



Patel & another v Patel (Suing as the legal administrator of the Estate of Narshibhail Patel Fulabhai-Shareholder) & another (Civil Application E094 of 2022) [2023] KECA 631 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 631 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E094 OF 2022
FA OCHIENG, LA ACHODE & WK KORIR, JJA
MAY 26, 2023**

BETWEEN

MAHENDRA CHANDULAL PATEL 1ST APPLICANT

SEJAL ASHISH PATEL 2ND APPLICANT

AND

NITA HASMUKHI PATEL (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF NARSHIBHAIL PATEL FULABHAI-SHAREHOLDER) 1ST RESPONDENT

KENYA FLEXOGRAVURE LTD 2ND RESPONDENT

(Being an application for stay of execution and conservatory orders against the ruling and orders of the High Court at Nakuru (Matheka, J.) dated 10th November, 2022 in HC Commercial Cause No. E001 of 2022)

RULING

1. The applicants herein moved the court *vide* a notice of motion dated December 6, 2022 and brought under section 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5(2)(b), 42 and 47 of the [Court of Appeal Rules](#), 2010. The applicant prays that an order do issue to stay the execution and/or implementation of the ruling and orders issued by the high court on November 10, 2022 in Misc Civil Application No E001 of 2022 pending the hearing and determination of the intended appeal; that an order do issue staying the proceedings in Misc Civil Application No E001 of 2022 pending the hearing and determination of the intended appeal. The application is premised on the grounds on the face of it and on the supporting affidavit sworn by the 1st applicant and evenly dated as the application.



2. According to the applicants, the gist of the application is that the applicants are directors of the 2nd respondent while the 1st respondent is a 3rd party to the 2nd respondent and therefore lacked the requisite *locus standi* to file a suit for or on behalf of the 2nd respondent. They contended that the high court in Misc Civil Application No E001 of 2022 granted the 1st respondent leave to commence a derivative claim against the applicants and conservatory orders were also issued which orders have paralyzed the operations of the 2nd respondent. It is also the applicants' case that High Court in Misc Civil Application No E001 of 2022 was filed under section 238 and 239 of the [Companies Act](#) and therefore conservatory orders would not issue because the grant of such orders is required to be anchored on a substantive suit which was not filed in this case. The applicants also stated that the prior to the filing of Misc. Civil Application No E001 of 2022 and to date, the 2nd respondent is facing financial constraints exacerbated by the effects of COVID-19 and unless the application herein is allowed, the 2nd respondent may be forced to wind up due to failure to meet its financial obligations. The applicants argue that the orders of the learned judge are not in the best interest of the 2nd respondent and have the ultimate effect of paralyzing the operations of the 2nd respondent as it barred the directors from holding meetings which are the only mode of steering the operations of the 2nd respondent. The applicants reiterate the grounds of appeal and contend that they are apprehensive that unless the orders sought are granted, the intended appeal will be rendered nugatory as the 2nd respondent will have ceased to be.
3. The application was opposed through the replying affidavit sworn by the 1st respondent. According to the 1st respondent, she is a minority shareholder of the 2nd respondent by virtue of being an administrator to the estate of Narshibhai Fulabhai Patel regardless of the pending transfer of the said shares to her name. She opposed the grounds of appeal raised by the applicants and contended that her application in Misc Civil Application No E001 of 2022 was within the precincts of the law and merited. She also contended that her move to seek leave prior to lodging a derivative suit has legal backing and that seeking leave without filing the main suit does not render an application incurable. She further contended that the court in issuing the conservatory orders was satisfied that she had established a *prima facie* case and that there was a need to preserve the subject matter. It is the 1st respondent's case that the impugned orders were meant to preserve the subject matter by keeping the 2nd respondent alive and operational and without the orders, the subject matter will be defeated. She contended that meetings of board members are not equated to the day to day operations of the company and therefore the 2nd respondent can still be kept afloat with the said orders in place. In conclusion, the 1st respondent contends that if the prayers sought herein are granted, the 1st respondent will be prejudiced as the subject matter of her derivative claim will be lost and the same will be defeated. She prayed that the application be dismissed with costs.
4. This application was heard in plenary on 21st February, 2023 with SC Ahmednasir and Mr Muchoki appearing for the applicants and Ms Aoko holding brief for Mr Kisila for the 1st respondent. There was no appearance for the 2nd respondent. Both sides had filed their submissions which they sought to rely on with SC Ahmednasir briefly highlighting the submissions for the applicant orally.
5. For the applicant, Ahmednasir, SC, submitted that all they seek is for this court to maintain the 2nd respondent as a going concern and rescue it from imminent collapse. Counsel argued that the applicants have met the threshold for grant of stay under rule 5(2)(b) of the [Court of Appeal Rules](#). Counsel further referred to the case of [Stanley Kangethe Kinyanjui vs. Tonny Ketter & Others](#) [2013] eKLR to point out the two-tier test of whether or not there was an arguable appeal; and if so, whether or not the appeal would be rendered nugatory. Counsel reiterated their grounds of intended appeal to submit that the trial court committed an error in principle when it issued the impugned orders. On nugatory test, counsel submitted that unless the stay orders were granted, there would be no company



