



**Mohamed v Adan & 3 others (Civil Application E202 of 2023)
[2023] KECA 887 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 887 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E202 OF 2023
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
JULY 24, 2023**

BETWEEN

HUSSEIN UNSHUR MOHAMED APPLICANT

AND

YUSUF ABDI ADAN 1ST RESPONDENT

HUSSEIN AHMED FARAH 2ND RESPONDENT

MOHAMED ABDIKADIR ADAN 3RD RESPONDENT

BLUEBIRD AVIATION LIMITED 4TH RESPONDENT

(Being an application for stay of execution of the Ruling of the Commercial and Tax Division of Kenya at Nairobi (Mwangi, J.) delivered on 25th April 2023 in HCCC No. 100 of 2016)

RULING

1. Before this court is a notice of motion dated May 15, 2023 brought by the applicant pursuant to the provisions of rule 5(2) (b) of the rules of this court. The applicant seeks stay of execution of the ruling of Mwangi, J. delivered on April 25, 2023 pending the hearing and determination of the intended appeal.
2. The background of this application is that the applicant, the 1st, 2nd and 3rd, respondents were the shareholders of the 4th respondent, “the company”. The 1st respondent held a 25% shareholding while the appellant, 2nd and 3rd respondents jointly held 75% shares of the company.
3. The 1st respondent had contended that the applicant, 2nd and 3rd respondents had breached their trust and acted in breach of their fiduciary duty owed to the company, that they had privatized and personalized the assets of the company both in Kenya and abroad for their own personal use, and that they had denied him lawful share of the profits and dividends from the company as the same was shared amongst themselves.



4. On March 30, 2016, the 1st respondent filed an application in the High Court in which he sought, inter alia, leave to continue the suit as a derivative action, and an order to freeze the International Bank account operated by the applicant, 2nd and 3rd respondents in the name of Amazon International FZE. Mabeya, J. in his ruling delivered on July 29, 2021 dismissed the application.
5. Subsequently, the 1st respondent filed an application seeking a review of the ruling of Mabeya, J. In the application, the 1st respondent sought orders to set aside the said orders, and an alternative order for the appointment of a valuer to undertake the valuation of the company in order to determine the value of his shares. By a ruling dated October 1, 2021, the learned judge dismissed the review application but okayed the right for a buy-out of the 1st respondent.
6. In line with the said ruling, the parties entered into a consent and agreed on a valuer, RMS (Eastern Africa) Consulting Limited, an audit, tax and consulting services provider, who took the assignment and prepared a Business Valuation Report dated December 6, 2021. The 1st respondent's shares were valued at Kshs.320,912,500/=. The applicant filed an application dated February 9, 2022 and sought, inter alia, the adoption of the valuation report of December 6, 2021. The 1st respondent filed his reply and thereafter the application was argued. In a ruling dated June 3, 2022, the court adopted the consent and ordered the 1st respondent to transfer his 25% shareholding in the company to the 3rd respondent at a consideration of Kshs.320,912,500/= being the value of the 1st respondent's shareholding. The payment was to be made within sixty (60) days of the date of the ruling.
7. Dissatisfied with the ruling of 3rd June 2022, the 1st respondent preferred an appeal to this Court by filing his Notice of Appeal dated 14th June 2022 and subsequently filed under Certificate of Urgency a Notice of Motion under rule 5(b) of this Court's Rules dated 16th June 2022 seeking stay of execution. This Court however declined to certify the application as urgent.
8. The 1st respondent went back to the High Court and filed an application dated 15th August 2022 seeking to set aside the appointment of RMS (East Africa) Consulting Limited to value the 4th respondent, to set aside the valuation report of 6th December 2021, and to appoint a reputable firm to undertake the valuation of the company within fourteen (14) days with a view of ascertaining the value of the 1st respondent for subsequent purchase by the applicant, the 2nd and 3rd respondents or any one of them or by the company, and the company's capital be reduced within fourteen (14) days thereafter in compliance with the court's order of 1st October 2021.
9. The application was heard before Mwangi, J. vide a ruling dated 25th April 2023, the said judge overturned the ruling of Mabeya, J. of 3rd June, 2022 and directed the Court's Deputy Registrar to appoint another valuer. In effect, the appointment of RMS (East Africa) Consulting Limited and the Valuation Report by RMS dated 6th December 2021 were set aside.
10. The applicant was dissatisfied with the decision of Mwangi, J. and lodged a notice of appeal dated 27th April 2023 on which the application for stay of execution of the impugned ruling is premised.
11. The applicant contends that he has an arguable appeal with overwhelming prospects of success as evidenced by the annexed draft memorandum of appeal which raises eight (8) grounds of appeal. The main contention being that the impugned decision goes against the doctrine of res judicata and the well-established principles of functus officio.
12. On the nugatory aspect, the applicant stated that unless stay of execution of the said ruling is granted, the intended appeal will be rendered nugatory. The applicant is apprehensive that the impugned ruling will be fully implemented for reason that the Deputy Registrar of the High Court has since appointed Price Waterhouse Coopers Limited (PWC) Kenya as the new valuer. The applicant contends that this



