



REPUBLIC OF KENYA



Al Buraq Limited v Aexel Auto Spares Limited & another (Civil Application E677 of 2022) [2023] KECA 848 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 848 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E677 OF 2022
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
JULY 7, 2023**

BETWEEN

AL BURAQ LIMITED APPLICANT

AND

AEXEL AUTO SPARES LIMITED 1ST RESPONDENT

SIYAMA COMPANY LIMITED 2ND RESPONDENT

(An application for stay of execution of the Ruling/Order of the High Court at Nairobi (Mabeya, J.) dated 9th September 2022 in High Court Civil Suit No. 663 of 2012)

RULING

1. Before this court is a notice of motion dated October 6, 2022 brought by the applicant under the provision of sections 3A and 3B of the [Appellate Jurisdiction Act](#), rules 5(2) (b) and 53 of the [Court of Appeal Rules](#) and paragraphs 1 and 3 of the [Court of Appeal Practice Directions](#). The applicant seeks stay of execution of the ruling/order of the High Court at Nairobi (Mabeya, J) delivered on September 9, 2022 in HCCC No 663 of 2012 pending hearing and determination of an intended appeal.
2. The background to the application is that the 1st and 2nd respondents had a business relationship. The 1st respondent regularly supplied motor vehicle spare parts to the 2nd respondent, at times on credit basis.
3. In the course of time, the 2nd respondent delayed in making payment, prompting the 1st respondent to institute a suit against the 2nd respondent, to wit, HCCC No 663 of 2012, claiming a sum of Kshs 15,101,715.98 for goods obtained by the 2nd respondent on credit, and which had remained unpaid.
4. Although the 2nd respondent filed a defence, it failed to attend court to defend the suit. On May 8, 2019, the trial court (Kasango, J.) entered judgment in favour of the 1st respondent against the 2nd respondent as follows: Kshs 15,101,715.98 plus interest at the rate of 2% per annum from the date of filing suit



until payment in full; Kshs 46,500 with interest at Court rate from the date of filing suit until payment in full; costs of this suit.

5. The 1st respondent commenced execution proceedings to satisfy the court decree. Warrants of Attachment of Movable Property were issued to the 1st respondent through Sure Auctioneers. The applicant contended that, although it was not a party to the suit before the trial court, on May 28, 2021, one Benard Njoroge of Sure Auctioneers went to the applicant's premises on Plot No M. N/VT/2348 Mombasa Mainland, Changamwe Port Reitz where the applicant carries on the business of metal fabrication and proclaimed the applicant's assorted goods. The auctioneer served the applicant with warrants of attachment and a notice to the auctioneers by the court, both dated May 21, 2021.
6. The applicant took out objection proceedings to the execution process through a Notice of Motion dated June 2, 2021. The applicant sought the lifting of the warrants of attachment and stay of execution.
7. The applicant contended that it was not a party to the suit, and was a stranger to the entire proceedings under which judgment and decree leading to the execution proceedings were issued; and that it was never served with any pleadings or any notice of intention to execute against its property. It denied owing the 1st respondent any money as claimed in the warrants, and further denied any relation to the 2nd respondent. The applicant contended that the goods proclaimed by the auctioneer belonged to it and not the 2nd respondent, the judgment debtor.
8. The applicant annexed a copy of CR12 dated April 27, 2021 to the supporting affidavit of Fatima Mohammed Ahmed, its director, which showed that the directors/shareholders of the applicant were the said Fatima Mohammed Ahmed and one Leyla Mohamed Ahmed.
9. The application was opposed by the 1st respondent, who argued that the application was an abuse of court process as one Abubakar Mohamed Ahmed, who was a director of the 2nd respondent, and who had sworn affidavits before the trial court, was a close relative of Fatuma Mohammed Ahmed and Leyla Mohamed Ahmed, the directors of the applicant herein; that the application had been filed in bad faith by concealing material facts; that the copy of CR12 filed in court was addressed to the said Abubakar Mohamed Ahmed, a director of the 2nd respondent; and that the applicant's intention was to curtail the 1st respondent from realizing the fruits of its judgment.
10. Vide a ruling dated September 9, 2022, the trial court held, inter alia, that the applicant had failed to establish ownership of the proclaimed goods. The trial court was of the view that, while the applicant may not be related to the 2nd respondent as they are different and distinct entities, the applicant did not produce any evidence to prove its beneficial or legal right to the proclaimed goods. It therefore dismissed the objection proceedings with costs.
11. Aggrieved by the said decision, the applicant intends to lodge an appeal before this Court. The applicant contends that its intended appeal is arguable and has high chances of success. The grounds on arguability as borne out of the draft Memorandum of Appeal annexed to the affidavit of Fatima Mohammed Ahmed are, inter alia, that the learned judge erred in law and in fact by failing to appreciate the law and evaluate the evidence placed before him; by failing to appreciate documents filed to confirm the equitable interest of the applicant herein; and by dismissing the applicant's application with costs.
12. On the nugatory aspect, it is argued that the applicant will suffer irreparable loss and damage unless the 1st respondent is restrained by an order of injunction as removal of the proclaimed goods will bring its business to a halt as the said goods constitute the appellant's tools of trade; and that no amount of compensation or order of the court will revive the distracted business or otherwise compensate the



applicant for the irreparable loss it will suffer from the stoppage of production and loss of business even if the appeal finally succeeds.

13. The application is opposed by the 1st respondent. By way of a replying affidavit sworn by Mohammed Aamir Butt, its director, the 1st respondent states that the applicant has not met the threshold for grant of orders of stay; and that the execution that the applicant seeks to stay relates to movable goods and that, therefore, damages will be an adequate remedy should the intended appeal be successful.
14. At the hearing of this application, learned counsel Mr. Kahia appeared for the applicant while learned counsel Mr. Momanyi was present for the 1st respondent. There was no appearance for the 2nd respondent. Highlighting the applicant's written submissions dated November 2, 2022, counsel reiterated that the intended appeal was arguable and would be rendered nugatory if the orders sought are not granted. He submitted that the applicant had satisfied the twin test for grant of the orders sought as laid down in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others* [2013] eKLR.
15. In a brief highlight of his written submissions, Mr. Momanyi reiterated that the applicant had not satisfied the twin test for the grant of the orders sought and urged us to dismiss the application with costs.
16. We have carefully perused the record, submissions by counsel and considered the applicable law. It is trite law that, in an application of this nature, an applicant must demonstrate that the appeal or intended appeal is arguable. The applicant must also show that the appeal, if successful, would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe v Tony Keter & others* (*supra*).
17. The applicant contends, inter alia, that the learned judge overlooked the mandatory provisions of Order 22 rules 51, 52, 53 and 54 of the *Civil Procedure Rules*. The grounds being raised by the applicant are, in our respectful view, not idle, and can only be interrogated on appeal. We are mindful of the principle that a single bona fide arguable ground of appeal is sufficient to satisfy the requirement of arguability. See the case of *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004. We are therefore satisfied that the intended appeal is arguable.
18. Turning to the nugatory aspect, it is contended, inter alia, that the proclaimed goods constitute the applicant's tools of trade and that, unless stay of execution is granted, the applicant's business will be brought to halt and, in the premise, occasion it irreparable loss and damage. This Court in *Stanley Kinyanjui Kangethe v Tony Keter & others* (*supra*) observed as follows on nugatory aspect:
 - "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."
19. The proclaimed goods are movable properties said to belong to the applicant. It is our view that if the said goods are disposed of by way of sale, the applicant would be reasonably compensated by way of damages for the said goods and associated losses in the event its intended appeal is successful. Accordingly, the applicant has not demonstrated that its intended appeal shall be rendered nugatory if we decline to grant the orders sought.
20. As the applicant has not satisfied both limbs as required of a rule 5(2) (b) application, the application fails, and is accordingly dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY JULY, 2023.

D. K. MUSINGA, (P.)



JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

