



**Jocham Hospital Limited v Penina Njeri Musyimi (Civil Appeal (Application)
E031 of 2023) [2023] KECA 944 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 944 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E031 OF 2023
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

JOCHAM HOSPITAL LIMITED APPLICANT

AND

PENINA NJERI MUSYIMI RESPONDENT

(An application for Stay of Execution of the decree and orders of the High Court at Mombasa (Magare J.) delivered on 20th April 2023 in Mombasa H.C. Civil Appeal No. 167 of 2021)

RULING

1. The principles that apply to the application dated April 26, 2023 brought by Jocham Hospital Limited, the Applicant herein, that seeks an order of stay of execution of the decree and orders given by the High Court at Mombasa (Magare J.) on 20th April 2023 pending the hearing of its intended appeal are settled. The Applicant is 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 v Tony Ketter & 5 others* [2013] eKLR.
2. The Applicant in this respect avers in the said application and supporting affidavit and further affidavit sworn on April 27, 2023 and May 17, 2023 respectively by Nathan Kiplagat, its Chief Administrator that it filed an application dated March 22, 2023 in the High Court, which was dismissed on April 20, 2023 by the following impugned orders:
 - a. The upshot is that I find no merit in the Application herein dated 22/3/2023 is bereft of merit (sic) and as such the same is dismissed with costs of Ksh 20,0000/=
 - b. The lower Court file be returned.



- c. Stay of execution in this matter and in the court below is vacated forthwith and the respondent shall be at liberty to execute forthwith.
 - d. This file is closed.”
3. The Applicant avers that its appeal in the High Court was meritorious and it filed a notice of appeal on April 20, 2023 against the impugned ruling and subsequently filed a letter requesting for copies of the proceedings and ruling in order to enable it file its appeal. Further, that if the respondent executes the decree awarded to her in MSA MCCC No. 526 of 2019 for the amount of Kshs 3,168,452.95/= then the appeal would be rendered nugatory and if the appeal succeeds, it was not likely to recover the aforesaid amounts. In addition, that the Applicant is ready and more than able to satisfy the decree should the appeal not succeed, and as a sign of good will on its part, is ready and willing to deposit Kshs 500,000/- as security for costs for due performance of the decree. The Applicant averred that it has a constitutional right to ventilate its appeal without fear that execution would be levied against it pending the hearing of the appeal.
4. The Applicant in its further affidavit deponed that on or about 8th March 2023, it was served with the Respondent’s proclamation of attachment of movable property, and that the Respondent through its auctioneers executed against it and attached some of the Applicant’s movable properties being a motor vehicle and an ambulance used to ferry members of the public. The Applicant averred that the learned Judge of the High Court failed to take cognizance of the fact that the trial Court in MSA MCCC 256 of 2019 awarded quantum of damages inconsistent with what was pleaded and proved. Further, that its draft memorandum of Appeal dated 14th May 2023 raised triable issues that ought to be canvassed and determined by this Court, and that all the applications it had filed were necessary in order to meet the ends of justice
5. The Respondent in opposition to the application filed a replying affidavit she swore on 10th May 2023, and averred that the impugned ruling illustrated the plethora of interlocutory motions filed by the Applicant in the High Court, during the pendency of which it enjoyed orders of stay of execution of the trial Court’s decree. The Respondent detailed the said applications in her affidavit, and it was her deposition that there were two appeals before this Court, namely the Notice of Appeal filed on 23rd March 2023 challenging the ruling of Njoki Mwangi J. delivered on 14th October 2022, and the Notice of Appeal filed on 20th April 2023 seeking to challenge the ruling of Kizito Magare J. delivered on 20th April 2023. The Respondent in addition averred that she had moved this Court by way of an application dated 17th April 2023 in Mombasa Civil Application No. E027 of 2023- Peninah Njeri Musyimi vs Jocham Hospital Limited, to have the Notice of Appeal filed on 23rd March 2023, struck out under Rules 77(2) & 86 (b) of the *Court of Appeal Rules, 2022*. Lastly, it was the Respondent’s assertion that the main prayers in the instant application were incapable of execution, since they sought to stay a negative order other than the aspect of costs which were assessed at Kshs 20,000/=, and that she should not be dragged into the Applicant’s dispute with its lawyers and driven away from the seat of justice.
6. A brief background to the instant application is that the Respondent initially filed a suit in the Mombasa Chief Magistrate’s Court being MSA CMCC No. 526 of 2019, in which the trial Magistrate (Hon. C. Ndegwa SPM) delivered judgement in her favour and awarded her damages of Kshs 2,569,490.00/- as against the Applicant. The Applicant thereupon filed an application for stay of execution dated 4th October 2021 in the trial Court which was dismissed on 4th February 2022. The Applicant also filed a Memorandum of Appeal in the High Court in MSA HCC Civil Appeal No 167 of 2021 on 4th October 2021, and a motion dated 9th February 2022 seeking that the Memorandum of



