



Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives v Mehta International Limited & another (Civil Application E414 of 2022) [2023] KECA 462 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KECA 462 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E414 OF 2022
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA
APRIL 20, 2023**

BETWEEN

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND CO-OPERATIVES APPLICANT

AND

THE MEHTA INTERNATIONAL LIMITED 1ST RESPONDENT

THE MEHTA GROUP MANAGEMENT LTD 2ND RESPONDENT

(Being an application for stay of execution and of further proceedings pending appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (A. K. Ndung'u, J.) dated 13th October 2022 in Judicial Review Misc. App. No. E079 OF 2022)

RULING

1. The 1st respondent, The Mehta International Limited, entered into a joint venture with the Agricultural Development Corporation and the Kenya Development Corporation in March 1978 to incorporate Agrochemical and Food Company Limited (ACFC) under the now repealed [Companies Act](#) (Cap 486)
2. Pursuant to Article 118(a) of ACFC, the 1st respondent structurally designated the 2nd respondent, The Mehta Group Management Limited, to facilitate its execution of its role under the joint venture in accordance with the Articles of ACFC.
3. In furtherance of Article 118(a), the 1st respondent designated a Resident Director and Chief Executive Officer for appointment. One of such appointees to whom the proceedings herein relate was one Ashok Agarwal.



4. By a letter dated November 8, 2021, the applicant, the Cabinet Secretary in the Ministry of Agriculture, Livestock, Fisheries and Co-Operatives, directed Mr Mohammed Bulle, the then Chairman of ACFC, inter alia, to: review the management contract with a view to terminating it altogether; and upon termination, internally identify with immediate effect a suitable replacement for the CEO in an acting capacity with the concurrence of the applicant pending competitive recruitment by the Board; and to fast-track the review of the Articles and Memorandum of Association to align with the [Companies Act, 2015](#) and the [State Corporations Act \(Cap 446\)](#).
5. The foregoing directives were premised on the fact that ACFC was a State Corporation in which the Government of Kenya held 56% of its shares while the remaining 44% were held by the 1st respondent.
6. Disaffected by the applicant's directives, the respondents moved to the High Court seeking leave to apply for judicial review of the applicant's decision vide a Chamber Summons dated May 25, 2022 supported by the annexed affidavit of Ashok Agarwal sworn on May 25, 2022. When the Summons were heard ex parte in the first instance on June 3, 2022, the court (AK Ndung'u, J) granted leave and ordered that the substantive Motion accompanying the Summons in draft be taken out within 21 days next following; that the applicant do file its response within 14 days of service; that the question as to whether leave as granted should operate as stay be determined inter partes, and that the same be canvassed by way of skeleton written submissions; that the respondents do file their skeleton written submissions in that regard within 4 days from the date of that order; that the applicant do file its skeleton written submissions within 4 days of service of the rival submissions; and that the matter be mentioned on June 16, 2022 for further directions.
7. Despite having been duly served, and having failed to file its responses and to appear when the respondents' Motion dated June 9, 2022 came up for mention for the third time on June 29, 2022, the learned Judge made further orders and directed that the leave granted to take out the Motion do operate as: a stay of implementation of the impugned directives contained in the letter dated November 8, 2021; suspension of the appointment of Mr Timothy Ogwang' as the purported Acting CEO of ACFC; and suspension of the purported termination of the 2nd respondent as the Manager and Mr Ashok Agarwal as the CEO of ACFC. The learned Judge further directed that the 2nd respondent and Mr Agarwal be accorded all necessary facilities to resume and perform their roles as was the case immediately before the impugned administrative action pending hearing and determination of the substantive Motion for judicial review; that the Motion be served, the responses (if any) be filed within 21 days; and that the matter be mentioned on October 5, 2022.
8. Dissatisfied by the order of the court (AK Ndung'u, J), dated June 29, 2022, the Attorney-General filed a Notice of Motion dated July 15, 2022 seeking variation of the impugned orders and joinder, the grounds and particulars of which we are unable to ascertain in the absence of the application in the record before us. Neither do we have the benefit of replies (if any) thereto. Suffice it to observe that that application is yet to be heard.
9. On July 27, 2022, the respondents filed a Motion in the trial court to cite the applicant, Mr Mohammed M Bulle and Mr Timothy Ogwang, jointly and severally, for contempt of court. The respondents' Motion dated July 27, 2022 was supported by an affidavit of Ashok Agarwal. Gathering from the ruling delivered on January 19, 2023, in the absence of the Motion and supporting affidavit on the record before us, the respondents' Motion was anchored on the ground that, despite service of the orders made on June 29, 2022, the contemnors had elected to disregard those orders.
10. In his replying affidavit sworn on September 19, 2022, Mr Mohammed M Bulle deponed that 'once the Management Contract between the ACFC Board and the 2nd respondent lapsed on December 31,



2022, the tenure of Mr Ashok Agarwal lapsed by effluxion of time.' Mr Bulle denied being in contempt of court and deponed that the orders to which the Motion for contempt relates have never been served upon him.

