



**Chesikaw v Kenya Anti-Corruption Commission (Civil Appeal (Application)  
E537 of 2023) [2023] KECA 1357 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1357 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E537 OF 2023  
HA OMONDI, A ALI-ARONI & JM MATIVO, JJA  
NOVEMBER 10, 2023**

**BETWEEN**

**MICHAEL CHESIKAW ..... APPLICANT**

**AND**

**KENYA ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

*(Being an application for stay of execution of the judgment and orders of the High Court of Kenya, Anti-Corruption and Economic Crimes Court at Milimani, Nairobi, (Maina, J.) dated 29th June, 2023 in ACEC Case No. 4 of 2016 (formerly HCCC No. 897 of 2006)*

**RULING**

1. By an application dated July 17, 2023, Michael Chesikaw (the applicant) prays for stay of execution of the Judgment and orders made on June 29, 2023 (Maina, J) in ACEC case No 4 of 2016 (formerly HCCC No 897 of 2006, *Kenya Anti-Corruption Commission v Job Keittany & Michael Chesikaw*) pending hearing and determination of this appeal. The application is premised on the provisions of article 159 (2) (e) of the [Constitution](#), rule 5 (2) (b) of the [Court of Appeal Rules](#) and sections 3A & 3B of the [Appellate Jurisdiction Act](#).  
  
The applicant prays that the costs of the application be in the cause. Prayers (1) and (2) of the application have lapsed.
2. The application is anchored on grounds listed on the face of the application, the applicant's supporting affidavit sworn on June 17, 2023 and further affidavit sworn on July 27, 2023 together with the annexures thereto. The respondent opposed the application through a replying affidavit dated July 26, 2021 sworn by David Kang'ara, an investigator working for the respondent.
3. The background to this litigation, albeit in summary form is that the 1<sup>st</sup> respondent received a complaint that Par Aid which was registered in the names of the applicant and the 1<sup>st</sup> defendant (now deceased) had used, falsified receipts to account for a grant received from National Aids Control



- Council (NACC) a public body. Investigations established that Par Aid used fake receipts to account for the grant of Kshs 7,500,000/= disbursed to it by the NACC. Consequently, *vide* plaint dated August 18, 2006, the respondent moved the High Court in ACEC Case No 4 of 2016 (formerly HCCC No 897 of 2006) seeking recovery of the said plus interest at court rates and costs of the case.
4. In its statement of defence dated September 29, 2006, the applicant vehemently denied the claim and maintained that he was acquitted of criminal charges against him in Kibera Anti- Corruption Case No 7157 of 2007 in which the court found that the receipts were not forged and that the research was carried out and concluded.
  5. In its judgment dated June 29, 2023, the trial court held that the respondent had proved, on a balance of probabilities, that the applicant and the 1<sup>st</sup> defendant (deceased) misappropriated the sum of Kshs 7,500,000/= belonging to NACC through their community based organization Par Aid. The trial court ordered the applicant to pay the respondent the sum of Kshs 7,500,000/= with interest at the rate of 12% per annum from the date of receipt of the funds, plus, the costs of the suit.
  6. Aggrieved by the verdict, the applicant filed a notice of appeal dated July 5, 2023 and lodged at the court registry on July 7, 2023 and a memorandum of appeal dated July 17, 2023.
  7. The cornerstone of the applicant's case is that he has an arguable appeal, which has high chances of success as evidenced by the grounds enumerated in his memorandum of appeal. Essentially, the applicant faults the trial judge for heavily relying on the evidence of the 2<sup>nd</sup> respondent (now deceased), adduced in Kibera Criminal Case No 7157 of 2012 *Republic vs Job Keitany and another* yet the criminal court found the said confession inadmissible.
  8. As to whether the appeal will be rendered nugatory unless we grant the orders sought, the applicant stated that he was apprehensive that the respondent would commence execution proceeding against him after the stay granted by the High Court lapses, and the respondent will proceed to attach his matrimonial home standing on Nairobi/block 72/2126 thereby exposing his minor children to untold hardship and the loss would be irreversible and incapable of being compensated by an award of damages
  9. The respondent's case is that the instant application is bad in law, incompetent and an abuse of the court process and that it offends order 9 rule 9 of the [Civil Procedure Rules](#) because it is based on the notice of appeal dated July 5, 2023.
  10. It is also the respondent's case that the applicant's appeal is frivolous and not arguable. Further, the learned judge considered the confession by Job Keitany and all the evidence tendered before it on merit and arrived at the decision that Job Keitany together with the applicant herein were liable to compensate NACC through the respondent.
  11. As to whether the appeal will be rendered nugatory, the respondent argued that there is no imminent danger of execution against the applicant since the respondent has not begun the execution process. Further, the applicant has not furnished any evidence to prove that the property claimed to be in danger belongs to him, or that the property has no encumbrances, nor has he proved the property is matrimonial property as claimed. Furthermore, the respondent maintained that the applicant has not proved that the respondent would be unable to restore the applicant to the position prior to the execution in the event his appeal succeeds. Consequently, if the sought orders are granted, then public interest and expeditious finalization of recovery of public assets will suffer. Lastly, the respondent maintained that the applicant is an advocate and a person of means and currently a lecturer at Egerton University, therefore, he is capable of settling the decretal sum from his other sources of income other than his alleged matrimonial property.



