



**Bulle v Mehta International Ltd & another (Civil Application
E055 of 2023) [2023] KECA 554 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 554 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E055 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
MAY 12, 2023**

BETWEEN

MOHAMMED BULLE APPLICANT

AND

MEHTA INTERNATIONAL LTD 1ST RESPONDENT

MEHTA GROUP MANAGEMENT LTD 2ND RESPONDENT

*(Being an application for stay of execution and further proceedings pending appeal
against the Ruling and Orders of the High Court of Kenya at Nairobi (A. K.
Ndung'u, J.) dated 19th January 2023 in Judicial Review 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Kenya Development Corporation in March 1978 to incorporate Agrochemical and Food Company Limited (ACFC) under the now repealed *Companies Act* (Cap 486)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 Cabinet Secretary in the Ministry of Agriculture, Livestock, Fisheries and Co-operatives directed the applicant, 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 Cabinet Secretary 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 directives aforesaid, the respondents moved to the High Court seeking leave to apply for judicial review of the Cabinet Secretary'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 (A K 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 Cabinet Secretary do file his 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 his 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 his 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. On July 27, 2022, the respondents filed a Motion in the trial court to cite the applicant, the Cabinet Secretary 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.
 9. 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, the applicant 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." The applicant 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 Cabinet Secretary 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 the Cabinet Secretary, 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 Cabinet Secretary as the Acting Managing Director of the ACFC and, therefore, could not be held in contempt of the said court orders.

12. By a ruling dated January 19, 2023, Ndung'u, J found the applicant, the Cabinet Secretary and Mr Timothy Ogwang in contempt of the orders of the court issued on June 30, 2022 and ordered that "... they appear in person before the court on February 21, 2023 to confirm the purging of the contempt in default of which they are to be sentenced in accordance with the law. In default of appearance a warrant of arrest is to issue."
13. Aggrieved by the decision of the learned Judge made on January 19, 2023, the applicant moved to this Court on appeal and lodged its notice of appeal dated January 30, 2023.
14. By a Notice of Motion dated February 16, 2023, the applicant moved this Court seeking, inter alia: stay of execution of the ruling delivered on January 19, 2023 pending appeal; stay of further proceedings of the Judicial Review application No E079 of 2022 pending appeal; an interim order restraining the respondents from taking any steps to resume the management of ACFC; and that the costs of the Motion do abide the outcome of the intended appeal.
15. The applicant's Motion is supported by his annexed affidavit sworn on February 16, 2023, and is anchored on the grounds, inter alia: that the intended appeal raises substantial and arguable points of law and fact; that the intended appeal is meritorious with a high probability of success; that the applicant stands to suffer irreparable harm and irredeemable injustice if the orders sought are not granted; that the operations of the subject company would be greatly hampered with the likely stalemate in decision making and operations; that the application has been brought without unreasonable delay; and that it is in the interest of justice and for the overarching purpose of constitutional integrity that this Court grants the orders sought.
16. Annexed to the applicant's supporting affidavit is a draft memorandum of appeal setting out seven (7) grounds on which the intended appeal is preferred. According to the applicant, the learned Judge erred: in finding that the applicant is in contempt of the orders issued on June 30, 2022; by failing to appreciate the issues in dispute between the parties; in failing to appreciate that the impugned orders would occasion irreparable loss and damage; by making orders without due regard to the provisions contained in the statutes governing the subject matter; in failing to appreciate the applicant's submissions; by finding the applicant in contempt for a decision made by the entire Board of Directors of the subject company, ACFC; and by failing to appreciate that the impugned orders were incapable of enforcement.
17. In support of the applicant's Motion, learned counsel Ms Lilian Kosgey filed written submissions and a list of authorities dated February 3, 2023 citing three judicial authorities, namely: *Kiu & Another vs. Khaemba & 3 Others* [2021] KECA 318 (KLR) for the proposition that an arguable appeal is one that warrants the Court's intervention to interrogate issues before it; *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR and *Katangi Developers Limited vs Prafula Enterprises Limited & Another* [2018] eKLR on the definition of the term "nugatory".
18. In reply to the applicant's Motion, the respondents filed an affidavit of Mr. Ashok Agrawal sworn on April 6, 2023. According to Mr Agrawal, the applicant's Motion is an attempt to mislead this Court into condoning a continuing brazen disregard of a valid and subsisting order of June 29, 2022.
19. Learned counsel for the respondents, CM Advocates LLP, filed written submissions dated April 7, 2023. Counsel cited the cases of *Erdemann Properties Limited vs NEMA & Others* [2020] eKLR contending that the applicant has no arguable appeal, as the only substantive ground (No 6) is settled



