Sarrai Group Ltd v Kimeto & Associates Advocates & 11 others (Civil Application E185 of 2023) [2023] KECA 1259 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KECA 1259 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E185 OF 2023

MA WARSAME, K M'INOTI & KI LAIBUTA, JJA

OCTOBER 13, 2023

BETWEEN

SARRAI GROUP LTD ..... APPLICANT

AND

KIMETO & ASSOCIATES ADVOCATES ..... 1ST RESPONDENT

KHAMINWA & KHAMINWA ADVOCATES ..... 2ND RESPONDENT

WEKESA & SIMIYU ADVOCATES ..... 3RD RESPONDENT

VARTOX RESOURCES INC ..... 4TH RESPONDENT

PONAGIPALLI VENKATA RAMANA RAO ..... 5TH RESPONDENT

MUMIAS SUGAR CO. LTD. (IN RECEIVERSHIP & ADMINISTRATION) ..... 6TH RESPONDENT

KCB BANK KENYA LTD ..... 7TH RESPONDENT

WEST KENYA SUGAR CO LTD ..... 8TH RESPONDENT

SARBAJIT SINGH RAI ..... 9TH RESPONDENT

RAKESH KUMAR BVATS ..... 10TH RESPONDENT

STEPHEN KIHUMBA ..... 11TH RESPONDENT

WESLEY GICHABA, ADVOCATE ..... 12TH RESPONDENT

(Application for stay of execution and proceedings pending the hearing and determination of an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Chepkwony, J.) dated 27th April 2023 in HCIP No. E004 of 2019)

RULING

1. The notice of motion before us is by the applicant, Sarrai Group Ltd (Sarrai), and is dated May 10, 2023.

2. Sarrai seeks, in the main, stay of execution of the ruling and order of the High Court of Kenya dated 27th April 2023 and stay of further proceedings in the trial court pending the hearing and determination of an intended appeal. There is a notice of appeal dated May 8, 2023 evincing Sarrai's intention to appeal against the said ruling.

3. There is a related application No. E.187 of 2023, involving the same parties and the same ruling. The applicants in that application are Sabarjit Singh Rai, Rakesh Kumar Bvats and Stephen Kihumba, who likewise seek stay of execution of the ruling of the High Court dated 27th April 2023 and also stay of further proceedings. The applications were heard back to back. Being so closely intertwined and involving the same parties and the same ruling, our decision in this application shall apply mutatis mutandis to Civil Application No. E. 187 of 2023.

4. It is worth noting that some of the parties to both applications have, without let or hindrance, introduced into the applications all manner of allegations, insinuations and innuendos, including allegations of judicial bias, misconduct, and outright corruption, which compelled a judge of the High Court and a bench of this Court to recuse themselves. As will be evident shortly, attempts have been made to recuse even this entire bench. Be that as it may, the applications before us are fairly straight forward, and we intend to focus on them without being distracted by allegations which are best left to the competent authorities, which we were informed are already seized of the matter to determine the veracity of the allegations.

5. The short and relevant background to the applications are that on 14th April 2022, the High Court (Mabeya, J.) issued an order, among others, revoking a lease agreement entered into on 22nd December 2021 between Sarrai and the 5th respondent, Mumias Sugar Co. Ltd. (In Receivership and Administration) (Mumias). The learned judge further ordered the removal of the 6th respondent, Ponagipalli Venkata Ramana Rao (Mr. Rao), as administrator and receiver of Mumias. In his place, the court appointed Mr. Kereto Mrima as an independent administrator of Mumias, with a further order that Mr. Rao should hand over to Mr. Mrima within 7 days from the date of the order.

6. It appears that, on 25th April 2022, the 10th Respondent, Rakesh Kumar Bvats (Mr. Bvats), moved to the High Court and obtained an ex parte order before Chepkwony, J., the substantive part of which provided thus:

> "Pending the hearing and determination this application inter partes, a stay of execution and or enforcement of the order set out in paragraph 150(h) of the ruling made on 14th April 2022 revoking, cancelling and nullifying the lease issued to the applicant and directing the applicant to forthwith vacate the premises of Mumias be and is hereby granted."

7. By a further order, Mr. Bvats was directed to serve the application upon the respondents thereto and appear before Mabeya, J. on 5th May 2022 for directions. The fate of that application is not readily apparent from the record, but what is clear is that, on 14th July 2022, Mabeya, J. recused himself from the matter, which then landed before Okwany, J.

