



Wachenya Auto Garage v Ethics and Anti-Corruption Commission & another; Andrew Biketi Musuya t/a Mukuyu Petroleum Dealers & 4 others (Interested Parties) (Civil Application E167 of 2023) [2023] KECA 1663 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1663 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E167 OF 2023
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA
DECEMBER 15, 2023**

BETWEEN

WACHENYA AUTO GARAGE APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

MILDRED KERUBO OBARE 2ND RESPONDENT

AND

**ANDREW BIKETI MUSUYA T/A MUKUYU PETROLEUM
DEALERS INTERESTED PARTY**

SALOME WALEGHWA INTERESTED PARTY

BHINDER CORPORATION LIMITED INTERESTED PARTY

SACHDEVA NABHAN & SWALEH ADVOCATES INTERESTED PARTY

LOLONG CONTRACTORS LIMITED INTERESTED PARTY

(Being an application for stay of proceedings pending the filing, hearing and determination of record of appeal against Ruling and Order by E. Maina, J. dated 16th March, 2023 in Nairobi HCACEC No. 16 of 2019)

RULING

1. By a Notice of Motion dated 28th April 2023, the applicant seeks grant of stay of the suit in the High Court at Nairobi Anti-Corruption and Economic Crimes Division, namely HC. ACEC No. 16 of 2019, together with costs of the application.



2. The application is supported by the affidavit sworn on even date by one Wilson Muigai Wachira, the director and shareholder of the applicant. He avers that the 1st respondent instituted the aforesaid suit, seeking to repossess amongst other things, motor vehicle registration No. KCF 863S Toyota Prado on the allegation that it belonged to the 1st interested party, and that it had been purchased with proceeds of crime, namely corruption.
3. He contended that this was not the position, as the said motor vehicle was originally registered in the name of the 3rd interested party before being transferred to the 2nd respondent and finally to the applicant, who bought it from her (the 2nd respondent); that the 1st and 2nd respondents entered into a consent dated 23rd May 2022, which was served upon him on 4th August 2022, whose terms, inter alia, were to have the suit wholly discontinued against the 2nd respondent and that she be discharged from the proceedings; that he objected to the said adoption of the consent vide an application dated 9th December 2022, which was dismissed by the trial court in a ruling dated 16th March 2023; that the suit is part heard, and if it proceeds to its logical conclusion without the 2nd respondent who is a necessary party in explaining the process of transfer of the motor vehicle, he will be greatly prejudiced.
4. The application is opposed vide a replying affidavit sworn on 12th May 2023 by Paul Mugwe, an investigator with the 1st respondent and a member of the team which conducted investigations in respect of the matters raised in the application. According to the 1st respondent, the applicant is just but vexing the trial court with unnecessary applications. He states that, in addition to the application that gave rise to the instant application before us, it has filed an application dated 2nd May 2023, seeking for the trial judge's recusal. Thus, the two applications are meant to saddle the process of the trial, and are an abuse of the court process; and that therefore, this application should be dismissed for being brought in bad faith.
5. He further deposes that the application was filed as an afterthought, coming a month after the impugned ruling, which was inordinately late, yet no explanation has been proffered for the delay; that stay of proceedings should not be imposed unless for extremely good and plausible reasons; that the applicant has failed to demonstrate that he will be prejudiced if the hearing proceeds without the 2nd respondent; that to the contrary, if the orders sought are granted, public interest, expeditious determination of the case and recovery of lost public funds will be at risk.
6. The applicant through its afore stated director and shareholder, filed a further affidavit sworn on 9th June 2023, deposing that it never filed an application before the trial court seeking similar orders; that records with National Transport Safety Authority (NTSA) show that the motor vehicle was initially registered in the name of the 3rd interested party before being transferred to the 2nd respondent who then transferred it to him, and that the removal of the 2nd respondent from the proceedings will occasion him immense prejudice. He is also aggrieved that the consent entered into between the 1st and 2nd respondents came after five witnesses had testified, which raises an eye brow.
7. The matter came up for hearing before us on a virtual platform on the 26th July 2023. Learned counsel Mr. Kiongera appeared for the applicant, learned State Counsel Ms. Murugi appeared for the 1st respondent while learned counsel Mr. Bwire appeared for the 1st and 2nd interested parties. All counsel relied on written submissions with limited oral highlights. The submissions for the applicant are dated 9th June 2023 while those of the 1st respondent are dated 2nd June 2023.
8. In highlighting the submissions, Mr. Kiongera noted that the 1st respondent intends to repossess the subject motor vehicle, alleging that it was purchased through proceeds of crime. He noted that the motor vehicle was imported into the country by the 1st interested party who then sold it to the 2nd



respondent from whom the applicant subsequently bought. Therefore, for the applicant to have had the possession of the motor vehicle, the 2nd respondent must have initiated the transfer process through the Transport Integrated Management System (TIMS). According to the applicant, the removal of the 2nd respondent as a party to the proceedings, more so after five witnesses have testified would make it difficult for it to prove the movement of ownership of the motor vehicle from one party to another, noting that she is the bridge between the parties.

9. Whilst emphasizing that the appeal is arguable, counsel submitted that the learned judge misunderstood the role of the 2nd respondent, which is in explaining the movement of ownership of the motor vehicle from one person to another; that the 2nd respondent is therefore a necessary party and her removal will be very prejudicial to the applicant.
10. On whether the appeal will be rendered nugatory if the orders sought are not granted, counsel submitted that the applicant stands to suffer double jeopardy as the motor vehicle has already been handed over to the 1st respondent, yet he had already paid its purchase price to the 2nd respondent; that as a result, he stands to lose both the motor vehicle and the money; that if the trial were to proceed without the 2nd respondent, it would mean that the applicant would not be able to raise questions that can only be answered by the 2nd respondent; and that if the appeal succeeds, a retrial may have to be ordered which would be a waste of the court's time and resources. Further, that by virtue of Article 27 of *the Constitution*, the applicant is entitled to equal treatment before the law, which can only be guaranteed if he is granted a fair hearing by including the 2nd respondent in the trial court's proceedings.
11. Mr. Bwire submitted that the 1st and 2nd interested parties had not filed any papers and that they would abide by the decision of the Court.
12. Ms. Murugi submitted that the issues that were raised in the impugned application were to be considered upon the exercise of discretion by the trial court. In this regard, the learned judge exercised her discretion judiciously; that the applicant is not arguing that the learned judge considered the wrong principles, or that she gave orders outside her mandate; that in any case, as to who should be a party to a suit, is a matter to be decided by the plaintiff, and in this case, by the consent of both the 1st and 2nd respondents, it was agreed that the 2nd respondent was an unnecessary party; and that the consent having been entered into willingly and without coercion, it is lawful and cannot be set aside.
13. On the submission that the appeal will not be rendered nugatory if the orders sought are not granted, counsel posited that it is not at all an issue before the trial court whether the 2nd respondent bought the motor vehicle. Instead, what is before the court for determination is how the motor vehicle was imported and transferred, and on the evidence before the trial, this question can be determined without the 2nd respondent being a party. Counsel submitted that the suit is a matter of public interest. It was also her view that the applicant is not being subjected to double jeopardy, noting that if the 1st respondent succeeds in the suit, the motor vehicle will be forfeited to it.
14. In rebuttal, Mr. Kiongera submitted that it was not within the mandate of the 1st respondent to determine whether or not the evidence adduced before the trial court is sufficient, but that it is within the powers of the trial court itself. For this reason, all facts and evidence should be laid bare before the court to enable it make an objective decision. We understood the counsel to be saying that the participation of the 2nd respondent in the trial court proceedings was material to a just and objective determination.
15. We have duly considered the application, the replying affidavit and the submissions of the parties. The obvious issue for determination in such an application is whether the intended appeal is arguable, and if so, whether the appeal will be rendered nugatory if the orders sought are not granted.



16. In determining whether the appeal is arguable or not, this Court in the case of Dennis Mogambi Mang'are vs. Attorney General & 3 others [2012] eKLR held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

17. From a perusal of the pleadings in the trial court, the parties are; the 1st respondent herein, EACC, as the applicant with the 1st interested party, Andrew Biketi Musuya T/A Mukuyu Petroleum Dealers as the respondent. All the other parties herein are named as the interested parties. It is evident that the claim is against the 1st interested party and not any other parties; there is no claim against the 2nd respondent, Mildred Kerubo Obare, who is the focus in the application. Therefore, her removal from the proceedings would not be fatal to the proceedings, or prejudicial to the applicant. The parties are all in agreement that the documents presented to the trial court, and more specifically the Transport Integrated Management System's records show that the change of ownership of the motor vehicle from one party to another are in existence, accurate and in the possession and knowledge of the court. We then are of the view that the trial should be afforded an opportunity to make a determination on the evidence before it, and thereafter any aggrieved party has the right of appeal.

18. The applicant also urged that without the presence of the 2nd respondent participating in the proceedings, some questions in the course of the trial might go unanswered. However, there is nothing preventing the applicant from calling the 2nd respondent as a witness, and putting to her any questions he might have and would wish her to answer or clarify for the court.

19. On the nugatory limb, whether an appeal will be rendered nugatory depends on the circumstances of each case. (See *Reliance Bank Ltd vs. Norlake Investments Ltd* (2002) 1 EA 227). In the case of *Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others* [2014] eKLR, the Court had this to say:

“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

20. As was stated by this Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR, an appeal will be rendered nugatory if what is sought to be forestalled cannot be reversed or can only be reversed at great expense or cannot be adequately compensated with damages.

21. The applicant brought forth the argument that he might suffer double jeopardy, as he might lose both the motor vehicle and the monies spent in purchasing the motor vehicle. As we stated herein above, an aggrieved party has a right of appeal, and there is nothing estopping the applicant from exercising this right should he be aggrieved by the trial court's decision. The applicant can also be compensated for any loss. The registration of the motor vehicle can also be reversed in the event that the applicant is successful.

22. It is evident that the applicant has not satisfied the Court that the appeal would be rendered nugatory if the orders sought are not granted.

23. It is trite that an applicant is obliged to satisfy both limbs of the principles applicable in an application of this nature. The applicant has in this case failed to satisfy both limbs of the application and we accordingly dismiss the Notice of Motion dated 28th April 2023. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

H. A. OMONDI



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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