- Appeal be deemed to be properly on record and for stay of execution of the decree in the trial Court, which motion was dismissed by the High Court (Njoki Mwangi J.) on 14th October 2022.
7. The Applicant subsequently filed two applications on 25th October 2022, one in the trial Court seeking to strike out the trial Court's decree, and in which stay order were granted pending the inter partes hearing of the motion; and one in the High Court seeking a review of the ruling by Njoki Mwangi J. of 14th October 2022. By way of an application dated 27th October 2022, the Respondent also moved the High Court to call for and examine the record of the trial Court and vacate the stay orders, and after calling for the file, the High Court directed that both the Applicant's and Respondent's applications be heard and determined together. However, on 23rd March 2023 prior to the ruling on the said applications, the Applicant filed a Notice of Withdrawal discontinuing its application for review; and instead filed a Notice of Appeal against the ruling by Njoki Mwangi J. delivered on 14th October 2022, and an application seeking leave to appeal against the said decision and stay of execution of the said ruling. This application was the subject of the impugned ruling delivered by Magare J. on 20th April 2023 that is sought to be stayed in the instant application.
 8. We heard the instant application on this court's virtual platform on 22nd May 2023 and learned counsel Ms. Linet Kithee appeared for the Applicant, while learned counsel Mr. Masore appeared for the Respondent. And both counsel highlighted their respective submissions dated 15th May 2023 and 19th May 2023. On the requirement of an arguable appeal, Ms. Kithee referred us to the Applicant's draft memorandum of appeal to submit firstly, that the prayer for leave to appeal out of time would if successful, have operated to stay the execution of the judgment and decree delivered on 25th August 2021 in MSA MCCC No. 526 of 2019 whose award was inordinately high for the injuries sustained by the Respondent; and secondly, it was trite law that an appellant had constitutional right to ventilate its appeal without fear of execution being levied against it. The counsel reiterated the chronology of events at the trial Court in MSA MCCC No. 526 of 2019, and that the Applicant's counsel on record filed an application seeking to reopen the defence case and enable the Applicant call its defence witnesses but the application was dismissed leading to the delivery of the judgment on 25th August 2021. Therefore, that there was denial of natural justice to the Applicant.
 9. Mr. Masore on his part submitted that the Applicant is seeking to substitute the impugned orders of 20th April 2023 with an order that it be granted an opportunity to be heard on appeal before the High Court through the reinstatement of the Memorandum of Appeal dated 1st October 2021 as a proper Court Record, but that the learned Judge of the High Court was neither called upon by the Applicant to deem the Memorandum of Appeal dated 1st October 2021 against the trial Court's decree properly on record, nor did the Judge strike out the same in the said orders. On the contrary, that it was the ruling of 14th October 2022 by Njoki Mwangi J. that probed the Memorandum of Appeal against the trial Court's decree against which the Applicant had already filed a Notice of Appeal dated 22nd March 2023. Therefore, that the Applicant was using the ruling delivered by Magare J. on 20th April 2023 as a red herring to assail the ruling of Njoki Mwangi J. delivered on 14th October 2022.
 10. We need to point out 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. As held by this Court in *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR The



Applicant's draft memorandum of appeal dated 14th May 2023 in this respect sets out the following grounds of appeal:

1. That the Learned Judge erred in law and fact by failing to fully appreciate that the filed Memorandum of Appeal dated 1st October 2021 raised triable issues in that:

The trial Court awarded judgment in favour of the Respondent as follows:

Special damages Kshs 16,990.00/- General damages for pain and suffering Kshs 1,200,000.00/- Future medical expenses Kshs 1,132,500.00/-

Loss of earning capacity Kshs 120,000.00/-

Loss of consortium Kshs 100,000.00/- Costs of the suit and interest at Court's rates

Yet in its amended Plaintiff dated 25th April 2019, the Respondent had only sort the following:

Special damages

General damages future medical expenses Kshs 1,132,500.00/-
Costs and incidentals of the suit

Interest at Court rates.

2. That the Learned Judge erred in law and fact by totally failing to appreciate that there was indeed orders for consideration in the stay of execution application dated 22nd March 2023 as a cursory look at the record will reveal that the application dated 9th February 2022 did seek the alternative order of deeming the Memorandum of Appeal filed on 4th October 2021 to be properly filed and on record.
3. That the Learned Judge erred in law and fact by totally failing to appreciate that there were indeed orders for consideration in the stay of execution application dated 22nd March 2023 as a cursory look at the record will reveal that the application dated 22nd March 2023 did seek the alternative order of leave to file an appeal against the Ruling of Hon. Njoki Mwangi J. delivered on 14th October 2022 out of time.
4. That the Learned Judge erred in law and fact by totally disregarding and overlooking the fact that the Appellant's previous advocates on record M/s Kariuki & Kayaki had filed an affidavit sworn on 30th March 2021 admitting to wrong doing on their part that led to the Appellant not calling its defence witnesses during the trial hearing.
5. That the Learned Judge thus erred and misdirected himself by condemning the Appellant herein unheard on account of an excusable error on the part of its legal advisor who had duly acknowledged and apologized to Court for his mistake.



