



REPUBLIC OF KENYA



**KENYA LAW**  
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**Korir v Karebe Gold Mining Ltd & 4 others (Civil Application  
E012 of 2023) [2023] KECA 803 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KECA 803 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E012 OF 2023  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
JUNE 30, 2023**

**BETWEEN**

**CHESERET ARAP KORIR ..... APPLICANT**

**AND**

**KAREBE GOLD MINING LTD ..... 1<sup>ST</sup> RESPONDENT**

**KAREBE GOLD MINING LTD ..... 2<sup>ND</sup> RESPONDENT**

**PIUS KIPTANUI KOGO ..... 3<sup>RD</sup> RESPONDENT**

**PIUS KIPTANUI KOGO ..... 4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF PETROLEUM AND  
MINING ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for stay pending the hearing and determination of an  
intended appeal from the Ruling of the Environment and Land Court at Kapsabet  
(M. N. Mwanyale, J.) dated 9th March, 2023 in ELC Case No. E009 of 2022)*

**RULING**

1. Before us is an application dated March 20, 2023 in which the applicant prays for an order of stay suspending orders of the ruling of the Environment and Land Court (MN Mwanyale, J) dated March 9, 2023 and an order of stay of proceedings in ELC No E009 of 2022 pending the hearing and determination of this application and the intended appeal.
2. The factual background of this case is as follows: the applicant is the owner of land parcel numbers Nandi/Chemase/224 and Nandi/Chemase/974, hereinafter “the suit properties”. In 2009, the applicant leased part of the suit properties to the 1<sup>st</sup> respondent, through its subsidiary, for a period of 10 years, which lease was renewable for a further 10 years, 6 months before expiry of the lease. On March 19, 2018 the applicant issued a notice of non-renewal of the lease, marking the start of litigation



over the suit properties. On July 3, 2018 the 1<sup>st</sup> respondent's subsidiary issued a notice of renewal of lease for a further 10 years. This offer was rejected by the applicant, who then asked the 1<sup>st</sup> respondent's subsidiary to vacate the suit properties. The matter was then referred to an arbitrator. The arbitrator's award dated April 30, 2019 was to the effect that, the lease was validly renewed for a further term of 10 years from January 22, 2020.

3. Dissatisfied with the award, the applicant filed an application to set aside the award.

Pursuant to a ruling delivered on February 26, 2020 by the Environment and Land Court, the arbitral award was set aside. Aggrieved by the ruling, the 1<sup>st</sup> respondent's subsidiary sought 90 days' injunctive orders which lapsed on August 5, 2020. The 1<sup>st</sup> respondent's subsidiary also filed an appeal against the ruling before the Court of Appeal. The 1<sup>st</sup> respondent's subsidiary's application dated July 28, 2020 for stay of execution before this Court, was dismissed on December 2, 2022.

4. The 1<sup>st</sup> respondent then moved the Environment and Land Court and obtained *status quo* orders dated October 18, 2022 barring either party from mining on the suit properties pending the outcome of the application before the Court of Appeal. The applicant and the others denied knowledge of the said orders.
5. On the strength of the order of October 18, 2022 the 1<sup>st</sup> respondent filed an application dated November 17, 2022 against the applicant and others citing them for contempt of court. In the ruling dated March 9, 2022 the applicant and others were found in contempt of the court order. Aggrieved, the applicant lodged a Notice of Appeal to this court and also filed the present application.
6. The application is brought under rule 5(2)(b) of the [Court of Appeal Rules](#) and Sections 3A and 3B of the [Appellate Jurisdiction Act](#). The application is supported by the applicant's affidavit and on the grounds on the face of the application to wit that: the applicant was aggrieved by the impugned ruling in which, the court found him to be in contempt of the orders granted on October 18, 2022; the applicant's application for review was not entertained by the court; there are fundamental points of law and fact against the ruling; the applicant has an arguable appeal with good prospects of success for reasons outlined in the draft memorandum of appeal; the applicant's liberty was at stake having been ordered to attend court on March 23, 2023 for mitigation and sentencing; if the orders sought are not granted, the appeal will be rendered nugatory as the applicant might be deprived of his liberty before the intended appeal; without an order of stay suspending the impugned ruling, the appeal will be rendered nugatory; no prejudice will be occasioned to the respondents if the prayers sought are granted and the applicant abides by the conditions therein; and that the application has been brought without undue delay, and the balance of convenience tilts in favour of the applicant owing to his ownership and possession of the suit properties.
7. In his replying affidavit, the 2<sup>nd</sup> respondent stated that: the application is an abuse of the court process aimed at delaying and frustrating the administration of justice; the application does not meet the threshold for grant of stay of execution; the application and the supporting affidavit do not demonstrate that the applicant has an arguable appeal; the grounds in the draft memorandum of appeal are mere generalities and insinuations without legitimate legal questions; in any event, the applicant has already admitted on oath that he acted in contempt of the court order; the applicant has since complied with the impugned ruling by purging the contempt, the present application has been overtaken by events; the applicant has mitigated before the trial court and asked for leniency on sentencing; the application and supporting affidavit do not demonstrate that the appeal will be rendered nugatory if stay is not granted; applicant has not explained why he has not filed an appeal 30 days after the ruling; the application for review was rightly dismissed, having been filed after a notice of appeal was lodged; the orders with respect to the application for review are negative and without any positive obligation