- to preserve as the 2nd respondent stood a chance of failing due to inability to deliver on its financial obligations. Counsel pointed out that a derivative action ought to be geared towards securing the best interest of a company and not an individual which they argued was the intention of the 1st respondent.
6. Counsel relied on the case of *Gbelani Metals Ltd & 3 Others vs. Elesh Gbelani Natwarlal & Another* [2017] eKLR to buttress the submissions on the nugatory test. Counsel reiterated that the orders of the trial court carried with them adverse effects on the wellbeing of the 2nd respondent by barring meetings where resolutions which breathe life into the operations of a company are made. In addition, counsel also submitted that the 2nd respondent will not be able to meet any of its financial obligations without board resolutions; and as a result, counsel argued, the 2nd respondent will be faced with numerous civil suits rendering the company frozen hence defeating the intent of the derivative suit. In the end, counsel relied on the case of *Reliance Bank Ltd vs. Norlake Investments* [2002] 1 EA 227 to urge the Court to allow the application.
 7. For the respondent, counsel submitted that the applicants had not met the threshold for grant of stay of execution under the rule 5(2)(b) of the *Court of Appeal Rules*. Counsel submitted that the intended appeal is not arguable as the issues raised in the draft memorandum of appeal were succinctly addressed by the trial court. Counsel posited that under section 238(3) of the *Companies Act*, the 1st respondent was required to demonstrate a *prima facie* case which it did prior to being issued with the conservatory orders.
 8. According to counsel, the intended appeal is pegged on technical as opposed to substantive questions of law. Counsel also submitted that with the orders of the trial court in place, the intended appeal will not be rendered nugatory. Counsel recounted the facts leading to Misc Civil Application No E001 of 2022 and submitted that the conservatory orders did not interfere with the day to day running of the 2nd respondent. Counsel argued that the orders did not bar meetings of the board of directors who are the ones charged with manning the operations of the company. On the contrary, counsel submitted, that the orders only barred the convention of the special general meeting of members of the company. Counsel also submitted that it was only a dereliction of duties by the management that could stagnate operations of the company. Counsel further submitted that the applicants were before this court in a bid to secure an opportunity to continue their mismanagement of the 2nd respondent which the trial court had sought to curtail. In conclusion counsel urged us to find that the trial court balanced the interests of both parties when it issued the conservatory orders and to dismiss the application for want of merit.
 9. We have accorded due consideration to the notice of motion, the supporting affidavit, the replying affidavit as well as the submissions by both parties. An application for stay brought under rule 5(2)(b) of the *Court of Appeal Rules* turns on proof of two limbs; whether the appeal is arguable and whether the appeal will be rendered nugatory. This view is fortified by the pronouncement in *Attorney General & another v Eunice Makori & Another* [2021] eKLR where the court stated as follows:

“Undoubtedly, this Court has unfettered discretion under Rule 5(2) (b) to grant an order of stay. The principles guiding the exercise of such discretion are well settled. 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. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. (See: *Multimedia University & Another v Professor Gitile N. Naituli* (2014) eKLR).”



