



**China Gezhouba Group v JTG Enterprises Limited & another (Civil Appeal
(Application) E418 of 2023) [2023] KECA 1266 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1266 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E418 OF 2023
MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA
OCTOBER 27, 2023**

BETWEEN

CHINA GEZHOUBA GROUP APPLICANT

AND

JTG ENTERPRISES LIMITED 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

*(Application for stay of execution pending the hearing of the appeal
against the Orders of the High Court of Kenya (Mabeya J.) dated 22nd
August 2023.) in Milimani HC Commercial Case No. E649 OF 2021)*

RULING

1. The 1st respondent filed a suit in the High Court against the applicant sometimes in June 2021, claiming inter alia, payment of a sum totalling KShs. 68,376,306,492 as particularized in the plaint. This was on the footing of an alleged breach of the subcontract it entered into with the applicant on 2nd July 2019. The Sub Contract No. CTH-ENG-2019-014 was for excavation, protection, support, and drainage works for the main spillway of the main project.
2. The main contract had been entered into between the applicant and the Ministry of Water, Sanitation, and Irrigation in March 2018 for the construction of Thwake Multipurpose Water Development Dam in Makueni County. The subcontract between the parties was based on the terms in the main contract. It was the case of the 1st respondent that it had delivered on its part of the bargain, hence the need for payment. The applicant and 2nd respondent on the other hand were of the view that as much as the 1st respondent had performed its side of the contract, its payment was subject to the provisions of the main contract which had provisions as to how and when payments would be effected. Accordingly, payment to 1st respondent was not due.



3. Mabeya, J. delivered the judgment of the court on 9th August 2023, in favour of the 1st respondent against the applicant in the sum of KShs.682,763,004.92 plus costs and interest. The applicant, dissatisfied with the judgment, filed a notice of appeal dated 18th August 2023 and subsequently, lodged an application in the trial court for stay of execution of the said judgment pending appeal. After inter partes hearing of the application, a ruling was delivered on 22nd August 2023 in which the trial court gave a conditional stay on terms that the applicant pays the 1st respondent, the sum of KShs. 84,054,610.68. The applicant was unable to comply, hence the present application in which the applicant still seeks an order of stay of execution of the aforesaid orders. The applicant is apprehensive that the 1st respondent may execute the decree to recover the said monies any time now. The application is brought under the provisions of rule 5 (2) (b) of the [Court of Appeal Rules](#).
4. The applicant contends that the appeal is arguable and should the orders sought not be granted, it will suffer irreparable loss as its properties will be auctioned, and the appeal will thereby be rendered nugatory.
5. On whether the appeal is arguable, the applicant contends that the learned trial Judge failed to appreciate the fact that payment of the monies to the 1st respondent was governed by the express provisions of the sub-contract. That further, the Judge failed to appreciate the fact that under the said sub-contract and particulars thereof, the monies due to the 1st respondent as the sub-contractor were only payable upon the applicant receiving payment from the employer, in this case, the Ministry of Water, Sanitation and Irrigation.
6. In opposing the application, the 1st respondent in a replying affidavit sworn by its Director, Joseph Thuo Gichuhi, deposed that there were admissions made during the trial and by the applicant's former counsel in his written submissions filed in the suit conceding that payments were due. Hence, the Judge's orders were made based on the clear admissions by the applicant. Further, that the applicant is a foreign company and was only in Kenya for the project. That the applicant had started moving some of its equipment from the site and the current application is only meant to buy time so that it may leave the Country. That there were no justifiable reasons whatsoever to issue the orders sought.
7. The 2nd respondent did not file a replying affidavit but did file written submissions.
8. On the arguability of the appeal, the applicant submitted that the 1st respondent had admitted that the project was not complete and the defects liability period had not commenced, hence the said money was not yet due and payable. That even though there was an admission by the former advocate on record for the applicant, the same did not have the effect of amending the provisions of the main and the subcontract. It relied on the case of [Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others](#) [2013] eKLR to buttress the fact that it had made an arguable case with high probability of success.
9. On whether the appeal will be rendered nugatory, the applicant, relying on the case of [National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another](#) [2006] eKLR, submitted that though the amount sought to be recovered by the 1st respondent inclusive of the computed interest currently stands at KShs. 109,624,049.52, the applicant had no knowledge of any assets owned by the 1st respondent, and neither does it have knowledge of the 1st respondent's financial ability to refund the colossal amount of KShs. 109,624,049.52. It was contended that the 1st respondent had not demonstrated remotely or at all through evidence, that it would have the ability to refund the amount.
10. The application is supported by the 2nd respondent. It submits that the decision by the Judge to direct the applicant to pay the amount was a direct affront to the provisions of the sub-contract as well as the main contract. It reiterates the averments by the applicant on the arguability of their case. On the appeal