- in law to the effect that the liability of a person to whom a notice of a subsisting order is notified and served is impeachable; *Consolidated Bank of Kenya & 2 Others vs Usafi Limited* [2006] eKLR; and *Republic vs Director of Fisheries & Another* [2001] eKLR submitting that this Court should restate the enjoinder of the applicant to comply with the impugned order before being heard on any other issue.
20. This Court has pronounced itself time and again holding that, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the *Court of Appeal Rules* pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see *Anne Wanjiku Kibeh vs Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited vs A A Kawir Transporters & 4 Others* [2014] eKLR).
 21. With regard to the second limb of the twin principle, the term “nugatory” was defined in *Reliance Bank Ltd vs Norlake Investments Ltd* [2002] 1 EA p 227 at p 232 as “worthless, futile or invalid”. It also means “trifling”.
 22. A cursory look at the applicant draft memorandum of appeal in the backdrop of the record as put to us reveals no issue or substantive issues of law or fact deserving of the Court’s inquiry on appeal against the impugned ruling. With the exception of the 1st ground, which merely states the trial court’s decision, the 2nd 3rd 4th 6th and 7th grounds touch on the merits of the respondents’ Judicial Review application, which is pending determination, while ground No 5 cannot be the subject of appeal in the absence of substantive grounds that point to the applicant’s contention in that regard.
 23. It is noteworthy that the learned Judge merely ordered the contemnors to appear in person on February 21, 2023 to confirm the purging of the contempt in default of which they were to be sentenced. To our mind, all that they were required to do was to appear and confirm that they had purged the contempt, or explain why they could not purge the contempt. That door is still open.
 24. Having carefully examined the record as put to us, the applicant’s Notice of Motion dated February 16, 2023, the affidavit in support thereof, the respondents’ replying affidavit, the written and oral submissions of learned counsel for the applicant and for the respondents, the impugned ruling and orders, the applicant’s draft Memorandum of Appeal, and the grounds on which the intended appeal is anchored, we reach the inescapable conclusion that the intended appeal is not arguable. In the circumstances, we need not address ourselves to the second limb of the twin principle for grant of orders under rule 5(2) (b) of this *Court’s Rules*. Accordingly, we find nothing to warrant stay of execution of the orders issued on June 30, 2022 or of the proceedings in the trial court pending the intended appeal.
 25. Finally, it would be remiss of us not to pronounce ourselves on this Court’s discretionary power to stay proceedings before a trial court pending appeal. We take to mind that it is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. As stated by this Court in *David Morton Silverstein vs Atsango Chesoni* [2002] eKLR -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts..”



26. The High Court at Meru in *Kenya Wildlife Service vs James Mutembei* [2019] eKLR, Gikonyo, J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”

27. *Halsbury’s Laws of England*, 4th Edition Vol 37 has this to say at p 330 and p 332

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

... ..

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

... ..

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

28. In conclusion, we find nothing to suggest that the proceedings sought to be stayed are frivolous, vexatious or harassing, or to be manifestly groundless. Moreover, the circumstances of this case do not call for such stringent orders as to stay proceedings in the superior court. We need not overemphasise the fact that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his or her case. That explains why the test for stay of proceedings is high and stringent, and why this Court’s power to grant such orders should be exercised sparingly.

29. In view of the foregoing, we find that the applicant has failed to satisfy the twin principle for grant of the orders sought pursuant to rule 5(2) (b) of this *Court’s Rules*. Accordingly, the Notice of Motion dated February 16, 2023 fails and is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

NG’ENYE-MACHARIA



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