8. On their part, the 7th respondent, KCB Bank Kenya Ltd, and Mr. Rao were aggrieved by the order of the High Court of 14th April 2022 and applied to this Court for an order of stay of execution. On 6th June 2022 this Court (Makhandia, J. Mohammed and Kantai, JJ.A.) granted an interim order of stay of execution pending delivery of its ruling on the application and, ultimately, on 23rd September 2022, the Court issued an order of stay of execution of the orders of the High Court pending the hearing and determination of the intended appeal.

9. Back in the High Court, Okwany, J. entertained an application in which the court was requested to issue orders to preserve the assets of Mumias from vandalisation and wastage during administration. By a ruling dated 28th July 2022, the High Court:

   i. issued orders stopping any dismantling, stripping, removing, transferring or disposing of any movable or immovable assets of Mumias with immediate effect;

   ii. ordered the return of all moveable assets, machinery or equipment that had been removed from the premises of Mumias;

   iii. directed Sarrai Group, its agents, employees, servants, subsidiaries or affiliates to cease any and all activities including operation of machinery, dismantling, vandalising machinery removing assets or any other activity of whatever nature stored and situate within the premises of Mumias; and

   iv. ordered the Officer Commanding Mumias Police Station to facilitate the safe return of all vandalised and looted assets of Mumias.

10. On 5th August 2022, the 1st respondent, Kimeto & Associates Advocates, applied to the High Court to commit Sarrai, Sarbit Singh Rai, Rakesh Bvats, Stephen Kihumba and Wesley Gichaba, Advocate for contempt of court arising from alleged breach of the orders of 28th July 2022. By a ruling dated 27th April 2022, the subject of the two applications before us, Chepkwony J. found Sarrai, Sarbit Singh Rai, Rakesh Bvats and Stephen Kihumba guilty of contempt of court. Sarrai was sentenced to a fine of Kshs.100,000.00 and directed to purge the contempt within 15 days whilst Sarbit Singh Rai, Rakesh Bvats and Stephen Kihumba were directed to appear before the court on 18th May 2023 to show cause why they should not be sentenced to jail for contempt of court. Those are the orders the execution of which the applicants in the two applications before us seek to stay. But before we delve into the merits of the applications, we must first give reasons why at the hearing of the applications we rendered an ex tempore ruling and dismissed an application to recuse ourselves from hearing this matter.

11. The oral application for recusal was two pronged. In the first instance, Dr. Khaminwa, learned counsel for the 2nd respondent applied for recusal of the presiding Judge, the Hon. Mr. Justice Warsame, JA., on the grounds that he is a member of the Judicial Service Commission (JSC) and that a complaint had been raised and was pending before the JSC against some of the judges who had dealt with the dispute from which the applications before us arose. He contended that the presiding judge should not participate in the application as he was likely to participate in the complaints before the JSC. Citing Article 172(1) of *the Constitution* on the functions of the JSC, counsel propounded a rather broad test for recusal, which is that, once a party expressed apprehension of bias on the part of a judge, the judge had no choice but to recuse himself or herself.

12. On her part, Ms Kimeto, learned counsel for the 1st respondent, urged the entire bench to recuse itself. Reason?

    Because it was empanelled by an acting President of the Court of Appeal against whom she had a pending complaint before the JSC. The unstated assumption was that Judges of the Court of Appeal

are beholden to the President or an acting President who empanels them and therefore must do the bidding of the President or Acting President. For good measure, counsel submitted that she had previously recused an entire bench of the Court on the basis of the same argument. The application for recusal was supported by Mr. Muite, learned counsel for the 8th respondent, Mr. Wekesa, learned counsel for the 3rd respondent and Mr. Kilukumi, learned counsel for the 4th respondent, who submitted that the application raised weighty issues and created the perception of bias on the part of the Court.

13. Prof. Muigai, learned counsel for Sarrai, and Mr. Somane, learned counsel for the 6th and 7th respondents, opposed the recusal application, submitting that it was a mere stratagem to scuttle the hearing of the applications, which involved threat to the liberty of citizens after being adjudged guilty of contempt of court. Counsel further contended that there was no evidence of bias on the part of the Court, and that the application for recusal was a red herring intended to scare judges from sitting in the matter, or to forum shop.