12. In rejoinder, the applicant maintained that indeed a consent was entered between his erstwhile advocate and his new counsel on record and the same was filed before the superior court. Nevertheless, he is at liberty to instruct new counsel to act on his behalf on appeal despite the fact his erstwhile advocate lodged the notice of appeal. Further order 9 rule 9 is not applicable in proceedings before this court.
13. The applicant maintained that the title deed to his matrimonial property is in his name as evidenced in the annexures to his application. Further, he has provided a valuation report which contains particulars of development on the property as well as a current official search which confirms that he is the registered owner of Nairobi/Block 72/2126 which is his only free disposable asset. Responding to the issue of his means, the applicant maintained that he depends on his meagre income from the university to sustain his family.
14. The application before us is brought under rule 5 (2) (b) of the *Court of Appeal Rules, 2022*. The said rule was aptly described by this court in *Teachers Service Commission vs Kenya National Union of Teachers & 3 others* [2015] eKLR as essentially a tool for preservation which safeguards the substratum of an appeal in consonance with principles developed by the court over the years. The court also alluded to its inherent discretionary jurisdiction to preserve the substratum of an appeal or an intended appeal.
15. The principles developed by this court for granting a stay of execution, injunction or stay of proceedings under rule 5 (2) (b) of this court's *Rules* are well settled. (See of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR). The principles require an applicant seeking relief premised on the above Rule to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.
16. On the first principle, that is, whether or not the appeal is arguable, we have to consider whether there is at least a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this court on appeal. An arguable appeal was aptly described in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* (*supra*) as follows:
  - “vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
  - viii) In considering an application brought under rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
17. Before addressing our mind to the question whether the applicant has satisfied the twin principles to merit the orders sought, we will first address the question whether the firm of M/s Mutunga Justus & Associates Advocates are properly on record in this case as urged by the respondent's counsel. Before the trial court, M/s Rombo & Company Advocates represented the applicant. The respondent's contestation is anchored on the provisions of order 9 rule 9 of the *Civil Procedure Rules*.
18. Order 9 rule 9 of the *Civil Procedure Rules* is inapplicable to proceedings before this Court. In particular, the respondent's argument ignores rule 23 of the *Court of Appeal Rules, 2022* which provides as follows:
  1. Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the registrar a notice of the change and shall serve a copy of such notice on the other party or on every other party appearing in person or separately represented, as the case may be.



