



Kamau t/a Stiff Enterprises v Ethics & Anti Corruption Commission (Civil Application E008 of 2023) [2023] KECA 836 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 836 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E008 OF 2023
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA
JULY 7, 2023**

BETWEEN

STEPHEN GITHINJI KAMAU T/A STIFF ENTERPRISES APPLICANT

AND

ETHICS & ANTI CORRUPTION COMMISSION RESPONDENT

(Being an application for stay of execution pending hearing and determination of the intended appeal from the judgment of the High Court of Kenya at Nairobi (M. Ngugi, J.) dated 26th January 2022 in Nairobi ACEC Civil Suit No. 20 of 2016)

RULING

1. The Notice of Motion Application dated October 21, 2022 and supported by the affidavit of Stephen Kamau Githinji, is brought pursuant to rule 5(2) (b) of [Court of Appeal Rules 2010](#), seeking orders that there be a stay of execution against the judgment delivered on January 26, 2022 in Nairobi ACEC Civil Suit No 20 of 2016 pending the hearing and determination of the intended appeal.
2. The genesis of this matter stems from a suit filed by the Ethics and Anti- Corruption Commission (EACC), the respondent herein, seeking to recover the sum of Kenya Shillings Eight Million (Kshs 8,000,000.00) alleged to have been received by the applicant in a financial scandal, being part of Kenya Shillings Two Hundred and Eighty three Million (Kshs 283,000,000.00) that the Nairobi City Council lost through fraudulent financial transactions in its pursuit to purchase a parcel of land for use as a public cemetery.
3. The applicant denied any act of fraud, contending that he needed to buy products for his business, and the Sum of Kenya Shillings Eight Million (Kshs 8,000,000.00) he received was not part of the Kshs 283,000,000.00 but a soft loan from his friend who worked for the Council, and which he refunded as vouchers. He also lamented that the respondent relied on criminal provisions of the law instead of the [Anti-Corruption and Economic Crimes Act](#) to pursue him.



4. The trial court in allowing the respondent's claim held that there was a direct link between the money paid by the Council in respect of the fraudulent transaction for purchase of land, and dismissed the defence that the money was a soft loan, describing it as a red herring intended to conceal the fact that the applicant had fraudulently received public funds to unjustly enrich himself. The applicant was thus ordered to pay to the State a sum of Kenya Shillings Eight Million (Kshs 8,000,000.00) in recovery plus costs and interest at court rates. The trial court granted stay of execution for thirty days, which stay has since lapsed.
5. That the applicant being dissatisfied with the decision has since filed an appeal which he describes as arguable, and faults the trial court's order for forfeiture of Kenya Shillings Eight Million (Kshs 8,000,000.00) without proof of any fraud and illegality on his part, or that he was aware that the money he received was part of the Kenya Shillings Eight Hundred and Eighty three Million (Kshs 283,000,000.00) that was paid by the Council to alleged fraudsters, and that the trial court ignored the evidence on record which established that the sum of Kenya Shillings Eight Million (Kshs 8,000,000.00) was traced back to an individual and that no fraud had been established against him, so it was erroneous to issue an order for restitution of the same amount.
6. The applicant is apprehensive that if execution proceeds, he will suffer substantial harm and injustice as the award is too high, and the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. In support of this proposition, the applicant draws from the decision in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.”
7. In opposing the application, the respondent through the replying affidavit dated March 7, 2023, sworn by its investigator, Taabu Lwanga, contends that investigations established that pursuant to the fraudulent transaction, some of the funds were distributed to persons/organizations, including the applicant, which position has been confirmed by the trial court, so no arguable appeal has been demonstrated, and the threshold set out in many past decisions, including *Johnson Kibunja Njoka v Joseph Njuguna and 3 Others* [2017]eKLR has not been met.