- being rendered nugatory, the 2nd respondent whilst relying on the case of *Samuel Mbuvi Mutemi t/ a Samtech Building Contractors vs. County Government of Machakos* [2020] eKLR, submitted that paying out the amount was a desecration of the provisions of the sub-contract and the main contract. Any payments at this juncture, before the lapse of the contract period between the main contractor and the 2nd respondent completely exposes it to unforeseen risks that may not be adequately compensated by an award of damages. In the event the applicant is forced to pay the amount at this point, the 2nd respondent and the public at large will suffer irreparable damage.
11. The 1st respondent in opposition to the application while equally relying on the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (supra) submitted that the application had not met the threshold for granting the prayers sought. That the appeal is not arguable as the orders of the trial court were based on the unequivocal admissions by the applicant that it was yet to pay the 1st respondent the amounts due. The admissions were made by both the applicant while testifying, and by his former advocate in his written submissions. That the idea that the said monies are not yet due is a misapprehension of the provisions of the contract and the sub-contract which provided that the applicant was entitled to deduct an amount from the retention amount. That further, the sub-contract between the parties provided that the defects liability period starts to run from the date of successful acceptance of the whole project upon completion.
 12. It was submitted that works were completed in October 2020 and no defects were noted during the one-year defects period that lapsed in October 2021, the 1st respondent was entitled to the money. On whether the appeal will be rendered nugatory, relying on the case of *Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others* [2000] eKLR, the 1st respondent submitted that this case ought to be considered based on its unique circumstances, as it is clear that the appeal will not be rendered nugatory given that the applicant has confirmed that indeed the money was owed and the only issue is when and not whether the same should be paid. As such, even if the appeal is successful and the monies had been paid, there will be no need for a refund. Therefore, such payment will not render the appeal nugatory.
 13. Has the applicant met the threshold for granting an order for stay of execution under rule 5(2) (b)? This Court has set out in several pronouncements the parameters to be met for an order for stay of execution to be granted.
 14. In the case of *Alfred Mincha Ndubi vs. Standard Limited* [2020] eKLR, this Court held that to succeed in an application under rule 5(2) (b), the applicant has to satisfy the twin principles that: the appeal is arguable; and is likely to be rendered nugatory if the orders sought are not granted and the appeal succeeds. See also the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [supra].
 15. We have carefully considered the motion, the grounds in support thereof, the various affidavits and the authorities cited. In our view, the appeal is arguable mainly on the grounds; whether the court failed to appreciate the fact that payment of the sub-contract amount to the 1st respondent was governed by the express provisions of the sub-contract and the main contract, and whether the Judge failed to appreciate the fact that under the said sub-contract, the monies due to the 1st respondent as the sub-contractor were only payable upon the applicant receiving payment from the employer, the Ministry of Water, Sanitation and Irrigation.
 16. On the nugatory aspect, the Judge granted conditional stay requiring the applicant to pay KShs, 84,054,610.68 to the 1st respondent which money the applicant contends is not yet due and payable. We are satisfied that payment of the said monies will ideally render the appeal nugatory. We revert to the observations made in *Reliance Bank Limited vs. 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. The applicant has stated that there are doubts whether the monies, if paid, the same may be recovered from the 1st respondent. This averment has not been sufficiently countered by the 1st respondent. We also note that the 1st respondent has not demonstrated that it will be able to refund the monies if paid, given the fact that the same is colossal.

17. Accordingly, we are satisfied that the applicant has succeeded in demonstrating the twin principles under rule 5(2) (b) of this Court's rules. The application therefore, succeeds and is allowed. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

