



REPUBLIC OF KENYA



**Gupta & 2 others v Gupta & 3 others (Civil Appeal (Application)  
E092 of 2022) [2023] KECA 487 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 487 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E092 OF 2022  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
MAY 12, 2023**

**BETWEEN**

**KUNJ GUPTA ..... 1<sup>ST</sup> APPLICANT  
WILLIS O. OLUGA ..... 2<sup>ND</sup> APPLICANT  
DARMAN GUPTA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**RUPA GUPTA ALIAS RUPA BULBULI BOSE ..... 1<sup>ST</sup> RESPONDENT  
VARUN GUPTA ..... 2<sup>ND</sup> RESPONDENT  
BAMBURI SUPERMARKET LIMITED ..... 3<sup>RD</sup> RESPONDENT  
REGISTRAR OF COMPANIES ..... 4<sup>TH</sup> RESPONDENT**

*(An application for stay of execution of the ruling and proceedings  
by the High Court at Mombasa (Njoki Mwangi J.) delivered  
on 30th November 2022 in Mombasa HCCC No E070 of 2021)*

**RULING**

1. The principles that apply to the Applicants' application dated December 14, 2022, that seeks to stay the ruling delivered by the High Court at Mombasa (Njoki Mwangi J) on November 30, 2022, and the proceedings in HCCC No E070 of 2021 -Rupa Gupta alias Rupa Bulbuli Bose vs Daman Gupta & 4 Others are settled. The Applicants are required to demonstrate firstly, an arguable appeal, and secondly, that unless an order of stay is granted their appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in various decisions and most notably in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.



2. The Applicants in this respect have averred in their application and the supporting affidavit sworn by the 1<sup>st</sup> Applicant that on November 30, 2022, the High Court delivered a ruling in which the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Respondent were found to have violated an order of the High Court dated July 30, 2022, and that the 2<sup>nd</sup> Applicant, who was representing the parties, was found to have advised and assisted his clients to disobey and circumvent the order of the High Court dated July 30, 2022. According to the Applicants, their appeal against the said ruling is arguable and has a high chance of success for the reasons that the High Court lacked jurisdiction to deal with the suit because the same related to ownership, use and occupation of land. Further, the prayer relating to the shares of the Premlal Gupta (Deceased) could only be determined in Succession Cause No. 5 of 2020 which was filed in respect of the said Deceased's estate. In addition, that the grounds of the for contempt of court were not proved, which grounds the Applicants explained in detail; and lastly, that Bamburi Supermarket Limited, the 3<sup>rd</sup> Respondent herein, is a limited liability company separate and distinct from its Directors (the Applicant and the 2<sup>nd</sup> Respondent, and was not restrained from continuing with its operations and from managing the suit property known as Land Reference No. 3413 Section I Mainland North by the order of the High Court made on July 30, 2021 which was alleged to have been breached. Therefore, and the learned trial judge erred in lifting its corporate veil and indicting the 2<sup>nd</sup> Applicant on the basis of letters written on behalf of the 3<sup>rd</sup> Respondent.
3. In addition, that if the orders sought herein are not granted, the appeal will be rendered nugatory because there is a high possibility that the 1<sup>st</sup> Applicant shall have served the sentence which the court may mete out to him which may include committal to civil jail thereby denying him his liberty, which sentence cannot be reversed once executed, and the said Applicant will suffer irreparable harm since no amount of damages can compensate committal to civil jail. Further, that the 2<sup>nd</sup> Applicant's professional standing will be negatively affected by the adverse finding that he abetted disobedience of the court order will suffer irreparable harm since he shall have lost his existing and future clients by the time the appeal is heard and determined because of the adverse finding. Lastly, that if a stay of proceedings is not granted, the appeal will be rendered nugatory because the case shall have proceeded before a court without jurisdiction by the time the appeal is heard determined.
4. The 1<sup>st</sup> Respondent opposed the application in a replying affidavit she swore on January 20, 2022, and averred that the stay of proceedings sought by the Applicants is a delay tactic since the Applicants had filed another application dated September 14, 2021 which is yet to be prosecuted seeking inter alia to strike out the suit. Regarding this disputed jurisdiction of the High Court, she has averred that the matter in issue is predominantly on the fraud of shareholding of the 3<sup>rd</sup> Respondent by the Directors, which the Commercial court is better placed to hear and determine. In addition, that the 2<sup>nd</sup> Applicant advised the 1<sup>st</sup> and 3<sup>rd</sup> Applicants to disregard the order of the learned trial Judge and proceeded to file suit and get a contradictory order before the Environment and Land Court. The 1<sup>st</sup> Respondent contended that the 1<sup>st</sup> Applicant has already been sentenced and paid a fine of Kshs 100,000/- while the 2<sup>nd</sup> Applicant was only cautioned, hence the fear of being committed to civil does not arise. In addition, that that the appeal will not be rendered nugatory on the mere fact that the trial would proceed and judgment given on merit.
5. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents did not file any response to the application, and we heard the application on this Court's virtual platform on January 24, 2023, when learned counsel Mr. Willis Oluga appeared for the Applicants, while learned counsel Mr Martin Tindi appeared for the 1<sup>st</sup> Respondent. There was no appearance for the 2<sup>nd</sup> to 4<sup>th</sup> Respondents, despite their counsel being duly served with the hearing notice. The counsel for the Applicants and 1<sup>st</sup> Respondent were directed by the Court to make oral