14. Having carefully considered the application for recusal, we reiterate that a judge does not recuse himself or herself as a matter of course, or merely because a party to the dispute has requested the judge to recuse himself or herself. There is a well-established test in this jurisdiction for recusal of a judge where it is alleged, as in this case, that there was a risk of perception of bias on his or her part, rather than actual bias. For example, in Kalpana H. Rawal v. Judicial Service Commission & 2 Others [2016] eKLR, this Court cited with approval the following passage from *Attorney General of Kenya v. Prof. Anyang' Nyong'o & 10 Others* (EACJ App. No. 5 of 2007):

> "We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, (a) litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case." (Emphasis added)

15. The Court further relied on the decision of the Supreme Court of Canada in *R.v.S* (R.D) (1977) 3 SCR 484 where the test of bias was expounded thus:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of

bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence." (Emphasis added).

16. The onus thus lay on the parties seeking recusal to demonstrate reasonable likelihood of bias. The threshold is high and not as low as propounded by Dr. Khaminwa. The real question is whether reasonable apprehension of bias was presented, which would make an informed and fair-minded person, seized of all the information surrounding this matter, and the impartiality required of judges by their constitutional oath, apprehend bias on the part of the bench. An important piece of information that a reasonable and fair minded person would be seized of in the context of this case is that Judges who represent their respective courts in the JSC are not ipso facto precluded from discharging judicial duties. It was common ground that Warsame, JA. was not seized of any complaint at the JSC arising from this matter. Secondly, and with great respect, it is too tenuous to suggest, without more, that a reasonable, informed and fair minded person aware of the principles and ethos of the Judiciary, can conclude that a judge is likely to be biased merely because the President or an Acting President of the Court has empaneled a bench of which he or she is a member. Judges do not empanel themselves and an informed and fair-minded person aware of the judicial oath of office and decisional independence of a judge would know that the President of the Court or any other judge responsible for empaneling a bench has absolutely no sway over the mind of judges regarding how they decide matters before them. With all due respect, the application for recusal before us was as fanciful as they come, and that is why we dismissed the same with costs. If judges in a collegiate court were to recuse themselves simply on account of the person who empanelled the bench, such courts would never work. A judge would be wrong to recuse himself or herself on spurious grounds, just as he or she would be wrong to refuse to recuse in the face of real likelihood of bias that has been proved to the required threshold.

17. Before we leave this issue, it would be apt to cite what this Court stated in *Kalpana H. Rawal v. Judicial service Commission* (supra) regarding the low threshold test of bias propounded by Dr. Khaminwa, who, alas, had propounded the same test in that case. This is to discourage spurious applications for recusal, which are becoming too common in our jurisdiction:

> "Before we consider the merits of the application, however there are a few issues raised by the parties that we must dispose of. Firstly, it is obvious from the test above that there is no basis for the rather elastic test propounded by Dr. Khaminwa, where a judge must automatically recuse himself or herself upon the making of a bare allegation by any of the parties. We have not come across any authority in support of the proposition and Dr. Khaminwa did not cite any. On the contrary decisions abound that judges should not recuse themselves on flimsy and baseless allegations."

18. Turning to the merits of the application, Sarrai submitted that its intended appeal was arguable because this Court had already stayed the orders of the High Court revoking the lease agreement with Mumias and changing the administrator of Mumias. The effect of that order of stay of execution, it was contended, was to revert to the status quo before 23rd April 2022, and that the High Court exceeded its powers when it purported to find Sarrai, Sarbit Singh Rai, Rakesh Bvats and Stephen Kihumba guilty of contempt of court in light of the orders of this Court. It was further contended that the orders which the High Court found to have been contravened were inconsistent with the order issued by this Court. Prof. Muigai further submitted that some of the parties that the High Court found to be guilty of contempt of court had not been served and were not heard, in breach of their right to be heard guaranteed by Article 50 of *the Constitution*.

19. Lastly, counsel submitted that unless an order of stay of execution is granted, the four persons risked being sent to jail, which would render their intended appeal nugatory, as that consequence was incapable of reversal.

20. The application was supported by the 9th, 10th, 11th and 12th respondents, who adopted Sarrai's submissions. Mr. Somane, learned counsel for the 6th and 7th respondents also supported the application, submitting that the High Court had totally ignored the order of stay of execution granted by this Court which, in his view was tantamount to the High Court sitting on appeal from that order. Counsel added that an award of damages would not adequately compensate persons who were denied their personal liberty through imprisonment.

21. The application was vehemently opposed by Dr. Khaminwa for the 2nd respondent, who submitted that a party adjudged guilty of contempt of court cannot apply for stay of execution. Such a party, he added, is only required to purge the contempt. Counsel contended that the issue of service was neither here nor there, and that the critical issue was whether the contemnors were aware of the Court order. He urged that the intended appeal was not arguable and that the Court must enforce court orders to avert chaos. Equally opposing the applications was Mr. Muite, learned counsel for the 8th respondent, who urged the Court not to be seen as undermining the authority of the High Court, whose orders had been violated. In counsel's view, the intended appeal was not arguable as the insolvency court acted within its jurisdiction.