6. That the Learned Judge erred in law and fact by disregarding the fact that the Appellant's bid to avoid simultaneous application being heard at the same time, filed the application before the Trial Court had been determined on 4th February 2022.
 7. That the Learned Judge failed to take cognizance of the fact that it is in the interest of justice to allow the Appellant the opportunity to defend the suit under article 159 of the *Constitution* of Kenya and the matter to be determined on merit. Substantive justice was not rendered by the Learned Judge.
 8. That the Learned Judge erred and misdirected himself by failing to appreciate that the mistake the subject matter hereof was the mistake of the advocate who after delivery of judgment in the Trial Court, failed to file the Memorandum of Appeal within 30 days of delivery of the judgment in the first instance.
 9. That that Learned Judge erred and misdirected himself by failing to appreciate that the said delay in filing the appeal was not inordinate as the Memorandum of Appeal was filed on 4th October 2021 which is barely 10 days after the due date of 24th September 2021.
 10. That the Learned Judge erred in law and fact by failing to full appreciate that the Appellant was ready and willing to bring the Appeal to fruition by the depositing of monies into a joint deposit account held by the parties herein.
 11. That the learned Judge misdirected himself in law and fact by totally failing to appreciate that there was a valid appeal that necessitated the issuance of a stay order by virtue of the notice of appeal dated 22nd March 2023 against the High Court's decision delivered on 14th October 2022 which was pending hearing and determination thus giving life to the application before him.
 12. That the Learned Judge erred and misdirected himself both in law and fact by disregarding that there were proceeding already before the Court of Appeal by virtue of the notice of appeal dated 22nd March 2023 thus warranting the issuance of the order for extension of time within which to file an appeal at the Court of Appeal
11. The Applicant in addition proposes to ask this court for orders in the draft memorandum of appeal:
 1. That the High Court's ruling and all the consequential Order therein delivered on 20th April 2023 be set aside and or vacated and the same be substituted with an order that the Appellant be given an opportunity to be heard on appeal before the High Court through the reinstatement of the Memorandum of Appeal dated 1st October 2021 as a proper Court record.
 2. That the appeal be allowed as prayed with costs of the instant appeal and cost in the lower court proceedings be borne by the Respondent
 3. That this Honourable Court do grant any other order it may deem fit to grant.
 12. We have gone to great lengths to reproduce the draft grounds of appeal, so as to illustrate why we are in agreement with the Respondent's submissions that the intended appeal appears to be a collateral attack on the ruling made by Njoki Mwangi J. on October 14, 2022, which was the one that substantively addressed the issues of the memorandum of appeal against the orders of the trial Court and stay of



the trial Court's decree, and which is the subject of a different appeal. In addition, the said grounds and Applicant's arguments appear to seek an overturn of the trial Court's orders, on which there is no appeal before this Court. The grounds of appeal as detailed in the said draft memorandum of appeal as well as in the body of the instant application are therefore not related to the ruling delivered by Magare J. on 20th April 2023, and to this extent we find that the Applicant's appeal is not arguable and is also in abuse of the process of Court.

13. On the nugatory requirement, Ms. Kithee submitted that should the subject matter be executed, chances were high that the outcome of the intended appeal would be rendered nugatory in that; firstly apart from the suit, the Applicants had never interacted with the Respondents and abode was unknown; secondly, the Respondent had not sufficiently demonstrated that she has known means of repaying the decretal amount, should the same be paid; and thirdly, the Respondent had not placed sufficient evidence of her ability to repay the decretal amount which was now quite substantial standing at Kshs 3,399,003.00/-. The Applicant submitted that in order to secure the order sought, it was prepared to pay the decretal amount in a joint interest-bearing account in the name of the advocates of the parties. The counsel relied on various cases in this regard including *Butt v RTT* (1982) KLR 417, *Kenya Shell v Kibiru & another* (1986) KLR 410, and *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased)) v Kariuki Marega & another* [2018] eKLR
14. Counsel for the Respondent submitted that the Applicant was inviting this Court to issue a stay of execution of a ruling dismissing an application for stay of execution of an earlier ruling, that similarly dismissed an application for stay of execution, and placed reliance on the decision in the case of *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] eKLR that an order dismissing an application is a negative order incapable of being stayed because there is nothing to stay. It was held in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (supra) that whether or not an appeal will be rendered nugatory depends on whether or not what is ought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In this respect, we note that the Applicant seeks to stay the execution of the orders of the trial Court, which are not the subject of its intended appeal. On the contrary, the orders of the High Court sought to be stayed were negative orders dismissing his application for stay of execution of yet other negative orders of the High Court. It was explained in this regard by this Court (Okwengu, Kiage & Sichale JJ.A) in the case of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR as follows:

“The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:

“What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

15. In addition, it is notable that the execution process of the trial Court's decree has already commenced, and the application is to this extent overtaken by events. In conclusion, it is our finding that the Applicant has not satisfied the requirements for the grant of stay orders. We therefore find no merit



in the Applicant's application dated 26th April 2023, which is hereby dismissed with costs to the Respondent.

16. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

