



Kenya National Capital Corporation Limited v Galot & 5 others (Civil Appeal (Application) E274 of 2022) [2023] KECA 995 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 995 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E274 OF 2022
A ALI-ARONI, LA ACHODE & PM GACHOKA, JJA
JULY 28, 2023**

BETWEEN

KENYA NATIONAL CAPITAL CORPORATION LIMITED APPLICANT

AND

MOHAN GALOT 1ST RESPONDENT

LP GALOT 2ND RESPONDENT

SP GALOT 3RD RESPONDENT

GP GALOT 4TH RESPONDENT

GALOT INDUSTRIES LIMITED 5TH RESPONDENT

**KING WOOLEN MILLS LIMITED (FORMERLY MANCHESTER OUTFITTERS
SUITING DIVISION LIMITED) 6TH RESPONDENT**

(An application for stay of execution pending appeal from the judgment of the High Court of Kenya at Nairobi (A.Mabeya, J.) delivered on 28th July 2022 in HC. Civil Case No. 2054 of 1993)

RULING

1. Before us is an application by way of a Notice of Motion dated August 1, 2022 expressed to be brought under rules 5 (2) (b) and 47(1), 49(1) of the [Court of Appeal Rules](#) 2010 and section 3A of the [Appellate Jurisdiction Act](#), Articles 10 2(b) and (c); 23 (3); 25 (c); 27 (1) and 50 2(c); 159 2(a) and (e) of [the Constitution](#) and all other enabling provisions of the law.
2. The applicant prays for the following orders:
 - a. Spent.



- b. Pending the hearing and determination of this application interpartes, stay of execution of the Honourable Court's judgment dated 28th July 2022 in Nairobi Civil Case No. 2054 of 1993 be granted ex-parte in the first instance.
 - c. There be stay of execution of the aforesaid judgment/decreed pending the hearing and determination of the preferred appeal in the Court of Appeal.
3. The application is supported by the grounds set out in the application and the affidavit dated August 1, 2022 by Michael M. Mwita, the applicant's head of credit, remedial collections and recoveries. In the supporting affidavit it is deponed that: the intended appeal has high chances of success; that if the stay is not granted the appeal will be rendered nugatory; that the applicant is a state corporation and therefore, there is no risk of default in the event the appeal does not succeed; that the applicant is a public company holding public money and it stands to suffer irreparable loss if the orders of the High Court are not stayed and that the order for stay is necessary as the orders of the High Court as framed are self-executing and therefore, the intended appeal will be rendered nugatory if they are implemented.
 4. The application is also supported by the further affidavit of Kangethe George Joseph, the advocate for the applicant. This affidavit is in response to the replying affidavits of the respondents. The applicant has also attached a draft memorandum of appeal, which was not annexed in the supporting affidavit of Mr. Mwita. The other averments are a repetition of the grounds set out in the application and the contents of the supporting affidavit of Mr. Mwita and we need not recite them again.
 5. The applicant has filed written submissions dated August 6, 2022, which we take the liberty to summarise as follows: that the applicant has an arguable appeal with a high probability of success; that the intended appeal will be rendered nugatory unless the order for stay is granted and that the applicant is ready to offer security in form of a bank guarantee. The applicant has cited the following authorities in support of the application:

Dennis Mogambi Mang'are v Attorney General & 3 others [2012] eKLR; *Multimedia University & another v Prof. Gitile N. Naituli* [2014] eKLR; and *NIC Bank Limited & 2 others v Mombasa Water Products Limited* [2021] eKLR.
 6. The application is opposed. The 1st, 5th, and 6th respondents have filed a replying affidavit dated September 5, 2022 through Mohan Galot, the 1st respondent. The averments in the replying affidavit can be summarised as follows: that the dispute between the parties has been the subject of Nairobi Civil Case No. 2054 of 1993 Mohan Galot & others vs. Kenya National Capital Corporation Ltd and judgment was entered in favour of the respondent; that on September 16, 1996 the parties recorded a consent for the deputy registrar to examine the respective parties' accounts and make a decision as to which party owed the other money; that upon listening to the parties, the deputy registrar issued an order that the applicant owed the respondent a sum of Kshs.20,513,111.18 together with interest at a rate of 18% from the year 2000 to August 27, 2004 amounting to Kshs.48,951,536.00; that the application for review of the order of the deputy registrar was dismissed by the High Court and thereafter, the applicant filed Civil Appeal No. 324 of 2010 which was also dismissed by the Court of Appeal; that the preliminary decree remains unsettled.
 7. It was further deponed that on January 14, 2022, the High Court issued directions for the hearing of the suit; that the respondents complied and filed their witness statements and documents; that the applicant did not comply with the directions of the court and the applicant's attempt to adjourn the case was rejected by the court on March 15, 2022; that the hearing proceeded and the applicant extensively cross-examined the 1st respondent; that after filing of submissions, the High Court entered judgment in favour of the respondents; that the intended appeal has no chance of success and cannot be



- rendered nugatory if the stay is not granted; and that the balance of convenience tilts towards dismissing the application.
8. The 5th and 6th respondents filed grounds of opposition and stated that: the applicant did not annex the draft memorandum of appeal to the application, thus there is no demonstration that the intended appeal is arguable; that the applicant has suppressed material facts, and that it failed to comply with orders that had been issued for filing of witness statements and documents; that the applicant actively participated in the hearing and filed submissions; that the dispute has been in court for 29 years and this application is another attempt to frustrate the consent that was filed in court; and that the applicant has not met the threshold for granting of the orders of stay.
 9. The 1st, 5th and 6th have filed written submissions dated September 5, 2022. They submit that the applicant has no arguable appeal; that the applicant was heard by the High Court and its' attempt to stay proceedings and to have the hearing start de novo was dismissed by the Court of Appeal; that the issue of the counterclaim and the amount owed to the litigant has been determined by the High Court, Court of Appeal and the Supreme Court; that there is no basis for the applicant to continue holding their titles when the court has held that no money is owed to the applicant and this application is just another attempt to delay payment.
 10. The principles applicable in an application for stay of execution are captured in Rule 5 (2) (b) of the [Court of Appeal Rules](#) and have been the subject of many decisions and are now a well-trodden path. To succeed an applicant must satisfy the twin principles namely:
 - i. An applicant must demonstrate that they have an arguable appeal; and
 - ii. That the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the decree, order of proceedings is not stayed.
 11. On the first limb of the twin principles, this court held in [David Morton Silversein v Atsango Chesoni](#) [2002] eKLR that for an

"order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal would in the absence of stay be rendered nugatory. [See also *Reliable Bank Ltd. (in liquidation) v Norlake Investments* [2002] 1 EA 227, *Nation Newspapers Limited v Peter Baraza Rabando*, [2007] eKLR and *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] eKLR."
 12. On sufficiency of the grounds to warrant a grant of the stay of the orders sought, this court in [Transouth Conveyors Limited v Kenya Revenue Authority & another](#) [2007] eKLR, held

"that a single issue will suffice, and an applicant need not establish a multiplicity of arguable issues. Neither is the applicant required to show that the point would succeed. (See *Kenya Commercial Bank limited v Nicholas Ombija* [2009] eKLR.) It only needs to be an issue that raises a serious question of law worthy of consideration by the Court, or one in respect of which a reasonable argument can be put forward in support. (see *Retreat Villas Limited v Equatorial Commercial Bank Limited & 2 others*, [2007] eKLR"
 13. On the first principle as to whether the appeal is arguable, we note that the applicant did not attach a memorandum of appeal in the affidavit in support of the application. However, this error was cured through the further affidavit of Kangethe George Joseph dated September 9, 2022. The grounds raised in the memorandum of appeal can be summarised as follows: that the learned Judge did not comply



with the mandatory provisions of Order 3(2), 7, 5(2), and 11 of the [Civil Procedure Rules](#) on pre-trial directions; the learned Judge failed to impeach the evidence of the 2nd, 3rd and 4th plaintiffs that was adduced contrary to the directions of the court and thus depriving the applicant a chance to tender evidence; denial of the applicant the right to adduce evidence in support of the counterclaim; denial of the applicant of a right to a fair hearing; the Judge's conduct was biased, hostile and discriminatory; failure to consider the applicant's submission; issuing orders that had not been prayed for; the Judge erred in ordering the discharge of the security, whose term had already expired and that the trial was conducted in breach of constitutional principles.

14. On the question of whether the applicant has an arguable appeal, we are careful not to delve into the merits of the appeal as this will be the preserve of the bench that will hear and determine the appeal. As was held by this court in *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004:

“In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage, as doing so may embarrass the ultimate hearing of the main appeal.”

As was held by this court in [R.F.S. v J.D.S](#) [2013] eKLR:

“Does the applicant herein have an arguable appeal? In answering this question we are cognizant of the advisability of circumspection and a retiring taciturnity that eschews the making of strong definitive findings at this stage that have the potential of embarrassing the court that will hear the main appeal.” (See *Damji Pragji Mandavia*)

15. Looking at the history of this matter, the applicant does not deny that the parties entered into a consent for the deputy registrar of the High Court to determine the issues of the rate of interest and who between the parties owed the other money. On April 21, 1997, the deputy registrar held that the applicant owed the respondents a sum of Kshs. 20,513,113.18 and the attempts to set aside that order have been pursued to the highest hierarchy of our courts and failed.

16. Whereas we are cautious not to comment on the arguability of the appeal, the court should also not shy away from expressing its doubts where the grounds are not convincing, when looked at in the totality of the documents that are before it. In [R.F.S. v J.D.S](#) [2013] eKLR, the court held:

“Having so cautioned ourselves, we nonetheless find without hesitation that the intended appeal herein raises no bona fide arguable points.”

We have doubts as to the arguability of the appeal, but we will leave that issue to the bench that will hear and determine the appeal.

17. We note that the applicant has not satisfied the first limb of the twin principles but even if we give the applicant the benefit of the doubt, it still has to satisfy the second principle. The 2nd limb is that the appeal, if successful, will be rendered nugatory unless the order for stay is granted. The term “nugatory” does not only mean worthless, futile, or invalid, it also means trifling (see [George Otieno Gache & another v Judith Akinyi Bonyo & 5 others](#) [2017] eKLR).



18. In determining whether an appeal will be rendered nugatory unless an order for stay is granted, the Court must consider the conflicting claims of both parties. In *Mbembe v Kamere* [2021] KECA 266 (KLR) (3 December 2021), this court expressed itself as follows:
- “ 15. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (supra) this court stated that: “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. 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.
16. In determining whether or not an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be determined on its merits.”
19. In determining this question on whether the appeal will be rendered nugatory, we note the following:
- i. The parties negotiated and recorded a consent on 1 September 6, 1996 and which was adopted as an order of the court on April 21, 1997. The applicant’s attempt to review that order failed and vide an order dated October 22, 2004, the applicant was ordered to pay a sum of Kshs.48,951,536.00 being the overpaid amount plus interest.
 - ii. On July 28, 2022, the applicant was ordered to pay a sum of Kshs.48,951,536.00 plus interest from August 27, 2004 until payment in full.
 - iii. The applicant was also ordered to discharge the titles that it was holding belonging to the applicants.
20. The claim by the parties is a monetary one. We further note that other than stating that it is a state corporation holding public funds, the applicant has not submitted or demonstrated that the respondents are not capable of refunding the decretal sum in the event the intended appeal is successful.
21. Regarding the securities, the applicant in the draft memorandum of appeal states that it is incapable of discharging L. R. No. 209/1640/2 Nairobi as its term has expired. If that is so, the applicant has not explained how the intended appeal will be rendered nugatory if it leases a lease whose term has expired.
22. As already noted, in determining whether an appeal will be rendered nugatory, the court has to consider the conflicting claims of both parties and each case has to be determined on its own merits. Taking into account the history and the conflicting claims of the parties and the facts in totality, the scale of justice tilts in favour of the respondents.
23. Accordingly, we are satisfied that the applicant has also not satisfied the second principle that the intended appeal will be rendered nugatory.
24. Consequently, we dismiss the application with costs to the 1st, 5th, and 6th respondents who responded and participated in the hearing of the application. Orders accordingly.

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

ALI-ARONI



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JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

