



Kenya Ports Authority v Cemtec Engineering Limited (Civil Application E046 of 2023) [2023] KECA 1065 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1065 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E046 OF 2023
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

CEMTEC ENGINEERING LIMITED RESPONDENT

(An application for stay of execution of the decree and judgment of the High Court of Kenya at Mombasa (Macharia Wangari, J.) dated 25th May 2023 in High Court Civil Appeal No. 68 of 2022)

RULING

1. In its application before us dated May 31, 2023, Kenya Ports Authority, the applicant, seeks an order principally under rule 5(2)(b) of the [Court of Appeal Rules](#) for stay of execution of the judgement and decree of the High Court at Mombasa in Civil Appeal No 68 of 2022 delivered on May 25, 2023 pending hearing and determination of the intended appeal against the impugned judgement. However, during the hearing of the application on June 26, 2023, learned counsel for the applicant Mr S Khagram sought to amend (with opposition by learned counsel for the respondent Mr Karina) the application to include a prayer for an order of stay of execution of the judgment of the Magistrates Court in CMCC No 88 of 2017 delivered on April 14, 2022.
2. The standard against which applications of this nature are determined by this court is established. For the court to exercise its discretion in favour of the applicant under rule 5(2)(b) of the [Court of Appeal Rules](#), the applicant is required to demonstrate that the intended appeal is arguable and that unless the orders sought are granted, the intended appeal, if successful, will be rendered nugatory. See [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) [2013] eKLR. But first, the background in brief.
3. Cemtec Engineering Limited, the respondent, filed suit against the applicant for breach of contract before the Magistrates in Mombasa in CMCC No 88 of 2017. The respondent's case was that the



- applicant contracted it to undertake paint work and yard marking at the applicant's premises; that it carried out the works but that the applicant, in breach of the contract, failed to pay an amount of Kshs 19,954,991.29. It sought judgment for that amount which was granted by the Magistrate's court in the judgment delivered on April 14, 2022.
4. The applicant was aggrieved by that judgment and lodged a first appeal before the High Court, being Civil Appeal No 68 of 2022. That appeal was dismissed by that court (Florence Wangare, J) in the judgment delivered on May 25, 2023. Pending determination of that first appeal by the High Court, the applicant had apparently deposited into court an amount of Kshs 34,283,664.00 to secure an order for stay of execution of the judgment of the trial court.
 5. The applicant is again dissatisfied with the judgment of the High Court and intends to challenge it on a second appeal to this court. In the affidavit in support of the present application, Stephen Kyandih, Senior Legal Officer of the applicant deposed that a notice of appeal against the judgment of the High Court has been lodged. The said notice of appeal is however not exhibited. It was urged that the intended appeal is arguable as demonstrated in the draft memorandum of appeal. Amongst the arguable points pointed out by counsel is the complaint that learned judge was in error in finding that a valid contract existed between the parties when there was no proof of the same.
 6. It was urged for the applicant that the respondent wishes to have the decretal sum deposited in the High Court as a condition for granting stay pending the appeal in the High Court pursuant to an order of that court released to it regardless of the applicant's intended appeal and that should that amount be released to the respondent, the applicant will suffer irreparable loss and harm as the respondent has no known means or assets to repay the decretal amount in the event the second appeal succeeds; that in that event, unless the orders sought are granted, the appeal will be rendered nugatory.
 7. In opposition to the application, Mr Karina relied on the grounds of objection and a replying affidavit sworn by Kenneth Njuguna Mwangi a director of the respondent. It was submitted that the intended appeal will not be rendered useless; that there is nothing to execute in the decision of the High Court; that the respondent has not obtained a decree from the High Court and neither has it taxed costs; that based on its statements of account from its bankers, the respondent has the ability to repay the decretal amount in the unlikely event that the second appeal succeeds.
 8. We have considered the application, the affidavits, and the submissions. We are concerned that the all-important notice of appeal referred to in the affidavit in support of the application was not exhibited. However, as the respondent did not contest the filing and service of the notice of appeal, we will dwell no further on that.
 9. As to whether the intended appeal is arguable, the applicant asserts in its draft memorandum of appeal, among other grounds, that the judge erred in applying an objective as opposed to a subjective test in considering whether the existence of a contract between the parties was established and that the respondent did not discharge its burden of proof to show existence of a valid contract. The respondent on the other hand asserts that the issues in contest between the parties before the trial court were resolved based on the applicant's admissions and based on documents produced by the respondent as the applicant did not produce any documents and neither did it call any witnesses. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are persuaded that the intended appeal is arguable.
 10. As to whether the appeal will be rendered nugatory if we decline to grant the orders sought, the applicant's case is that if this court declines to grant the orders sought in the present application, the decretal amount deposited in the High Court as ordered by that court as a condition to stay execution



of the trial court judgment will be released to the respondent and that the respondent has no known means or assets to repay in the event of the appeal succeeding.

11. The respondent on the other hand has urged the orders granted by the High Court, being negative orders, cannot be executed as the applicant was not ordered to do anything or refrain from doing anything or to pay any sum. The decision of the court in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme vs Milimo, Muthomi & Co Advocates & 2 others* [2022] eKLR among others, was cited. It was reiterated that the respondent neither applied or obtained a decree nor has it taxed costs nor applied for execution.
12. We have considered the rival arguments in that regard. In its judgment the subject of the intended second appeal, the High Court ordered:
 - “(a) The appeal is found to be without merit and it is hereby dismissed with costs to the respondent.
 - (b) The award of Kshs 19,954,991.29 as ordered by the trial court shall attract interest at court rates from the date of filing until payment in full.”
13. Given the nature of those orders, there is merit in the submission by the respondent that they are not capable of stay as the High Court neither ordered the parties to do anything or refrain from doing anything. See *Jennifer Akinyi Osodo vs. Boniface Okumu Osodo & 3 others* [2021] eKLR. It was perhaps on the basis of this realization that counsel for the applicant sought to amend the motion before us to incorporate a prayer for an order for stay of execution of the judgment of the trial court.
14. It is however apparent that the applicant’s concern is that the decretal amount it deposited in the High Court as a condition for stay pursuant to an order of that court will be released to the respondent. The order of the High Court directing the applicant to deposit the decretal amount, which order is not before us, is not the subject of the intended appeal. In effect, the deposit that the applicant seeks to prevent from being released did not arise from the impugned judgement of the High Court. The court cannot stay execution of an order with respect to which there is no notice of appeal. See *Nguruman Limited vs Shompole Group Ranch & another* [2014] eKLR. For the same reason, it would serve no useful purpose to allow the oral application to amend the application to incorporate a prayer for stay of the judgment of the trial court.
15. In the end, we are not satisfied that the applicant has demonstrated that the intended appeal will be rendered nugatory if we decline the orders sought. The applicant’s application dated May 31, 2023 fails and is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR*

