



Compact Freight Systems Limited v Aswa Developers & Contractors Ltd (Civil Appeal (Application) E003 of 2021) [2023] KECA 627 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 627 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E003 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
MAY 26, 2023**

BETWEEN

COMPACT FREIGHT SYSTEMS LIMITED APPELLANT

AND

ASWA DEVELOPERS & CONTRACTORS LTD RESPONDENT

(Being an appeal from the judgment of the Hon. Justice P.J Otieno and delivered by Hon. Justice D. Chepkwony on 17th December, 2018 in Mombasa High Court Civil Case No.85 of 2009)

RULING

1. By a notice of motion dated February 17, 2023 brought pursuant to rule 5 (2) (b) of the [Court of Appeal Rules](#), (herein after the rules), the applicant who is the appellant at the appeal seeks:
 1. Order 1 and 2 moot.
 2. Order 3 That pending the determination of the appeal, there be a stay of execution of the judgment delivered on December 7, 2018 in Mombasa High Court civil case No 85 of 2009 Aswa Developers and Contractors Limited v Compact Freight Systems Limited.
2. The application is based on the grounds on the face of the application and reiterated in the supporting affidavit sworn by the General Manager of the appellant dated February 16, 2023. The application is opposed by the respondent through a replying affidavit sworn by the director of the respondent company dated February 22, 2022 and annexures thereto.
3. The application was heard through this court's virtual hearing on the March 20, 2023. Learned counsel Mr Gikandi was present for the appellant while learned counsel Mr Maondo was present for the respondent. Both counsel relied on their written submissions and list of authorities dated March 3, 2023 and March 13, 2023 respectively, which they also highlighted before us. In their oral submissions,



both counsel agreed that the arguability of the appeal was not in contest as the appeal has already been argued and is pending judgment before this court.

4. On the nugatory test Mr Gikandi urged that the appellant relies on the provisions of articles 10 and 47 of the Constitution for the proposition that in order to uphold credibility and accountability in any matter, parties ought to be patient for the court to deliver itself in judgment in order to avoid awkward situations. He urged that if the Respondent attached the appellant's goods, they are likely to be sold at throwaway prices, and the respondent's financial means and its ability to refund the decretal sum and interest if the appeal succeeds is extremely unknown. Counsel urged that the appellant has exercised its right of appeal under article 164 (4) of the Constitution; that it has a right to know the outcome of the appeal that ought not to be compromised by the respondent's action to execute the judgment of the High Court.
5. Mr Gikandi buttressed his arguments on several authorities; the case of MM Butt v The Rent Restriction Tribunal civil application No 6 of 1979, (UR) where Madan, JA where he started:

“There is no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order (of injunction) is to prevent the court of appeal's decision being rendered nugatory should that court reserve the judge's decision... Proceeding on this narrow basis, that is to prevent the appeal if successful, from being rendered nugatory, I would grant the stay asked for pending determination of the appeal by this court against the decision.”
6. Mr Gikandi relied on the case of RWW v EKW (2019) eKLR, for the proposition that the purpose for an application for stay is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal is safeguarded and the appeal, if successful is not rendered nugatory. in the supporting affidavit, the appellant deposed that no sooner than the appeal was heard on February 7, 2023, the respondent sent auctioneers to their premises 10 days later, with clear intentions of proceeding with the execution of the judgment and decree of the High Court. Mr Gikandi decried that approach as a demonstration of lack of due regard to the principle expressed in the overriding principle and the need to give the Court of Appeal a level ground in which to make its determination. He relied on the ruling of Madan, JA in the case of MM Butt v the Rent Restriction, supra, that even where the High Court declined a stay, the Court of Appeal could still be right in granting stay to prevent its judgment, once delivered from being rendered nugatory.
7. Mr Maondo for the respondent opposed the application, urging that it was not automatic that the appeal will be decided in the appellant's favour. He relied on the case of Multimedia University & another v Professor Gitile N. Naituli (2014) eKLR on the principles to be considered by this court when exercising its unfettered discretion under rule 5 (2) (b) of the Rules.
8. On the nugatory aspect, he relied on the case of Stanley Kangethe Kinyanjui v Tony Keter & others (2013) eKLR, and urged that the term 'nugatory' should be given its full meaning that it does not only mean worthless, futile or invalid, but also trifling. He urged that whether the appeal will be rendered nugatory would depend on whether or not what is being sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will adequately compensate the party aggrieved.
9. He buttressed his submissions by urging that the grant of stay is discretionary; that courts have declined stay even when judgments are pending. He urged further that the application by the appellant has been brought late as judgment was delivered on December 28, 2018, and there has been part execution of the judgment and decree and what is awaited is execution to recover the balance.



