay of execution, injunction and stay of further proceedings under Rule 5(2) (b) of the Court of Appeal Rules, 2010 pending the hearing and determination of an intended appeal from the Ruling and/or Order of the High Court of Kenya at Nairobi (Mabeya, J.) dated 21st February, 2022 in HCCC. No. 139 of 2018 As Consolidated With HCCC No. 451 of 2017)

RULING

1. The applicant Lavington Housing & Investment Limited has by Motion on notice brought under Section 3 of the [Appellate Jurisdiction Act](#), Rules 2, 5(2) (b) and 47 of the [Court of Appeal Rules, 2010](#) (this has since been replaced by The [Court of Appeal Rules, 2022](#)) prayed in the main that we be pleased to issue an order of stay of execution of the orders issued by the High Court of Kenya at Nairobi (Mabeya, J) given on February 21, 2022 in the High Court Commercial Case No 139 of 2018 as consolidated with Commercial Case No 451 of 2017 pending the hearing and determination of the application and an intended appeal. We are also asked to stay the hearing and determination of



the 1st and 2nd respondents' contempt application dated February 21, 2022 in the said consolidated cases pending the hearing and determination of the applicant's intended appeal against the ruling and order made by the said Judge on February 21, 2022 and pending the hearing and determination of the application. Thirdly, that we issue an order staying further proceedings in the said consolidated case pending the hearing and determination of the applicant's intended appeal against the said ruling made on February 21, 2022 or, in the alternative, we issue an order staying execution or enforcement of any orders ensuing from the said application dated February 21, 2022. Finally, that we be pleased to make any such or further orders as we may deem just and expedient, and that we provide for costs. In grounds in support of the Motion and in a supporting affidavit of Abdi Mohamed Ali, the Managing Director of the applicant, it is said amongst other things that the Judge delivered a ruling on February 21, 2022 where he held that the applicant was in contempt of court and directed that the 1st respondent's contempt application of February 21, 2022 be heard, and that the applicant shall have no audience before that Court or any other Court save for purging the contempt; that the effect of that order was that the Judge found the applicant to be in contempt of court before hearing the contempt application, and the applicant was thus condemned unheard; that in making the said order, the Judge failed to give directions on the hearing of the applicant's application dated February 8, 2022 seeking to set aside the Judge's orders of December 31, 2021, February 15, 2022 and February 17, 2022 which were issued without the applicant, as an affected party, being afforded an opportunity to be heard. The applicant says that it has a good appeal with overwhelming chances of success in that the Judge made the order without having an application before him or a charge against the applicant, and without giving the applicant an opportunity to be heard on alleged contempt; that the order finding the applicant guilty of contempt was made when the order alleged to have been violated was made in the absence of the applicant, and when an application to join the applicant to the suit as an interested party was pending before the court; that there is a question whether the Judge had jurisdiction to make the orders; whether the applicant's fundamental right to protection of law has been violated; that a substantive order finding the applicant in contempt was made on a mention date and when no formal application had been filed or been listed for hearing; that the Judge erred in determining the contempt application before hearing the applicant's Motion for setting aside the impugned orders, which was filed first in time; that the Judge erred by disregarding that the applicant had purchased a property LR No 209/1063 at a public auction and was in possession; that the Judge erred by not finding that the equity of redemption had been extinguished; and that the applicant and its directors found to be contemptuous will be prejudiced as they will lose their liberty.

2. There is a replying affidavit by Asha Hersi Moghe, a director of the 1st (Yurub Investments Limited), 2nd (New Nyanza Wholesalers Limited) and 4th (Laburnam Courts Limited) respondents. She says inter alia that the applicant is yet to be declared to be in contempt of court; that there is a date for hearing of the application for contempt; that the applicant is misleading this Court to "... validate, sanitize their illegal activities right from the auction, transfer and illegal eviction of the Respondents on February 11, 2020 from the suit property".
3. Further, that the applicant is misleading this Court on the purport of Mabeya, J orders issued on "... 25 and 21st of February, 2020" and Mwita, J direction issued on February 28, 2020; that the High Court did not give final orders; that the applicants' rights have not been violated.
4. We have considered the written submissions filed by the applicant and those of the 1st, 2nd and 4th respondents.
5. When the application came up for hearing before us on a virtual platform on March 16, 2022 learned counsel Mr Sagana appeared for the applicant; learned counsel Mr Okatch appeared for the 1st and 2nd respondents; learned counsel Mr Kisinga appeared for the 3rd respondent while learned counsel Mr



Kaveke appeared for the 4th respondent. In a highlight of their written submissions counsel for the applicant submitted that it was wrong for the Judge of the High Court to order that the applicant be denied audience by all courts; that the learned Judge had directed the respondents to file contempt proceedings but that the applicant would not be allowed to participate in those proceedings. Further, that the respondents had filed an application to enjoin the applicant; that that application had not been heard, and that the applicant had not been joined in the proceedings. According to counsel, if the contempt of court application proceeds, the applicant and its directors could be fined or jailed rendering the intended appeal nugatory. He cited the case of *Centre Star Limited & Anor v Halima Mahmood Ali (suing in her capacity as the legal representative of the Estate of Hawa Hassan Mohamud) & 2 Others* [2018] eKLR where it was held that where an appeal is pending in respect of contempt proceedings, and an applicant may serve sentence before the appeal is heard and determined, stay of execution could be ordered.