10. Our first limb of interrogation is whether the intended appeal by the applicant is arguable. An arguable appeal is one which is not frivolous; but not necessarily one that must succeed. It should be one which raises issues or questions that call for interrogation by an appellate court. In *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, an arguable appeal was defined as:
- “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.”
11. We have considered the grounds of appeal enumerated in the annexed memorandum of appeal as well as those raised in the application itself vis-à-vis the judgment and the pleadings before the trial court. We note that the grounds raise various issues of law, and the application of the law to the facts of the appellant’s case. At the center of the intended appeal are the questions of the respondent’s *locus standi*, the application of sections 238 and 239 of the *Companies Act*, and grant of leave to institute a derivative suit where no substantive suit has been filed, among others. It is our view and we so find that the issues raised therein give rise to an arguable appeal. We need not say more on this lest we find ourselves delving beyond the remit of this application.
12. The second line of inquiry is whether the intended appeal will be rendered nugatory if the orders sought are not granted. For an appeal to stand the risk of being rendered nugatory, the orders sought to be stayed should be such that if the intervention of stay orders is not granted, the outcome of the appeal, if successful, would be worthless. In determining whether an appeal will be rendered nugatory, due consideration is given as to whether what is sought to be stayed is reversible. In the event that what is sought to be stayed is irreversible, the court must then assess whether damages can sufficiently compensate the party seeking stay. If, however the thing sought to be stayed is irreversible and damages cannot reasonably compensate the party seeking stay, then the appeal qualifies as one which will be rendered nugatory. The court in *stanley kangethe kinyanjui v tony ketter & 5 others* [2013] eKLR was of similar views where it stated as follows:
- “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.”
13. The applicant herein seeks stay against orders number 2 and 3 of the trial court which were as follows:
- “ii. The leave granted do operate as stay of any meetings whether general or special that may be convened by the board of directors of Kenya Flexogravure Ltd pending hearing and determination of the intended derivative suit.
- iii. The leave granted do operate as protection restricting activities of the board of directors of the affected party specifically on convention of any annual, emergency or special meetings, resolution on capital raising through sale, transfer or otherwise of shares or assets of the affected party pending the hearing and determination of this intended suit.”
14. In addressing the question of nugatory, counsel for the applicant argued before us that the trial court overlooked the adverse effects on the wellbeing of the 2nd respondent, by barring meetings where resolutions which breathe life into the operations of a company are made. Counsel also submitted that the 2nd respondent will not be able to meet any of its financial obligations without board resolutions;



and as a result, counsel argued, the 2nd respondent will be faced with numerous civil suits rendering the company frozen hence defeating the intent of the derivative suit. But the respondent was of the view that if the orders of stay are granted, the intended suit will be rendered nugatory as the interests of the affected party would not have been secured. According to her, if stay of execution is granted, the very essence of the intended derivative suit would be rendered moot.

15. In *Rhoda Mukuma v John Abuoga* [1988] eKLR, this court pointed out as follows:

“The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo.”

16. At the center of the dispute between the parties herein is the exercise of the powers of the directors of the company, Kenya Flexogravure Ltd and the intended disposal or dilution of the shares owned by the estate of Narshibhai Fulabhai Patel. The respondent sought to avoid dilution of her shares pending the hearing and determination of the intended suit. On the other hand, according to the applicants, Kenya Flexogravure Ltd is facing financial challenges and if not kept afloat, it will be liquidated altogether. In the circumstances of this case, we are satisfied that unless there is at least a partial stay of execution, the appeal, if ultimately successful, would be rendered nugatory. The nature of these divergent interests and rights of both sides calls for an intricate balance in protecting shareholders’ interests and the general well-being of the company.

17. We have given due consideration to the rival arguments advanced by both parties.

We share the respondent’s view that board meetings are not required to ensure the continuity of the day to day operations of the Kenya Flexogravure Ltd. However, we are also cognizant of the fact that suits may sometimes take time to be finalized and it could be prejudicial to the interests of Kenya Flexogravure Ltd if all board meetings are stayed during the pendency of the suit, which period is unknown. What is complained of by the respondent were the issue of proposed dilution as well as the inclusion of the directors who were alleged to have been appointed irregularly. We think that limiting the scope of the conservatory orders to these two aspects will offer better protection of the rights and interests of both the shareholders and Kenya Flexogravure Ltd.

18. In the circumstances, we find the application to be partially merited. Stay of execution is hereby granted with the following orders;

a. Pending the hearing and determination of the intended Appeal, there shall be a stay of order (ii) which was in the following terms;

“(ii) The leave do operate as stay of any meetings whether general or special that may be convened by the board of directors of Kenya Flexogravure Ltd pending hearing and determination of the intended derivative suit.”

19. As regards the costs of the application, we order that the same shall abide the outcome of the substantive appeal.

20. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2023.

F. OCHIENG



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JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