11. On their part, the applicant's and Mr Ogwang's case is that they are by no means in contempt of court. From the ruling dated January 19, 2023, we gather that Mr Mithika Linturi swore a replying affidavit stating that 'the ex parte orders in issue were obtained through non-disclosure of key issues to the court and hence blocking them from being heard prior to compliance with the order,' which amounted to miscarriage of justice. According to Mr Linturi, Timothy Ogwang is an employee of the Ministry of Agriculture and Livestock Development and was seconded by the applicant as the Acting Managing Director of the ACFC and, therefore, could not be held in contempt of the said court orders.
12. An issue arose as to whether the applicant, through the Attorney-General, should be given audience before compliance with the orders given on June 29, 2022. In its ruling delivered on October 13, 2022, the court (AK Ndung'u, J), directed that the application dated July 15, 2022 seeking variation of the orders of June 29, 2022 and joinder – which is not on the record before us – be stayed pending compliance with the orders of the court of June 29, 2022 and, in default of compliance, the Motion dated July 27, 2022 (for contempt) be set down for hearing.
13. Aggrieved by the decision of the learned Judge made on October 13, 2022, the applicant moved to this Court on appeal and lodged its notice of appeal dated October 14, 2022. It is noteworthy that the notice of appeal relates to the impugned order dated October 13, 2022 and to no other, and that the applicant is yet to lodge its record of appeal.
14. The intended appeal is founded on 12 grounds set forth on the face of the applicant's undated draft Memorandum of Appeal. The applicant faults the learned Judge for, inter alia:

'Failing to recognise that the right to be heard embodies the right of audience; allegedly acting outside his jurisdiction by determining the criteria for the applicant to discharge its statutory duties; for hearing and determining matters falling to be determined by ACFC's shareholders; failing to find that Ashok Agarwal had served his maximum term as Managing Director of ACFC and was not eligible for re-appointment; failing to consider that the respondents' management contract had come to an end on December 31, 2021; failing to appreciate that the reinstatement of MR Ashok Agarwal as Managing Director of ACFC would be unreasonable, illegal and capricious, and violates the authority and rights granted to shareholders under the Companies Act; and for failing to recognise that the orders granted would occasion irreparable loss and damage as the management contract had lapsed by effluxion of time on December 31, 2021. The applicant also contends that the orders of the learned Judge are incapable of enforcement, as compliance therewith would amount to compelling the Board and the applicant to enter into a management contract with the respondents; and that the orders and directions contained in the impugned ruling violate the Companies Act, and prescribe an illegal process in the reinstatement of Mr Ashok Agarwal as the Managing Director.
15. In the meantime, the applicant has moved the Court under rule 5(2) (b) of the Rules of this Court vide its Notice of Motion dated November 11, 2022 praying for: stay of execution of the ruling delivered on October 13, 2022 pending the hearing and determination of the intended appeal; an injunction restraining the respondents from taking any steps pursuant to the impugned ruling, including forcing themselves back into the management of the subject company; any other orders as the Court may deem fit; and that the costs of its application do abide the outcome of the intended appeal.



16. The applicant's Motion is supported by the annexed affidavit of Hon Mithika Linturi sworn on November 11, 2022, and is anchored on 9 grounds set out on the face of the Motion. In summary, the applicant contends that the intended appeal is arguable with a probability of success; that the applicant stands to suffer irreparable harm if the orders sought are not granted; that the operations of ACFC will be greatly hampered; and that ACFC is of immense public interest, and that disruption of its operations is likely to expose the public and shareholders to massive losses, and that its employees and suppliers are likely to be denied access to their dues.
17. In support of the applicant's Motion, learned Principal State counsel for the applicant, Ms Chimau Judith, filed written submissions dated December 1, 2022, which she highlighted orally when the matter came for hearing on the GoTo Meeting virtual platform on January 26, 2023. Counsel cited the cases of *Butt vs Rent Restriction Tribunal [1979] eKLR* on the twofold test of granting stay of execution under rule 5(2) (b) of the Rules of this Court, namely that the appeal is arguable, and that the appeal (or intended appeal) would be rendered nugatory absent stay; and *Stanley Kang'ethe Kinyanjui vs Tony Ketter and 5 Others [2013] eKLR* on what constitutes the nugatory limb of the twofold test.
18. The respondents oppose the applicant's Motion vide the replying affidavit of Ashok Agarwal sworn on January 24, 2023.
19. According to Mr Agarwal, the respondents' case is that, of the 12 grounds of appeal, 11 speak to the substantive dispute in the judicial review application dated June 9, 2022, which is yet to be heard; and that the 12th ground which raises the question as to whether a court can exercise its discretion to deny a contemnor audience until they comply with a valid order is a settled question of law, and is not arguable.
20. Opposing the applicant's Motion, learned counsel for the respondents, M/s CM Advocates LLP filed written submissions dated January 24, 2023, which Mr Lusi highlighted orally at the hearing of the Motion. Counsel cited, inter alia, the case of Consolidated Bank of Kenya and 2 Others vs Usafi Limited [2006] eKLR, drawing the Court's attention to the place of interlocutory injunctions in the context of rule 5(2) (b) of this Court's Rules; and *Erdemann Properties Limited vs. NEMA and Others [2020] eKLR* contending that failure to demonstrate an arguable appeal renders the second limb of nugatory superfluous. The remaining 3 cases cited by counsel had no direct relevance to the issue presently before us.
21. Having considered the Applicant's Motion dated November 11, 2022, the affidavit in support thereof and in reply thereto, the written and oral submissions of the learned Principal State Counsel and those of learned counsel for the respondents, we form the view that the Applicants' Motion stands or falls on three main grounds, namely: whether the appeal is arguable, which is to say, it is not frivolous; whether the appeal, if successful, would be rendered nugatory if we declined stay; and whether the temporary injunctive relief sought under rule 5(2) (b) pending appeal avails in the circumstances of this case.
22. The general principles that apply in applications under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of further proceedings pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings arising from the impugned judgment, decree or order were not stayed.
23. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the parties. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh vs Clement Kungu Waibara and IEBC [2020] eKLR* that, for stay orders to issue in similar cases,