22. On their part, Mr. Kilukumi for for the 4th respondent and Mr. Wekesa for the 3rd respondent, opposed the application on the grounds that Sarrai had already paid the Kshs 100,000 fine, which the High Court imposed and therefore there was nothing left to stay. As for the other parties who were found in contempt of court, counsel submitted that all they were required to do was to show cause and, if they did so, there was no risk of being jailed. Relying on the ruling in *Wardpa Holdings Ltd & 3 others v. Emmanuel Waweru Lima Mathai & Another* [2010] eKLR, counsel submitted that the application was merely speculative. It was also contended that the applicants had not appealed against the orders of Okwany, J. and, therefore the intended appeal against the orders of Chepkwony, J. only was not arguable. Lastly, counsel submitted that public interest demanded compliance with court orders.

23. Finally, we heard Ms. Kimetto for the 1st respondent who also opposed the application and submitted that the intended appeal was frivolous and based on deliberate defiance of court orders. It was contended that there was no contradiction between the orders of stay of execution by this Court and those of the High Court, which were merely conservatory in nature. Counsel urged that the orders of this Court did not touch on the assets of Mumias and, further, that in issue in the present applications was a money decree, which would not be rendered nugatory. Relying on the decision of this Court in *Fred Matiangi v. Miguna Miguna & 4 Others* [2018] eKLR, counsel submitted that all parties must obey court orders.

24. We have carefully considered the two applications. It is common ground between all the protagonists that, to obtain relief under rule 5 (2) (b) of the Court of Appeal Rules, the applicants must establish that their intended appeal is arguable and that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds (see *J. K. Industries Ltd. v. Kenya Commercial Bank Ltd*. [1982 – 88] KAR 1088). Both requirements must be satisfied. Otherwise, the applicants will not be entitled to an order under rule 5 (2) (b) if they satisfy only one of the requirements (see *Republic Kenya Anti-Corruption Commission & 2 Others* [2009] KLR 31).

25. The Court has consistently held that an arguable appeal is not one which must necessarily succeed. It is simply an appeal that is not frivolous and raises a bona fide arguable point that deserves to be considered and determined by the Court. (see *Kenya Tea Growers Association & Another v. Kenya Planters &*

Agricultural Workers Union, Civil Application No. Nai. 72 of 2001). To establish an arguable appeal, the applicants do not have to present a multiplicity of grounds. Even a single bona fide ground will suffice (see *Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 Others* [2014] eKLR).

26. The applicants in both applications submit that their appeals are arguable because they were adjudged in contempt on the basis of orders of the High Court that were contradictory or in conflict of the orders of stay of execution issued by this Court. They further contended that granted the constitutional hierarchy of the Courts, the High Court cannot enforce orders that are in tenor and effect contrary to orders of this Court. There is the additional complaint that some of the applicants were found guilty of contempt of court without service and an opportunity to be heard. We are satisfied that these issues are not frivolous, and that they deserve to be ventilated and determined by this Court. The applicants have therefore satisfied the first consideration under rule 5 (2) (b).

27. On the second consideration of whether the intended appeal risks being rendered nugatory, the relevant considerations are that what will render an appeal nugatory depends on the peculiar circumstances of the case (see *Reliance Bank Ltd v. Norlake Investments Ltd (*2002) 1 EA 227), and that the Court will grant stay of execution if what is apprehended cannot be undone once it happens, or cannot be undone without undue hardship or expense, or cannot be adequately compensated by award of damages (see *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR). The applicants contend that what is at stake is their liberty, the denial of which cannot be readily or adequately remedied in monetary terms. We are persuaded that, in case of committal to jail for contempt of court, loss of liberty of a citizen is involved, and that a successful appeal may in the circumstances be rendered nugatory because it is not possible to truly reverse the consequences of incarceration if the appeal succeeds. Accordingly, the applicants have also satisfied the second consideration under rule 5 (2) (b) of the *Court of Appeal Rules*.

28. In the circumstances, the Notice of Motion dated 10th May 2023 is hereby allowed. There will be stay of execution of the ruling and order of the High Court dated 27th April 2023, as well as stay of further proceedings, pending the hearing and determination of the applicant's appeal. This ruling shall apply mutatis mutandis to Civil Appeal No. E187 of 2023. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2023

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR