



REPUBLIC OF KENYA



KENYA LAW
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**Mwaringa v Waashe (Civil Appeal (Application) E012 of 2022)
[2023] KECA 981 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 981 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E012 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 28, 2023**

BETWEEN

GORDON MWATATA MWARINGA APPLICANT

AND

FRANKLIN MBURA WAASHE RESPONDENT

(Being an appeal against the entire judgement and decree of the Mombasa High Court rendered by P.J. O. Otieno on 26th November 2019 in Civil Appeal No 139 of 2018)

RULING

1. The applicant Gordon Mwatata Mwaringa in this application dated April 4, 2023 seeks stay of execution of the impugned judgement, the decree dated November 25, 2021 and the notice to show cause dated January 26, 2022 and any consequential orders issued in ELC Appeal No 139 of 2018, pending hearing and determination of the appeal E012 of 2022.
2. This case arises from a judgment of the Magistrates' Court dated July 13, 2018 which dismissed the respondent's case and entered judgment in favour of the applicant. The respondent had filed the suit in the Magistrate's Court seeking to recover Kshs 1,200,000/= worth of goods that were destroyed after a fire incident in the respondent's premises. The appeal to the High Court [PJ Otieno, J] was concluded on November 26, 2019 in favour of the respondent. The judge, sitting as a first appellate court overturned the judgement of the trial court and gave judgment for the respondent in the sum of Kshs 1,200,000/=. The respondent embarked on the execution of the High Court decree by extracting a decree and notice to show cause [NTSC] dated January 26, 2022. Njoki Mwangi, J dismissed the application for stay of execution of the NTSC pending appeal, which the applicant filed before the High Court.



The applicant then filed his appeal and filed this application dated April 4, 2023, seeking the orders as above. Counsel pointed out that unless stay is granted, the applicant is at risk of being committed to civil jail thereby rendering the pending appeal as nugatory.

Counsel stated that the applicant is a bread winner who will suffer loss if condemned to civil jail; that the respondent is not a man of means, and will be unable to refund the applicant the judgement award if the appeal is successful.

3. The affidavit in support of the application was sworn by the applicant, and reiterates the grounds on the face of the application. He deposed that the arguable point in the appeal is that the contract the subject matter of the suit was voidable at the option of the appellant on the grounds of duress, threat, intimidation and frustration. Annexed to the affidavit are a copy of the decree dated November 25, 2021 and notice to show cause dated January 26, 2022.
4. The background of the suit is that the respondent's premises caught fire that was caused by the appellant's servant. The parties entered into an agreement where the appellant was to compensate the respondent a sum of Kshs 1,200,000/=. The respondent sued the appellant to enforce the agreement. In his defence the appellant pleaded duress. The trial court found no merit in the respondent's claim but found merit in the appellant's defence after being satisfied that the agreement was entered into by duress, as the appellant was fearful that his servant would be arrested.
5. The appellant was dissatisfied with the judgement and approached the High Court on first appeal. The learned judge found that there was no evidence led to the effect that duress was effected on the appellant; the learned judge took issue with the finding that fear of arrest of the appellant's servant was evidence of coercion and duress. The court found merit in the appeal, entered judgement in favour of the respondent for the sum claimed in the plaint.
6. The appellant filed notice of appeal dated November 27, 2019 and a memorandum of appeal. The memorandum faults the learned judge for finding that there was no evidence of duress/coercion and for failing to find that the written contract was void for lack of performance by the parties. It was sought that the impugned decision be set aside.
7. The application was heard on the May 3, 2023. Learned counsel Mr Wandai Matheka was present for the applicant. There was no appearance for the respondent despite service of the hearing notice being effected on the March 25, 2023 and a reminder on April 24, 2023. The respondent filed no responses or submissions.

The application is therefore unopposed.

8. Mr Matheka relied on his written submissions. He urged that there was a notice to show cause which was filed before the superior court in which the respondent claims Kshs 3,000,000/=. That there is therefore a threat of execution. He urged that the appeal had high chances of success. One of the grounds was that the claim of Kshs 1.2million awarded by the first appellate court had not been specifically pleaded or proved. That the appellant had pleaded coercion and the trial court agreed with him, but the High Court ruled it out. He urged that if he is committed to civil jail, which is imminent, the appeal will be rendered nugatory.
9. We have considered this application, and the submissions by counsel and the affidavit in support and annexures thereto. *Reliance Bank Ltd (In Liquidation) vs Norlake Investments Ltd* – Civil Appl No



Nai 93/02 (UR), sets the applicable principles that guide the determination of an application of stay, or injunction thus:

“Hitherto, this court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

The applicant has urged that the judgment of the High Court granted an unpleaded and unproved claim in the sum of Kshs 1,200,000/=. Further that the applicant was challenging the learned Judge’s overruling of the defence of duress. We are satisfied that the appeal is not frivolous, it is arguable. We are aware that the applicant need not raise a multiplicity of grounds, even one is enough. See Somak Travels Ltd vs Gladys Aganyo [2016] eKLR.

10. As to the second principle of nugatory, the applicant has demonstrated that there is a threat of arrest and committal to civil jail, the respondent having taken out notice to show cause. We are satisfied that the second principle has satisfactorily been established.
11. We find that the applicant’s application dated April 4, 2023 has merit. Accordingly, we allow the application in terms of prayer 3 and grant stay of the execution of the judgment delivered by PJ Otieno, J on the November 26, 2019 and the decree and notice to show cause and any other consequential orders pending the hearing and determination of this appeal.
12. Costs of the application shall abide the outcome of the appeal.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