2. An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the judge.
19. This Court in *Tobias M Wafubwa v Ben Butali* [2017] eKLR held;
- “...Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the *Court of Appeal Rules*, 2010 or the *Supreme Court Rules*, 2010. Parties should therefore have the right to choose whether to remain with the same counsel to engage other counsel on appeal without being required to file a notice of change of advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”
- Also, the court stated:
- “As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent’s counsel was entitled to commence them without filing a notice of change of seeking the leave of the court to be placed on record.”
20. Undeniably, an application or appeal to the appellate court after judgment is an independent suit that is not bound by the provisions of order 9 rule 9 of the *Civil Procedure Rules*, unlike a review, execution, or stay of execution before the court that made the decision. Consequently, we hold that the instant application and the appeal are competently before court.
  21. We now address the question whether the applicant has satisfied the first prerequisite, that is, whether the intended appeal is arguable. We note that applicant has raised 11 grounds in his memorandum of appeal. We are alive to the fact that an arguable ground is not necessarily one that would succeed, but a ground that merits consideration by the court. (See *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR).
  22. The applicant faults the trial court for heavily relying on the evidence of the 1<sup>st</sup> defendant (now deceased) in Kibera Criminal Case No 7157 of 2012 *Republic v Job Keitany and another* which confession the criminal court found to have been inadmissible after conducting a trial within a trial. The applicant has also cited the doctrine of estoppel and the question whether sections 51 and 55 (c) of the *Anti-Corruption and Economic Crimes Act* envisage personal liability as opposed to joint liability for several persons. The applicant also is questioning the amount involved. As to whether the appeal will succeed, we leave it to the bench that will hear and determine the appeal on merits. On our part, we are satisfied that the appeal is arguable.
  23. As to whether the appeal will be rendered nugatory should the stay be refused, as was held in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) this Court stated that:
    - “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.



- x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

24. In *Reliance Bank Limited vs Norlake Investment Limited* [2002] 1 EA 227, this court held that 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 contended that his matrimonial property might be attached and sold in execution of a decree. To use the applicant’s own words, the fear that his house will be attached is premised on apprehension. The respondent is clear that it is yet to execute nor is there evidence on record to show that the respondent had commenced execution.
25. Even if execution had commenced, nugatory cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. (See the Supreme Court of India decision in see *Anandi Prashad v Govinda Bapu*, AIR 1934 Nag 160 (D). This is because execution is a lawful process. An applicant should go a step further to lay the basis upon which the court can make a finding that the appeal if successful will be rendered nugatory. It is not sufficient for the applicant to claim that the execution will adversely affect him. As this court held in *Hassan Guyo Wakalo v Straman EA Ltd* [2013] eKLR the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.
26. As was held in *Reliance Bank Limited v Norlake Investments Limited* (supra) “what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”
27. The subject decree is a money decree, hence, the question whether it can be rendered nugatory is relevant. In *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] KLR this Court held that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all.”

28. The court proceeded to hold that: -

“...It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind. We do agree with Mr Nowrojee that to convince the Court to follow the decision in *Reliance Bank* case (*supra*), the applicant needs to do more than merely saying that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to “put on the table” its financial position and



how the same would be affected. Of course, we do not need to emphasize that this approach of weighing position of parties as was done in Oraro’s case (*supra*) is only available in cases where the decretal amount is acceptably large in the circumstances of the case...”(Emphasis added)

29. As was stated in the excerpt underlined above, the applicant is required to put his financial position on the table and demonstrate that should the appeal fail, he will be in a position to settle the decree. Unfortunately, the applicant candidly pleaded inability to pay the money should the appeal fail by describing his university salary as meagre and by going into details of explaining that he uses his “meagre” salary to support his family. Also important is the fact the applicant said nothing about the respondent’s inability to pay his money should the appeal succeed. The applicant had a burden to demonstrate the respondent’s inability to settle the amount should he win the appeal. On the contrary, the respondent is a Constitutional Commission and we have no reason to doubt its financial ability to settle the claim should the appeal succeed.
30. Our above finding is supported by this Court’s decision in Kenya Hotel Properties Ltd v Willesden Properties Ltd Civil Application Number NAI 322 of 2006 (UR):

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

31. Flowing from the decisions cited above, and our above analysis and conclusions, it is our considered view that the applicant has not satisfied the nugatory aspect. Accordingly, the applicant’s application dated July 17, 2023 is hereby dismissed. Costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 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**