- action takes away his right of appeal and the right to unbiased judicial remedy. Lastly, that the sum at stake is significantly substantial, which constitutes special circumstances meriting the grant of stay as sought.
13. The application is opposed through a replying affidavit sworn on 20th May 2023 by the 1st respondent. He contends that the application is not arguable and does not stand a chance of success. In addition, the 1st respondent challenges the annexed memorandum of appeal attached to the applicant's supporting affidavit that it is not properly before the court as the same bears no case number, court stamp, or receipt for payment of filing fees. He further argues that a notice of appeal is not an appeal but just a formal notification of an intended appeal. The 1st respondent also contends that the applicant has not provided any compelling reasons or exceptional circumstances that warrant a stay of execution of the ruling. Lastly, the 1st respondent argues that a stay of execution will only serve to delay the proceedings and cause unnecessary hardship to the 1st respondent. He urged this Court to dismiss the application.
 14. At the hearing of this application, learned counsel Mr. Sagana was present for the applicant, learned counsel Mr. Lorot together with learned counsel Mr. Kibet represented the 1st respondent, MS Jan Mohamed SC appeared for the 2nd respondent, and learned counsel Mr. Kemboy appeared for the 4th respondent. There was no appearance for the 3rd respondent.
 15. In his brief highlight of the applicant's written submissions, Mr. Sagana argued, inter alia, that Mwangi, J. purported to sit on appeal against the rulings and orders of Mabeya, J.; that the learned judge erred in law in entertaining a review of orders made in a review application; and failing to find that the court was functus officio. The intended appeal is therefore arguable, counsel submitted.
 16. On nugatory aspect, Mr. Sagana told the Court that the 3rd respondent had deposited the sum of Kshs.320,912,500/= at the Judiciary account and the share transfers had also been executed by the Deputy Registrar; that the 2nd respondent had also sold his shares to third party based on the valuation report. Therefore, if stay is not granted the impugned decision will be fully implemented before the intended appeal is heard and that will render the appeal nugatory, if it succeeds.
 17. MS Jan Mohammed, SC for the 2nd respondent and Mr. Kemboy for the 4th respondent were in full support of the application. Although there was no appearance for the 3rd respondent, his advocates had filed their submissions in support of the application.
 18. Mr. Lorot for the 1st respondent highlighted his written submissions. He argued that the applicant's application had not met the two principles that must be established conjunctively as set out in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR. He submitted that the applicant's intended appeal is not arguable and the same will not be rendered nugatory if stay orders were not granted. In addition, it had not been alleged that the respondent cannot be refunded the money he had deposited if the intended appeal succeeds. Further, that the applicant would not suffer any prejudice if another valuation is done. Counsel therefore urged us to dismiss the application.
 19. We have considered the application, the 1st respondent's replying affidavit, the written and oral submissions by the parties, the applicable law and the authorities relied upon by the parties.
 20. Rule 5(2) (b) provides that:
 - “ 5.
 - (2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-



b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

21. Rule 5(2) (b) envisions the filing of a notice of appeal in accordance with rule 77. The applicant has filed a notice of appeal dated 27th April 2023. Therefore, the 1st respondent’s argument that the notice of appeal is just but an intention to appeal is unfounded. Further, the rule does not require that a memorandum of appeal should have been filed. The applicant has annexed a draft memorandum of appeal to his affidavit in support of the application. The Court is able to assess whether the applicant has an arguable appeal.
22. It is settled law that, in an application under rule 5(2) (b), an applicant must demonstrate firstly, that the appeal or intended appeal is arguable, which is to say that the same is not frivolous. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory if the orders sought are not granted. See. Stanley Kangethe Case (supra).
23. On the first limb of arguability of the intended appeal, the applicant contends that Mwangi, J. sat on appeal of the decisions of Mabeya, J; erred in law by reviewing orders arising from a review application; violated the doctrine of res judicata; and offended the principle of functus officio. In determining whether the intended appeal is arguable or not, we are alive to the fact that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully. See. Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others [2009] eKLR. In our view, the issues raised are arguable. We need not say much on arguability at this juncture, lest we embarrass the bench that shall ultimately hear the appeal.
24. On the nugatory aspect, it is now settled that whether or not an appeal is to be rendered nugatory depends on whether or not what is sought to be stayed if allowed to take place is reversible; or if it is not reversible whether damages will adequately compensate the party aggrieved. In the instant application, the applicant contends that he is apprehensive that the impugned ruling will be fully executed and implemented. At the hearing, it was submitted that the matter was before the trial court for further execution of the impugned ruling. Moreover, the applicant contended that the sum at stake is significantly substantial which constitutes special circumstances warranting the grant of stay.
25. In considering whether the intended appeal will be rendered nugatory, we are alive to the fact that each case must be considered within its own facts and peculiar circumstances. See David Morton Silverstein vs. Atsango Chesoni [2002] eKLR. In our analysis of the instant application, we are satisfied that the applicant has shown that the intended appeal will be rendered nugatory if we do not grant a stay. We agree with Mr. Sagana that a party cannot be allowed to maintain an advantageous position that he has gained from a prima facie flawed decision because he is able to pay damages.
26. In conclusion, we are satisfied that the applicant has satisfied both limbs for grant of stay under rule 5(2) (b) of the Court’s Rules. Accordingly, the Notice of Motion dated 15th May 2023 is hereby allowed. The costs of the application shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY JULY, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL



H. A. OMONDI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

