



**Kenya Railways Corporation v Kariuki (Civil Application  
E226 of 2022) [2023] KECA 213 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 213 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E226 OF 2022  
K M'INOTI, FA OCHIENG & GWN MACHARIA, JJA  
MARCH 3, 2023**

**BETWEEN**

**KENYA RAILWAYS CORPORATION ..... APPLICANT**

**AND**

**PETER NGARI KARIUKI ..... RESPONDENT**

*(Being an application for stay of execution of the judgment and decree of the Employment and Labour Relations Court at Nairobi (Nzioka wa Makau and H. Wasilwa, JJ.) dated 6th June, 2022, 23rd September, 2022 and 8th September, 2020 in ELRC Petition No. 2207 of 2014)*

**RULING**

1. This application is brought pursuant to section 3A and 3B of the *Appellate Jurisdiction Act*, Rule 5(2) (b), 42, and 43 of the *Court of Appeal Rules, 2010*. The application mainly seeks stay of execution of the orders of the ELRC dated September 20, 2020, the decree dated October 1, 2020 as well as the warrants of attachment and sale dated June 10, 2022. The application is premised on the grounds contained on the face of it as well as in the affidavit of Stanley Gitari sworn on even date.
2. The gist of the applicant's case is that on September 18, 2020, the ELRC (Wasilwa, J) issued an order to the effect that the applicant be substituted to take up the place of the defunct Rift Valley Railways Ltd which was the judgment debtor in this case. Through an application dated September 23, 2021, the applicant moved the ELRC to have the warrants of attachment and sale of the applicant's properties dated November 30, 2020 and extended on September 24, 2021 suspended and to have leave to appeal against the order of September 18, 2020 granted. Subsequently, upon hearing this application, the ELRC (Hon Nzioki wa Makau, J) vide a ruling issued on June 6, 2022 dismissed the application. The applicant further states that following this ruling, the respondent herein proceeded to institute attachment and execution against the applicant culminating in the attachment of the applicant's motor vehicle registration No KCH 904Q, a Toyota Hilux Double Cabin.



3. The applicant contends that this is on the backdrop of a different ruling by the same court (Nzioka, J) in HCCC No 136 of 2017, *Rift Valley Railways Ltd v Kenya Railways Corporation & Another*, which precluded the applicant from taking up the liabilities of the defunct Rift Valley Railways Ltd. The applicant's view is the said attachment and execution already put in motion by the respondent herein violates section 88 of the [Kenya Railways Corporation Act](#); which provision prohibits the seizure, by any person having by law power to attach, the immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings without the prior written permission of the Managing Director.
4. The applicant states that their intended appeal against the rulings and orders delivered by the ELRC on June 6, 2022, September 23, 2021 and September 24, 2021 is arguable and would be rendered nugatory in the event that the orders for stay are not issued. The applicant also states that this application has been brought timeously and without delay and that it is in the interest of justice that the stay be granted as prayed.
5. The application was opposed through the replying affidavit of Mr. Allan Ngure Karika, counsel for the respondent, sworn on July 5, 2022. It is the respondent's case that the Appellant was served with the Order dated August 27, 2020 inviting them for inter partes hearing on September 8, 2020 being the Substitution Proceedings to replace Rift Valley Railways Ltd with respondent but the applicant ignored. Copies of the said order and Affidavit of Service are marked ANK 1 and ANK 2 respectively. The respondent is of the view that the appellant squandered an excellent opportunity to ventilate the various issues raised. The respondent also rebutted the assertion by the applicant that the substitution of the appellant to take the place of Rift Valley Railways Limited was premature and unwarranted and pointed out that the same bordered on contempt of court.
6. In response to the reference to section 88 of the [Kenya Railways Corporation Act](#), the respondent argued that the second limb of section 88 was couched in mandatory terms which mandated the Managing Director to ensure that judgment debts owed by the corporation are paid off promptly. To this end, the respondent argues that the attachment of the applicant's motor vehicle KCH 904Q is strictly within the law. It is the respondent's view that the prayers sought in the application are not warranted in the circumstances and that the appellant's legal status falls under the [State Corporations Act](#) of 2012 hence they are not exempted from attachment whenever debts are owed by the corporation, to third parties. The respondent urged the Court to find the application devoid of merit and dismiss it with costs.
7. In a supplementary affidavit dated July 12, 2021, Mr Stanley Gitari takes the view that Mr Allan Ngure Karika was not competent to swear the replying affidavit on behalf of the respondent. Further and in response, he argues that Rift Valley Railways is still in existence as a corporate person and the CR-12 annexed as SG3 is therefore of importance to this Court. He takes the view that this Court is empowered to take in new evidence as a first appellate court in this matter. In response to the respondent's view on section 88 of the [Kenya Railways Corporation Act](#), the applicant states that it is a requirement that any attachment must be preceded by a written consent of the Managing Director in the absence of which such seizure is illegal. The applicant further stated that an auction of the seized motor vehicle was already on course and the same if allowed to proceed will render the appeal nugatory. The applicant reiterates that the appeal raises triable issues and that it will serve the interest of justice if the stay orders are granted.
8. This application was argued in plenary on September 14, 2022. Mr Robert Ndachi was present holding brief for Mr Geoffrey Nyagah for the applicant. For the respondent, Mr Allan Kirika was present.