submissions, after it transpired that Mr. Oluga had filed his written submissions the previous day and served the counsel for the 1st Respondent on the hearing day.

6. Mr Oluga reiterated the averments made in the Applicants' pleadings as regards the arguability of their appeal and how it will be rendered nugatory, and clarified that they Applicants were seeking to stay the effects of the impugned orders and proceedings as they were challenging the High Court's jurisdiction. Mr Tindi on his part submitted that there is no arguable appeal as no decision has been made by the High Court on the issue of its jurisdiction, and reiterated that the application had been overtaken by events as the 1<sup>st</sup> Applicant had paid the fine and no adverse orders were made against the 2<sup>nd</sup> Applicant who was discharged with a caution. Therefore, that the Applicants' appeal will also not be rendered nugatory.
7. The background to the application is that the suit in the High Court was filed by the 1<sup>st</sup> Respondent, who was the administrator of the estate of Prem Lal Ramnath alias Prem Lal Ramnath Gupta, who she claimed was a Director/Shareholder of Bamburi Supermarket Limited, the 3<sup>rd</sup> Respondent herein, which owned a building known Gupta Complex situated on Reference No. 3413 Section 1 Main Land North within Nyali Area at Mombasa Supermarket Ltd. The 1<sup>st</sup> Respondent sued the 1<sup>st</sup> and 3<sup>rd</sup> Applicants and 2<sup>nd</sup> to 4<sup>th</sup> Respondents arising from what she alleged to be the fraudulent attempt to change the shareholding of the deceased and dispossess her from running and managing the deceased's estate and ownership of Gupta Complex, and she also filed an application seeking a temporary injunction orders against the said parties. On July 30, 2021, Njoki Mwangi J. issued an interim ex parte order restraining the 1<sup>st</sup> Applicant and 2<sup>nd</sup> Respondent from interfering with the management, ownership and running of the affair of the building known as Gupta Complex, and the 1<sup>st</sup> Respondent thereupon filed an application for contempt of court dated August 31, 2021 and amended on September 9, 2021, which was the subject of the impugned ruling delivered on November 30, 2022. The 1<sup>st</sup> and 3<sup>rd</sup> Applicants and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in turn filed a Preliminary Objection dated September 14, 2021 challenging the Court's jurisdiction to grant the interim orders and to hear and determine the substantive suit, which objection was pending hearing at the time of delivery of the impugned ruling.
8. We need to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further that it is sufficient if the appeal raises only one triable issue. This Court in this regard held as follows in [\*Somak Travels Ltd vs Gladys Aganyo\*](#) [2016] eKLR

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
9. The Applicants did not annex a draft proposed memorandum of appeal, but set out their grievances with the decision appealed against the face of the application, namely that the trial Judge had no jurisdiction to entertain the application the that grounds for contempt were not proved. It is our view that these are not frivolous grounds, and that the Applicants have therefore established the existence of the first limb.



10. On the second limb, it was held in Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [*supra*] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. It is not contested that the 1<sup>st</sup> Applicant has since filing the application for stay, been sentenced and fined for contempt of Court by the High Court, and to this extent the application is overtaken by events. In addition, we cannot make any definitive findings at this stage as regards any adverse effects of the orders on the 2<sup>nd</sup> Applicant, which is a matter to be determined in the substantive appeal. Furthermore, if their appeal succeeds the sentence meted out can be reversed, any fines paid will be refunded, and good reputations restored at that stage. Lastly, the issue of the High Court's jurisdiction is still pending before the said Court, and the Applicants in this respect did not annex any ruling delivered thereon which can be the subject of an appeal in this Court. It is thus our finding for these reasons, that the Applicants have not demonstrated that their appeal will be rendered nugatory if stay is declined.
11. The Applicants have therefore not met the required threshold for stay orders, and their application dated December 14, 2022 is accordingly dismissed with costs to the 1<sup>st</sup> Respondent.
12. Orders accordingly.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of May, 2023.**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**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**