the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e, not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.

24. On our reading of the grounds on which the Applicant's Motion is founded, the draft Memorandum of Appeal, the affidavit in support thereof, and from the respective written and oral submissions of the learned counsel for the parties, we are persuaded that the applicants have an arguable appeal. Indeed, it is by no means frivolous. Whether the appeal will succeed or not is not for us to judge. That is a matter for determination at the hearing of the intended appeal. Neither is it material whether the appeal is preferred on only one or more grounds.
25. With regard to the adequacy of the grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited vs AA Kawir Transporters & 4 Others [2014] eKLR* observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay or temporary injunction are not granted.
26. The term 'nugatory' was defined in *Reliance Bank Ltd Vs Norlake Investments Ltd (2002) 1 EA p 227* at p 232 thus: 'it does not only mean worthless, futile or invalid. It also means trifling.' The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
27. The circumstances of the case before us are that what is ought to be stayed are orders staying hearing and determination of an interlocutory application pending compliance by the applicant with previous orders of the trial court in respect of which he was cited for contempt. Likewise, the temporary injunction sought in the second prayer would have the same effect as the stay sought with regard to the same stay orders sought to be challenged on appeal.
28. It is also noteworthy that the respondents' application for contempt was heard and determined on January 19, 2023 whereupon the applicant was ordered to appear before the trial court on January 21, 2023 for sentencing. In effect, the applicant's Motion has been overtaken by events. In any case, orders of stay of execution or of further proceedings, or injunctive relief, pursuant to rule 5(2) (b) of this Court's Rules pending appeal do not avail where the subject of the intended appeal are stay orders.
29. We hasten to observe that the learned Judge merely ordered stay of proceedings in the applicant's Motion for variation and joinder pending compliance with previous court orders that have not been challenged. He did not order anything to be done or refrained from and, in the circumstances, we find nothing to stay or restrain pending the intended appeal. To grant such orders in this case would have the effect of nullifying such orders at an interlocutory stage in the proceedings, a decision that can only be made in determination of the intended appeal.
30. This Court has time and again pronounced itself on the general rule that orders of stay are incapable of being stayed; and neither can injunctive relief issue against an order of stay pending appeal. Addressing itself to the question as to whether stay of an order of injunction pending appeal sought by an applicant pursuant to rule 5(2) (b) avails, this Court in *Consolidated Bank of Kenya & 2 others vs Usafi Limited [2006] eKLR* had this to say:

' We consider that under the rule in its present form there are only three types of orders permitted to be made under rule 5(2)(b) namely:

- i. A stay of execution.
- ii. An injunction.



iii. A stay of any further proceedings

'A stay of an injunction' is not included in that provision. The omission may well have been intended by the Rules Committee since to grant a stay of an injunction would have the effect of nullifying the injunction before the appeal against its grant had been heard.'

31. This Court's holding in Consolidated Bank of Kenya & 2 others vs' Usafi Limited (ibid) must be interpreted to mean that this Court has no jurisdiction to stay or issue an injunction against an impugned order of stay of further proceedings sought to be challenged on appeal. While the applicant's intended appeal is in our considered view arguable in satisfaction of the first limb of the twin principles that govern grant of orders under rule 5(2) (b), we nonetheless take to mind the conclusion reached in the Consolidation Bank case when the Court held:

' Having come to the conclusion that we have no jurisdiction under rule 5(2) (b) to grant the order sought we need say no more than that the Notice of Motion dated July 12, 2005 is incompetent and we order that it be and is hereby struck out with no order as to the costs thereof.'

32. As is the case here, the applicant's Motion before us seeks orders that the Court has no jurisdiction to grant. In the circumstances, we need not inquire as to whether the application satisfies the nugatory aspect of the twin principle for grant of orders under rule 5(2) (b). Accordingly, we reach the inescapable conclusion that the applicant's Notice of Motion dated November 11, 2022 is incompetent and is hereby struck out with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023

D. K. MUSINGA (P)

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JUDGE OF APPEAL

K. M'INOTI

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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