Both parties had filed their respective written submissions and also proceeded to orally highlight the submissions.

9. In the submissions filed by M/S Nyaanga & Mugisha Advocates and dated July 12, 2022, counsel submits in support of the applicant's case that the application herein has merit and the orders sought should be granted. Counsel also argues that the appeal is arguable as it raises weighty matters of law. On this limb of submissions, counsel reiterates that they have attached a memorandum of appeal (SG-9) in which ground 3 and 6 are issues of law in that the appellant ought not to be condemned unheard since they were neither a party to the cause leading up to the judgment nor to the application which ordered their substitution. To buttress this line of argument, counsel placed reliance on the case of *Cieni Plains Co. Ltd & 2 Others v Ecobank (k) Ltd* [2018] eKLR to submit that an appeal is arguable even if it raises only one arguable ground of appeal; and that it is irrelevant whether the said ground will succeed or not.
10. The second limb of the applicant's submissions was that the appeal will be rendered nugatory if stay orders are not granted. According to counsel, the respondent had already attached motor vehicle registration No KCH 904Q belonging to the applicant and this asset would be disposed in a public auction scheduled for July 12, 2022 at 11 am as per SG-1. In the end, the applicant submits the appeal is arguable but would be rendered nugatory if stay of execution is not issued; and that there will be no prejudice towards the respondent if the orders sought are granted. The applicant therefore urged us to allow his application and grant the orders of stay.
11. In highlighting his submissions orally before us, Mr Ndachi reiterated his written submissions. He further added that even though the motor vehicle had been proclaimed and was to be sold on July 24, 2022, the auctioneers were yet to dispose it off and that it is still at the auctioneer's yard. Counsel argued that the auction is not complete and therefore if the sale is not stayed then the appeal will be rendered nugatory.
12. For the respondent, the firm of AN Kirika & Co Advocates filed submissions dated July 19, 2021. The respondent's submissions were brief. On whether the orders of stay should be granted, it was submitted that the prayer was overtaken by events and that issuing a stay would be moot since the motor vehicle KCH 904Q had been proclaimed by the respondent. On whether the appeal is arguable, it was submitted that the merits or otherwise of the appeal had been rendered nugatory by the proclamation. Reliance was placed on the decision of this Court in *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others* [2020] eKLR where this Court discussed the moot doctrine in legal philosophy. Counsel submitted that the subject matter of the appeal, Motor Vehicle KCH 904Q, was already under proclamation by auctioneers appointed by the respondent, and the outcome of any appeal proceedings would fail the test laid out in the case cited above. It is therefore the respondent's prayer that this application be dismissed.
13. Mr Kirika for the respondent while highlighting submissions also reiterated his written submissions. He added that the issue at hand was moot as there had been execution when the motor vehicle was proclaimed. Without any documentary evidence in support, counsel submitted that the auctioneers had received and accepted an offer for sale of the motor vehicle and payment was due sometime during that week. On being questioned by the bench, counsel stated that it was his view that once a proclamation had been done, the execution was complete regardless of whether the sale is complete or not.
14. We have considered the notice of motion, the supporting affidavit, the replying affidavit as well as the submissions of both parties. In our view, this being a Rule 5(2)(b) application, the application will turn



upon consideration of the issues as established by this Court in the case of *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) 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 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) 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. *Damji Pragji* (supra).
  - 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.”
15. Our decision on this matter will be informed by the considerations highlighted above. On record there are two notices of appeal marked as SG7 and SG8. SG7 is with respect to the orders of the ELRC issued on September 23, 2020 and is dated September 28, 2021 while SG8 is in relation to the orders of the ELRC issued on June 6, 2022 and is dated June 14, 2022. With these on record, we are convinced that our jurisdiction has been properly invoked and we ought to exercise it in this instance.



