



Ochiel & 4 others v Ethics & Anti-Corruption Commission (Civil Application E394 of 2022) [2023] KECA 1142 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1142 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E394 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
SEPTEMBER 22, 2023**

BETWEEN

NICHOLAS OWINO OCHIEL 1ST APPLICANT

TERRY VIOLET MUTHONI MAINA 2ND APPLICANT

AND

TERIC VALUERS LIMITED CROSS APPELLANT

AND

TERNIC ENTERPRISES LIMITED 1ST APPLICANT

RICHARD OMONDI OCHIEL 2ND APPLICANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION RESPONDENT

(Being an application for stay of execution pending appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (E. Maina, J.) delivered on 24th October 2022 in A.C.E.C Suit No. E024 of 2022 (O.S))

RULING

1. By a Notice of Motion dated 15th June 2022, the respondent (the Ethics and Anti-Corruption Commission) applied to the High Court of Kenya at Nairobi (Anti-Corruption and Economic Crimes Division) in ACEC Case No. E24 of 2022 (OS) against the applicants seeking injunctive relief to restrain the applicants from dealing in any manner with various immovable and movable assets alleged to be unexplained and, in the alternative: (i) the motor vehicles subject to the respondent’s application be surrendered to the respondent within 7 days of the order sought; or (ii) the applicants do deposit into a joint interest-earning account in the names of the respondent and the 2nd applicant (Terry Violet



- Muthoni Maina) as security in the sum of KShs. 10,500,000, being the estimated value of the motor vehicles cited in the Motion.
2. The respondent's Motion, which was made ex-parte in the first instance, was anchored on 17 grounds set out on the face thereof and supported by the affidavit of Shadrack Mwenda, the respondent's investigator, sworn on 15th June 2022.
 3. The respondent's case was that the 1st applicant, Nicholas Owino Ochiel, had amassed assets not commensurate to his known and legitimate sources of income during the period when he served as a public officer; and that he used the 2nd 3rd 4th and 5th applicants as conduits to receive, hold or otherwise conceal funds acquired in the course of, or as a result of, his corrupt conduct.
 4. On 17th June 2022, the trial court (E. Maina, J.) granted the respondent injunctive orders on an interim basis and directed the respondent to serve its application upon the applicants to facilitate hearing inter partes. The application was fixed for further directions on 4th July 2022, but was adjourned for a further mention on 20th September 2022 to confirm whether the applicants had filed their responses to the respondent's Motion.
 5. When the parties came before the learned Judge on 20th September 2022, it became apparent that the applicants had not filed their responses. They applied for time to do so within 30 days. Their application was allowed and, in her order, the learned Judge set the respondent's Motion for further directions on 24th October 2022 and extended the interim orders to that date.
 6. Four months down the line, the applicants had not filed any affidavit in reply to the respondent's Motion by the time the application came for further directions on 24th October 2022. Consequently, the learned Judge treated the respondent's Motion as unopposed and allowed it in terms of prayers 4, 6 and 8, to wit, injunctive relief restraining dealings in the immovable and movable assets, and to surrender the motor vehicles cited in the Motion within 7 days for the purposes of preservation pending hearing and determination of the substantive suit. In the meantime, the applicants were at liberty to file their responses within 21 days from 24th October 2022. We find nothing in the record as put to us to suggest that such replies were ever filed.
 7. Dissatisfied with the orders of the trial judge, the applicants moved to this Court on appeal essentially on the grounds that the trial court erred by making substantive orders on the day set for mention; and by allegedly condemning the applicants unheard.
 8. Pending hearing and determination of the intended appeal, the applicants seek stay of execution vide the Notice of Motion dated 28th October 2022 under rule 5(2) (b) of this *Court's Rules*. The applicants' Motion is anchored on 10 grounds set out on the face thereof, and supported by the annexed affidavit of their advocate, Edwin Wangwe Waudu, sworn on 28th October 2022.
 9. In his affidavit, Mr. Waudu deposes that when the matter came up on 24th October 2022, he had indicated to the court that he intended to file 5 affidavits in reply to the respondent's Motion; that he had voluminous records to contend with, some of which were inaccessible; that he only required 3 days to finalise and file the replying affidavits; that the trial court ought not to have made substantive orders on a date scheduled for mention; and that the applicants were condemned unheard.
 10. In addition, the 1st applicant filed a further affidavit sworn on 11th November 2022, most of whose contents are in the nature of submissions in opposition to the respondent's Motion in the trial court. He goes to great lengths to restate the factual background narrated by his counsel, and concludes with an incontestable statement of the general principle that "... grant of an injunction is a discretionary



