



**Onchwati v Kenya Oil Co. Ltd & another (Civil Application  
E243 of 2021) [2022] KECA 127 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 127 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E243 OF 2021  
DK MUSINGA, W KARANJA & AK MURGOR, JJA  
FEBRUARY 18, 2022**

**BETWEEN**

**GIDEON MOSES ONCHWATI ..... APPLICANT**

**AND**

**KENYA OIL CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**NATION MEDIA GROUP ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the Ruling and orders  
of (J.K.Sergon, J.) dated 21st May, 2021 in HCC No. 140 of 2008)*

**RULING**

1. The applicant, Gideon Moses Onchwati, is aggrieved by the Ruling and orders of the High Court Civil Division dated 21<sup>st</sup> May, 2021, which allowed the 1<sup>st</sup> respondent's Kenya Oil Company Ltd's application and ordered restitution of Kshs. 16,129,272 paid to him by the 1<sup>st</sup> respondent, with interest at 12% p.a from 15<sup>th</sup> May 2017 until the date of full payment within 60 days from the date of the order, and in default, the 1<sup>st</sup> respondent be at liberty to execute the order of restitution for recovery of the amount. The court also ordered that the applicant pay the 1<sup>st</sup> respondent the costs of the application.
2. As a consequence, the applicant filed a Notice of Motion dated 9<sup>th</sup> July 2021 under section 3A and 3B of the Appellate Jurisdiction Act, rule 5(2) (b) of the Court of Appeal Rules, 2010, where he sought an order of stay of execution of the ruling and orders dated 21<sup>st</sup> May, 2021 and a stay of any other proceedings pending the hearing and determination of the intended appeal.
3. The motion was supported by the applicant's affidavit sworn on 9<sup>th</sup> July 2021 and written submissions where it was asserted that the intended appeal was arguable since the learned judge failed to take into account that section 75(1) of the Civil Procedure Act and order 43 rule (1) of the Civil Procedure rules prohibited a party that had sought to review a judgment from also lodging an appeal against the same



judgment; that the learned judge disregarded the fact that the 1<sup>st</sup> respondent had reviewed the judgment dated 2<sup>nd</sup> July 2015, which application was subsequently dismissed with costs to the applicant on 22<sup>nd</sup> March 2017, and that since there were no orders for stay of execution issued, the applicant had executed the decree for recovery of the decretal sum pending the assessment of costs of the suit; that execution took place on 15<sup>th</sup> May 2017 before the orders of stay were granted on 27<sup>th</sup> July 2017. Further, that the judge failed to appreciate that restitution is a tort where time lapsed after three (3) years, and that in any event, it was not established that the applicant had unjustly enriched himself at the respondent's expense.

4. It was also submitted that the applicant has an arguable appeal that will be rendered nugatory if the orders sought were not granted. The decision in *Regoil Kenya limited vs Winfred Njeri Karanja (2019) eKLR* was cited in support of the notion.
5. In a replying affidavit sworn on 23<sup>rd</sup> July 2021 by Martin Kimani, the 1<sup>st</sup> respondent's General Manager and in written submissions, the 1<sup>st</sup> respondent opposed the application on the basis that the applicant had not demonstrated that he had an arguable appeal and that this being a money decree, the appeal will not be rendered nugatory if the orders sought are not granted. It was further deponed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had obtained stay of execution orders of the judgment of the High Court on 14<sup>th</sup> August 2015 and 22<sup>nd</sup> June 2017 respectively, which were served on the applicant. But despite having been served, the applicant commenced execution proceedings and attached two of the 1<sup>st</sup> respondent's jet fuelling trucks which compelled the 1<sup>st</sup> respondent to pay the decretal sum of Kshs 21,641,217.
6. It was submitted that thereafter, Nation Media Group, the 2<sup>nd</sup> respondent, appealed against the judgment to this Court being Civil Appeal No. 88 of 2016, and that the 1<sup>st</sup> respondent had supported the appeal. This Court found merit in the appeal and by its judgment delivered on 11<sup>th</sup> October 2019, the applicant's award was reduced from Ksh. 15,500,000 to Kshs. 4,500,000 together with interest and costs; that the applicant had not challenged this Court's decision.
7. Thereafter by a ruling dated 21<sup>st</sup> May 2021, the High Court ordered the restitution of Kshs. 16,129,272 paid to the applicant by the 1<sup>st</sup> respondent, with interest at 12% p.a from 15<sup>th</sup> May 2017 until payment in full within 60 days from the date of the order, and in default, the 1<sup>st</sup> respondent be at liberty to execute the order of restitution for recovery of the amount. It is this ruling against which the applicant seeks to appeal, and hence this application for stay of execution.
8. It was also submitted that the 1<sup>st</sup> respondent is capable of repaying the sums refunded by the applicant, and for that reason, the intended appeal would not be rendered nugatory; that, in the alternative, as a condition for granting the orders of stay of execution sought, the applicant should deposit Kshs. 16,129,272 (together with interests from 15<sup>th</sup> July 2017) in a joint interest earning account in the names of both counsel for the applicant and the 1<sup>st</sup> respondent.
9. In so far as applications filed under rule 5(2) (b) of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR*, are that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”



10. On whether the intended appeal is arguable, the applicant has argued that the learned judge did not appreciate that pursuant to section 75(1) of the Civil Procedure Act and order 43 rule (1) a party that has reviewed the judgment cannot also lodge an appeal against the same judgment; that the judge disregarded the fact that the 1<sup>st</sup> respondent had filed an application for review which was dismissed with costs. As to whether or not the 1<sup>st</sup> respondent was entitled to file an appeal after having filed an application for review under order 43 of the Civil Procedure rules is a matter that we consider ought to be ventilated before this Court.
11. On the other hand, whether or not the intended appeal would be rendered nugatory, we do not think so. This is because in the first instance, following execution by the applicant of the decretal sum, the 1<sup>st</sup> respondent paid to him the sums ordered in full. Given these circumstances, were the sums to be returned to it by way of restitution, there can be no doubt that, were the appeal to succeed, the 1<sup>st</sup> respondent would be in a position to pay back the amount to the applicant.
12. Consequently, the applicant having failed to satisfy the twin conditions precedent for granting of an order under rule 5(2) (b) of this Court's rules, the application dated 9<sup>th</sup> July 2021 lacks merit and is hereby dismissed.

Costs in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**D.K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**A.K MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

