



**Makhanu v Cheruiyot & another (Civil Application  
E359 of 2022) [2023] KECA 328 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 328 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E359 OF 2022  
F SICHALE, KI LAIBUTA & LA ACHODE, JJA  
MARCH 17, 2023  
IN THE MATTER OF AN INTENDED APPEAL**

**BETWEEN**

**TITUS BARASA MAKHANU ..... APPLICANT**

**AND**

**EVANS K CHERUIYOT ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(An Application for stay of proceedings and Ruling of the High Court  
of Kenya at Nairobi (E. N. Maina, J.) dated 22nd September, 2022)*

**RULING**

1. The applicant, Titus Barasa Makhanu, filed a notice of motion dated October 5, 2022. His principal prayer was that this court stays proceedings in Nairobi HCACE Pet No 3 of 2022. Evans K. Cheruiyot and The Ethics and Anti-Corruption Commission were named as the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
2. The motion was supported by the applicant's affidavit in which he deponed that he is dissatisfied with the ruling of Maina, J dated September 22, 2022 allowing the 1<sup>st</sup> respondent to amend the motion and petition dated April 28, 2022; that his counsel on record has filed a notice of appeal dated November 23, 2022; that on September 29, 2022, the 1<sup>st</sup> respondent filed and served his advocates on record with the amended petition, amended notice of motion and a mention notice, and that it is likely that the High Court may set the matter for hearing any time, thus rendering his intended appeal otiose.
3. On November 30, 2022, the motion came up for hearing before us on the virtual platform. Mr Kitila appeared for the applicant. However, there was no representation for the 1<sup>st</sup> and 2<sup>nd</sup> respondents despite service of the hearing notice on November 15, 2022 at 4.08 pm via email. The 1<sup>st</sup> respondent had



however filed his submissions dated October 21, 2022. Miss Wambugu for the 2<sup>nd</sup> respondent had not filed the 2<sup>nd</sup> respondent's submissions. Given that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had no representation despite service of the hearing notice, we allowed the applicant to urge his motion.

4. Mr Kitila highlighted the applicant's submissions dated October 17, 2022 and a supplementary affidavit dated October 13, 2022. During the oral highlights, it was contended for the applicant that he has an arguable appeal as the notice of motion which was sought to be amended is not a pleading capable of amendment. Further, that the amended petition is not underlined in red to show added words or struck in red to show deleted words. On the nugatory aspect, it was contended that it was likely for the proceedings to be concluded and judgment delivered before the intended appeal is heard and determined.
5. The applicant filed a supplementary "affidavit" dated October 13, 2022. Looking at the said "affidavit" it is clear that it contains submissions as opposed to depositions.
6. Be that as it may, the motion before us is premised on rule 5(2) (b) of this *Court's Rules*. It goes without saying that, in order for us to grant an order of stay, an applicant has to establish arguability of the intended appeal and, secondly, that the appeal will be rendered nugatory absent stay. In *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR, it was held:
  - (i) In dealing with rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & another* (1989) KLR 459.
  - ii. The discretion of this court under rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
  - iii. The court becomes seized of the matter only after the notice of appeal has been filed under rule 75. *Halai & another v Thornton & Turpin (1963) Ltd* (1990) KLR 365.
  - 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 *bona fide* 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 Gitabi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, civil application No 124 of 2008.
  - viii. In considering an application brought under rule 5 (2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
  - 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.
7. On arguability, the learned judge considered whether the amendment sought was necessary for the determination of the red issues in controversy. Further, she came to the conclusion that the amendment sought did not introduce a new cause of action. On the need to underline and delete with red ink, she noted that on the e-platform, the colour that appears is black. Having taken into consideration the principles to be considered in an application for amendment of pleadings, we do not think the applicant has satisfied the first limb on arguability. However, we shall say no more lest we embarrass the bench that will be seized of this matter.
  8. On the nugatory aspect, we do not think that the intended appeal will be rendered nugatory, absent stay. This is an interlocutory appeal and the applicant has a right of appeal in the event that the trial court was to find against him.
  9. Having not satisfied the two conditions precedent of arguability as well as the nugatory aspect, we find no merit in the motion. It is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