remedy. The discretion is to be exercised judiciously and not capriciously. The court must consider the facts and weigh them against the law.”

11. Learned counsel for the applicants filed written submissions and list of authorities both dated 15th November 2022. On the authority of [Daniel Kibet Mutai and 9 Others v the Attorney-General](#) [2019] eKLR, counsel submitted that

“... where averments are made in an affidavit and not controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted.” Counsel also cited the case of [Daniel Maingi Muchiri v Jubilee Insurance Company Ltd](#) [2017] eKLR for the proposition that a court has no jurisdiction to hear submissions and issue a reasoned ruling on a mention date. They urge us to allow their Motion as prayed.
12. In reply vide her affidavit sworn on 7th November 2022, Ms. Grace Maina, learned counsel for the respondent, contends that the applicants have no arguable appeal, and that they have not demonstrated how the appeal, if successful, would be rendered nugatory. In her written submissions and list of authorities both dated 24th November 2022, counsel cited the cases of [Star Publication Limited and Another v Ahmed Nasir Abdullahi](#) [2015] eKLR and [Hiram Maluki Kasoni v Karsan Ramji and Sons Limited and Another](#) [2021] eKLR, contending that the applicants had no arguable appeal on account of being guilty of laches in failing to file their replies to the respondent’s Motion; that they gave no credible reason for the 4 months’ delay; and that the applicants’ Motion was an abuse of the due process of this Court (see [In the Matter of the Council of Governors; Senate and Another](#) [2014] eKLR).
13. On the nugatory aspect, learned counsel for the respondent submitted that as an entity, the respondent “... is fully capable of complying with whatever legal consequences that may accrue from the intended appeal.” According to her, the intended appeal, if successful, would not be rendered nugatory. Counsel urges us to dismiss the applicants’ Motion with costs to the respondent.
14. The principles that apply in applications under rule 5(2) (b) of the [Court of Appeal Rules](#) for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this Court to which we now turn.
15. On the first limb of this twin principle, this Court held in [Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC](#) [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, that is to say, that it is not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
16. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in [Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others](#) [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
17. On our reading of the Memorandum of Appeal, grounds on which the applicants’ Motion is founded, the affidavits in support thereof, the replying affidavit, and of the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicant’s intended appeal is arguable.



That satisfies the first limb of the twin principle for grant of orders under rule 5(2) (b) of this Court's Rules.

18. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
19. The circumstances of this case are that the impugned orders constitute preservative orders in the nature of injunctive relief to restrain dealings in the movable and immovable assets, including the motor vehicles cited in the respondent’s Motion in the trial court pending hearing and determination of the substantive suit. We also take to mind that, as an alternative to surrender of the motor vehicles for the purpose of preservation by the respondent, the 2nd applicant may elect to furnish security by way of a bank deposit in the joint names of the 2nd applicant and the respondent. We hasten to observe that the value of the assets in question are quantifiable and capable of restoration to the applicants in the event that the intended appeal succeeds, and that any loss is capable of compensation by award of damages.
20. In view of the foregoing, we reach the inescapable conclusion that the applicants have failed to satisfy the second limb of the twin principle. Accordingly, the intended appeal, if successful, would not be rendered nugatory absent stay. In effect, the applicants’ Notice of Motion dated 28th October 2022 fails and is hereby dismissed with no orders as to costs.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