10. Relying on the authority of *Magnate Ventures v Simon Mutua Muatba & another* (2018) eKLR, Mr Maondo urged that the appellant had not secured the substratum of the appeal in his various applications for stay before the High Court as he had failed to fulfill the requirements of order 46 rule 6 (2) of the *Civil Procedure Rules*. He submitted that the appellant failed on grounds it was unable to demonstrate that it would suffer substantial loss unless stay was ordered; that the application was made without undue delay; and failed to offer such security as court ordered. He urged that the application is an abuse of the court process as the five similar applications before the High Court were all dismissed. He also urged that the appellant never alleged that the respondent will be unable to refund the decretal sum if the appeal succeeded.
11. In the alternative and without prejudice, the respondent urged the court to order the appellant to deposit the decretal sum in court or in a joint account in the names of both counsel to the parties if the court was minded to order stay.
12. We have considered the application, the affidavits filed for and against the application; the submissions by counsel and the cases relied upon. As prescribed by rule 5 (2)(b) and held in *Halai & another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365, the principles applicable in the exercise of the court's unfettered discretion under rule 5(2) (b) to grant an order of stay are also well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, the applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR cited by the Respondent.
13. As we started by stating both counsels agreed that as the appeal has been argued and is pending delivery of judgment, the first principle of demonstrating that the appeal was arguable was not contested. The appeal was heard on the February 7, 2023 and judgment set for June 9, 2023. This application was filed after the appeal was heard, and a stay was granted pending this ruling. This application will therefore be determined on the basis of the second applicable principle whether the appellant has demonstrated that the appeal will be rendered nugatory if stay sought was not granted and the appeal were to succeed.
14. The appellant has shown that when the application was urged judgment of the appeal was merely three months away. He has urged that there was need for a little more patience, as the remaining time was not long, in order to avoid an awkward situation. He has shown that ten days after the appeal was heard, the respondent sent auctioneers to the appellant's premises, a clear indication of their intention to execute during the pendency of the judgment on appeal. We are satisfied that the respondent was bent on executing the judgment of the High Court when the final determination by this court is at the doorstep. The question is, why execute now?
15. If we heard the respondent well, his main complaints are that the appellant had made several similar applications before the High Court, all which were declined and therefore to make a similar one before this court was an abuse of the court process.
16. The application before this court is made on the basis of rule 5(2)(b) of this *Court's Rules*. The principles applicable are very different from those considered by the High Court in a similar application under order 46 rule 6 of the *Civil Procedure Rules*. Indeed, as Mr Maondo submitted and as restated clearly in the case he relied on of *Magnate Ventures v Simon Mutua*, supra, the principles are that an applicant must demonstrate that it would suffer substantial loss unless stay was ordered; that the application was made without undue delay; and an offer of such security as court may order should be met. With due respect to counsel, rule 5 (2) (b) of the Rules does not restrict an applicant who failed to secure stay before the superior from approaching this court with a similar application. The principles considered by this court are basically two, as both counsel have ably submitted, to demonstrate the



appeal is arguable, which was not contested, and to demonstrate it will be rendered nugatory if the stay is not granted and the appeal was to succeed.

17. The delay in bringing the application before us was another issue raised why the application should not be granted. We have considered this ground. The applicant has shown that before coming to this court, time was spent before the High Court with the various applications filed before that court. We think that the delay was explained. The appellant could not have approached this court while still trying to prosecute those other applications before the High Court. It would have been an abuse of court process were it to apply in both courts at the same time.
18. It is our considered view that it is only reasonable and prudent for the parties to await the outcome of the appeal before taking any further steps at execution of the judgment, whether or not there has been part execution. In the circumstances, we find merit in the appellant's application dated February 17, 2023 and grant it in terms of order 3 as follows;
 1. That pending the determination of the appeal herein, there shall be a stay of execution of the judgment delivered on the December 17, 2018 in
 2. Mombasa High Court Civil Case No 85 of 2009; Aswa Developers & Contractors Limited v Compact Freight Systems Limited.
 3. Costs shall abide the outcome of the appeal.
19. Those are the orders of the court.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2023

P. NYAMWEYA

JUDGE OF APPEAL

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J. LESIIT

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