16. Therefore, in rendering ourselves within the principles already established in Stanley Kangethe Kinyanjui case above, we are required to interrogate the application before us and ensure that it satisfies the twin principles, namely, that there is an arguable appeal, and that if the order of stay is not granted, the appeal is bound to be rendered nugatory.
17. On whether the appeal at hand is arguable, the applicant has submitted that their memorandum of appeal (SG-9) raises issues of law. The applicant specifically referred to ground 3 and 6 which in their view raises issues of law relating to the fact that the appellant was neither a party to the cause leading up to the judgment nor to the application which ordered their substitution. In the circumstances, the appellant argues that they should not be condemned unheard. In rebuttal, the respondent expressed the view that the merits or otherwise of the appeal had been rendered nugatory by the proclamation.
18. The respondent placed reliance on this Court’s decision in *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others* [2020] eKLR. We however wish to point out that in the *Okiya Omtatah Okoiti* (supra), the court addressed the issue of mootness of the appeal. That case is therefore distinguishable with the present case. The intended appeal is yet to be heard and rendering ourselves on the issue of whether the appeal is moot or not is premature at this stage. In this application, all we are to do is to satisfy ourselves that the intended appeal is arguable. An arguable appeal is not one which must succeed, but rather, it is one which ought to be argued before the court and which is not frivolous. This Court in the case of *Attorney General & Another v Eunice Makori & Another* [2021] eKLR defined an arguable appeal as one which is not frivolous or idle. The Court stated:

“Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle ...”

19. We have gone through the memorandum of appeal and we agree with the applicant’s view that the intended appeal is one which is arguable. The intended appeal is concerned with interpretation of section 88 of the *Kenya Railways Corporation Act*, the participation of the applicant in the proceedings as well as substitution of corporate persons in civil matters, among other issues. In our view, these are issues that call for our determination in the appeal. We therefore reach the inevitable conclusion that the intended appeal is arguable and that whether it is moot or not is a matter which parties will have an ample opportunity to address during the hearing of the appeal.
20. The next line of inquiry is whether the appeal by the applicant will be rendered nugatory if the orders of stay are not issued. In *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (supra), this Court held that the applicable test is whether or not what is sought to be stayed is reversible if stay is not granted and whether damages will reasonably compensate the aggrieved party. In *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR, this Court considered what amounts to an appeal being rendered nugatory and stated thus:

“In *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227, this Court held that:

‘..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.’

A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”



21. The applicant in addressing this limb stated that the respondent had already attached motor vehicle registration No KCH 904Q belonging to the applicant. According to annexure SG-1, there was to be a public auction scheduled for July 12, 2022 at 11 am. For the Respondents, it was submitted that issuing a stay would be moot since the motor vehicle KCH 904Q had been proclaimed by the respondent. According to counsel for the respondent, execution was complete by virtue of the proclamation and that it did not matter whether the sale was complete or not.
22. The question then is whether if the motor vehicle KCH 904Q were auctioned whilst the appeal was pending; and if the appeal ultimately succeeded, would damages provide sufficient compensation for the applicants. However, the financial capacity of the respondent is ordinarily a matter within his special knowledge. Therefore, we would expect the respondent to make available the evidence in his possession, to demonstrate his ability to compensate the applicant if the appeal succeeded, while there had been no stay of execution. Currently, there is no information before us from which the Court can determine whether or not the respondent had the ability to compensate the applicant. Accordingly, we shall refrain from venturing into the realm of speculation.
23. However, we are cognizant of the fact that as at September 14, 2022 when this matter came up for hearing, the motor vehicle was yet to be sold by the auctioneers. We disagree with the position adopted by the respondent that once proclamation is effected then execution is deemed to have already taken place. This is far from the truth, for proclamation is just but part of the process of execution. It is therefore a fact before this Court that the motor vehicle whose auction this application sought to stay is still in the hands of the respondent's agents. In the circumstances, this Court is still within right to arrest the sale of that motor vehicle and in the process save the appeal from being argued in vain. The scales of whether the appeal may be rendered nugatory or not therefore tilts in favour of the applicants.
24. That being the case, we hold the view that it is in the interest of justice to stay the execution, and let parties argue their appeal while the *status quo* is maintained. This is in line with the aim of an application for stay which in *Safaricom Ltd v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, this Court identified as to guarantee or provide an interim relief to an appellant.
25. In the circumstances, we hold the view, and we so find, that the applicant has established both the arguability and the nugatory aspect of the intended appeal. Having established the twin limbs to grant orders under Rule 5(2)(b) of the *Court of Appeal Rules*, the application dated June 29, 2022 has merit and is hereby allowed. The costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2023.**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**F. W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