and nothing to be stayed; and that there is a risk that the orders sought herein will interfere with the judicial independence of the trial court.

8. The application was canvassed by way of written submissions. The applicant submitted that he has an arguable appeal having been held in contempt for mining, without any evidence of such mining. If sentenced to jail, he would be prejudiced. Citing the case of *Fatima Ali Mohamed v Harbans Singh Soor* [2007] eKLR counsel maintained that the intended appeal was arguable given that, the order by the court prohibited mining, and there was no evidence to show that there was mining. Further, counsel faulted the learned Judge for failing to entertain the applicant's application for review. Counsel also cited the case of *Attorney General v Pascal Barasa Olaimo & 75 others* [2020] eKLR in submitting that the intended appeal raises serious questions, to warrant this Court's consideration.
9. On the nugatory aspect, counsel submitted that the applicant's liberty is at stake, having been found to be in contempt of Court. The applicant has already mitigated before the trial court and now awaits sentencing, which sentence might be pronounced by the court and/or served before the intended appeal is heard and determined. To buttress this submission, counsel relied on the decision in the cases of *Jackson Kipkemboi Koskey & 7 others v Rev. Samuel Muriithi Njogu & 4 others* [2007] eKLR and *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another* [2014] eKLR.
10. The 1<sup>st</sup> respondent contended that there was no arguable appeal as the applicant was trying to canvass the appeal which he had previously filed. The applicant had not raised any issue to challenge contempt of court in his memorandum of appeal. The applicant had not demonstrated that he will be sent to jail, as the court might not sentence him to jail. The appeal will not be rendered nugatory. The applicant had also apologized for being in contempt and had demonstrated that he purged the contempt. This court should not interfere with the process pending before a competent court.
11. Relying on the case of *Attorney General v Okiya Omtatah Okoiti & another* [2019] eKLR counsel submitted that the only plausible ground the applicant had advanced was that his liberty was at stake. Counsel contended that the application was a mere speculation, as the applicant had not demonstrated that he was likely to lose his liberty, or that there was an immediate threat to his liberty, as an order for committal is yet to be made. Counsel insisted that the issue of sentencing should be left at the discretion of the trial court. Counsel prayed that the application be dismissed with costs to the 1<sup>st</sup> respondent.
12. The 2<sup>nd</sup> respondent submitted that the trial court made a negative order that, it lacked the jurisdiction to order review, as the applicant had filed an appeal. The ruling on contempt convicted the applicant, what remains is the sentencing, hence the present application is speculative. The applicant admitted on oath that he was in contempt.
13. Placing reliance on the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 counsel submitted that, the grounds set out in the draft memorandum of appeal were mere generalities and the grounds do not set out legitimate questions to necessitate the interrogation of the appellate court. Counsel urged the court to take note that, the applicant had already purged contempt, and he could not therefore seek to challenge the ruling on contempt. Counsel further submitted that the right of review is foreclosed the moment a notice of appeal is lodged and has not been withdrawn, and therefore the court cannot be faulted for not entertaining the same.
14. On the nugatory aspect, counsel submitted that the applicant had already been convicted of contempt and that what remains is the sentencing. Counsel argued that the conviction can be challenged at any given time, and failure to issue a stay order does not diminish that right. Counsel pointed out that seeking stay of the sentence which is yet to be meted is premature.