Further, that the applicant has not established the existence of any imminent danger as no execution proceedings have commenced, nor has any material been presented to this Court suggesting that the respondent would not be in a position to restore the applicant to his position prior to the execution of the decree, in the event that the appeal succeeds; and in any event, the respondent is a public body and the money to be refunded constitutes public funds, which it is obliged to hold, and not spend.
8. In addition, the respondent submits that grant of the orders sought would militate against public interest which requires expeditious determination of the case, and recovery of lost public funds would suffer, and we should thus dismiss the application.
9. In examining whether the applicant has satisfied the requirements necessary for granting an order for stay of execution, we note the acknowledgment in many decisions by this Court, that rule 5(2) (b) applications arise at an interlocutory stage, and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the



appeal. For instance, in the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, [2015] eKLR the court stated:

“(23) It is clear to us that Rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years.”

[“27] Rule 5(2) (b) of the Court of Appeal Rules is derived Article 164(3) of the Constitution. It illuminated the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of the Appeal/intended Appeal.”

10. This Court has set out the parameters to be met for an order of stay to be granted in an application under Rule 5(2) (b) as stated in the case of *Alfred Mincha Ndubi v Standard Limited* [2020] eKLR where this Court quoted with approval the case of *Ishmael Kangunyi Thande v Housing Finance Company of Kenya Limited* Civ Appl No Nai 157 of 2006 to succeed in an application in Rule 5(2) (b) the applicant has to establish that: -

- i. The appeal is arguable.
- ii. The appeal is likely to be rendered nugatory if the injunction is not granted and Appeal succeeds.”

These principles were restated by this Court in *Multi Media University & Another v Prof Gitile N Naituli* (2014) eKLR. ‘...from the long line of decided cases on rule 5(2) (b) the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR as follows:

- (i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction,
- (ii) The discretion is wide and unfettered if it is just to do so,
- (iii) Court becomes seized of the matter only after Notice of Appeal is filed under Rule 75,
- (iv) In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances,
- (v) An applicant must satisfy the twin principles,
- (vi) Whether appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised,
- (vii) Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous,
- (viii) The court must not make a definitive/final finding as to facts of law in an application under Rule 5 (2) (b),
- (ix) Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.”



11. In considering whether the appeal is arguable we take note of the observations made in the case of *Wasike v Swala* [1984] KLR 591 this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court.
12. In the case of *Attorney General v Okiya Omtata & Anor* [2019] eKLR this Court held:

“the principles for our consideration in exercise of our unfettered discretion under rule 5(2) (b) to grant an order of stay is well settled. Firstly, the Applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
13. This Court has held in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya* [2014] eKLR “it is sufficient that the issues raised are arguable.” In Kisumu Civil Appeal 74 of 2016, *George O Gache & Anor v Judith Akinyi Bonyo & Others* this Court stated “at this stage the Court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona fide issue is sufficient.”
14. We have cited a long line of cases addressing various aspects of what a court should consider in determining the issue of an arguable appeal, and our perusal of the Memorandum of Appeal herein leads this Court to the conclusion that the appeal raises the arguable issue regarding the place of asset recovery as a tool in curbing corruption; the test for asset recovery, and whether or not the decretal sum was too high. The issue in this Courts view is not idle and/or frivolous. See *Co-operative Bank of Kenya Limited v Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
15. On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. (see also *Oraro & Rachier Advocates v Co-operative Bank of Kenya* [1999] LLR 1118.
16. In the case of *African Safari Club Limited v Safe Rentals Limited*, [2010] eKLR this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

In this regard the court is to decide which party’s hardship is greater.

17. Regarding the nugatory aspect, this Court notes that the thrust of the applicant’s complaint is that the judgment sum was too high. The respondent has explained that it is an institution that would be holding the funds on behalf of the public, and nothing has been presented before us to suggest it would quickly dispose of the funds; or that the respondent would not be able to repay the decretal sum should the appeal succeed. The test of whether or not an appeal will be rendered nugatory is whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible, whether damages will adequately compensate the aggrieved party. We hold the view that the EACC being a government body is very well and able to compensate the applicant should his appeal succeed. In short this Court is not entirely convinced that the applicant has satisfied the second limb.



18. This Court also agrees with the respondent that the granting of stay on matters recovery of public property goes against the public interests, the applicant having been suspected of having illegally benefitted from public property.
19. As the requirement is that to succeed in an application under Rule 5(2) (b), the applicant must satisfy not either, but both of the limbs. Accordingly, this application fails and costs shall abide the outcome of the appeal.

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

H. A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