6. Mr Kisinga for the 3rd respondent had not filed written submission but made submissions supporting the application. In his view, by barring the interested party from having audience, the Judge had concluded the matter without hearing that party, which was in breach of the applicant's rights under Article 50 of *the Constitution*.
7. Mr Okatch submitted that the High Court had issued orders on December 31, 2021 preventing transfer of the suit property; that the applicant obtained eviction orders from a Magistrates court after which the High Court had ordered preservation of the status quo; and that the applicant was then in contempt of court. Counsel submitted that, if the applicant is found to be in contempt, it can offer mitigation before sentence; and that the Motion before us was an abuse of the process of the Court.
8. According to Mr Kaveke (for the 4th respondent), the order by the High Court of February 15, 2022 was clear in that it ordered that the applicant shall not be heard by any court until it complied with Court orders.
9. In a brief reply, counsel for the applicant submitted that whether or not the applicant was in contempt was a matter before the High Court.
10. We have considered the Motion, the lengthy affidavits and the law.
11. The principles that apply when this Court is called upon to exercise its jurisdiction under rule 5(2) of the *Court's rules* are well known, and have been the subject of various pronouncements by this Court and its predecessor. For an applicant to succeed in an application of this nature, it must 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. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR where those principles are discussed in detail.
12. The applicant here says that it has been found in contempt of court in proceedings to which it was not a party. Also, that it has been denied audience by the High Court.
13. We have perused the Order issued by the High Court on February 21, 2022. It says after the heading:

“In Court (virtually) On 21st February, 2022 Before The Honourable Mr Justice Alfred Mabeya
Order



This matter coming up for mention on February 21, 2022 before the Honourable Mr Justice Alfred Mabeya. And upon hearing the Counsel for the Plaintiff and Counsel for the Defendant and Counsel for the Interested Party:

It is hereby ordered:

- a. That the order of February 15, 2022 was very clear and has to date not been complied with. The Interested Party shall have no audience before this or any other court in this matter until it fully and entirely complies with the order of February 15, 2022 or for purging the contempt only. It has used an illegal order to take possession and continue to remain there unlawfully.
- b. That the applications dated October 28, 2021 and February 21, 2022 shall be heard together and in priority to other pending applications.
- c. That this file is once again re-allocated to Hon Mwita, J to be heard together with HCCC No 139 of 2018 as ordered on 3/2/2022 and the Registry is directed accordingly.
- d. That the application dated February 21, 2022 by the Plaintiffs be served before close of business today. The same be respondent (sic) to within 3 days for hearing on February 28, 2022 before Hon Mwita, J.

Given under my hand and the Seal of this Honourable Court at Nairobi this February 21, , 2022.

Issued at Nairobi this February 21, 2022.

(Signed)

Deputy Registrar

High Court Of Kenya, Nairobi

Milimani Commercial & Tax Division.”

The High Court directed that the applicant will not have audience before it until it complies with an order made on February 15, 2022, the same day that the order is issued. We find that it is an arguable point on appeal whether the applicant, which was not party to the suit, could be found to be in contempt of court and be denied audience by the Court. The position in law is that an applicant who approaches us with an application for stay of execution pending appeal is not required to show that there are a multiplicity of arguable points, and a single bona fide point calling for consideration by the Court will suffice – *Damji Pramji Mandaria v Sarah Lee Household and Body Care (K) Limited*, Civil Application No 345 of 2004 (ur).

14. It is argued for the applicant on the nugatory aspect, which must also be satisfied for an application of this nature to succeed, that it and its directors may be convicted and be sentenced to jail. We agree. Contempt of Court proceedings carry penal consequences, and this is a necessary consideration when considering the nugatory aspect in an application for stay of contempt proceedings. This Court faced



with a similar scenario had this to say in the case of Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another [2006] eKLR:

“In cases which are purely civil, this Court hardly grants a stay of proceedings on the basis that even if the proceedings to be stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – see for example *Silverstein v Chesoni*, [2002] KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory.”

The applicant has satisfied the principles that we consider in an application for stay of execution pending appeal. We allow prayers 2, 3, 4 and 5 of the Motion dated March 2, 2022. Costs of the Motion shall await determination of the intended appeal.

15. Finally, this ruling was to be delivered on June 24, 2022 but has been delayed due to a mix-up which has now been resolved. We apologize to all the parties for the delay.
16. This ruling is delivered in accordance with rule 34(4) of the Court of Appeal Rules, 2022, Mbogholi Msagha, JA having since ceased to hold office.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

S. OLE KANTAI

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JUDGE OF APPEAL

DR. K.I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