15. We have carefully considered the application, the grounds in support thereof, the affidavits, submissions by counsel, authorities cited and the law. We take cognizance of the fact that the jurisdiction of this Court under Rule 5(2)(b) is original, independent and discretionary. However, we note that the discretion is to be exercised judiciously and with reason; not on impulse or pity.
16. Rule 5(2)(b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR this Court stated *inter alia*:

“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.”

The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
17. It follows therefore that, the applicant has a duty to demonstrate that he has an arguable appeal, and upon satisfying that principle, he has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. (See: *Trust Bank Limited & another v Investech Bank Limited & 3 others* [2000] eKLR).
18. In the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR the court held that; in determining whether the appeal is arguable or not, it is trite that by arguable it does not mean the appeal must be one that must to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court.
19. On whether the applicant has established an arguable appeal, we have considered the applicant’s annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicant which we think merit consideration by this Court is the contention that he was found in contempt of court yet there was no proof that he had been mining on the suit properties in contravention of the court order. The other interesting issue being raised in the draft memorandum is whether or not the trial court could entertain an application for review, where a notice of appeal against the same ruling sought to be reviewed, had been lodged. The respondents contend that, the applicant has already purged contempt and he cannot therefore seek to challenge the same. They also contend that the order by the court not to entertain the application for review was justified as being the law. We find that the solution to these contestations by the parties herein, can only be determined at a full hearing. Therefore, this and the other issues raised in the draft memorandum of appeal are in our considered view not frivolous.
20. On whether the appeal will be rendered nugatory, should the impugned ruling not be stayed, we note that it is common ground that the applicant has been held in contempt of a court order by the trial court. It is also not in dispute that, the applicant has since mitigated on his conviction and awaits sentencing. The pending sentence is what makes the applicant apprehensive that his liberty is at stake, and that if this Court does not intervene, then he will be sent to jail and his intended appeal will be rendered nugatory.
21. We find the concern by the applicant that his liberty is at stake, to be a legitimate concern, given that one of the sentences prescribed by law for contempt of court is a jail term, and that the respondent’s prayer before the trial court is that, if the applicant and others are held in contempt, they should be committed to prison for a maximum period of six months. We therefore hold that since jail term is a possible sentence to be meted against the applicant, he has a right to explore all avenues available to



him, including an appeal against the conviction before he is sentenced. In the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (*supra*) the court held that:

“The power of the court in guarding and protecting the authority and dignity of court orders, although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case.”

22. Be that as it may, should the sentence meted out on the applicant be a jail term or a fine, we have no doubt in our minds that, if stay is not granted, then the applicant will serve or have partially served his sentence by the time his intended appeal is heard and determined. In the case of *Jackson Kipkemboi Koskey & 7 others v Rev. Samuel Muriithi Njogu & 4 others*, (*supra*) the court held thus:

“We are of the view that this is a proper case in which we should exercise our discretion in favour of the applicant. It cannot be denied that to refuse the application would render the intended appeal nugatory since the applicant is likely to have served the six months’ jail sentence by the time the appeal comes up for hearing.”

23. In the case of *Reliance Bank Ltd v Norlake Investments Ltd*, (*supra*) this Court stated that:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.” (Emphasis ours).

24. In the circumstances of the present case, we are persuaded that the applicant has demonstrated an arguable appeal which may be rendered nugatory should stay not be granted. We so hold because if the applicant is sentenced to jail, he would be unable to recover the time and freedom lost, in the event that his appeal was successful after he had been imprisoned.

25. Accordingly, the application dated March 20, 2023 is allowed; but only to the extent of staying the process of sentencing. In effect, if there be any other proceedings, apart from sentencing, the same are not stayed.

26. Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF JUNE, 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**

