



**Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v
Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application)
E383 of 2021) [2022] KECA 491 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 491 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E383 OF 2021
W KARANJA, MSA MAKHANDIA & KI LAIBUTA, JJA
FEBRUARY 18, 2022**

BETWEEN

**REGISTERED TRUSTEES, KENYA RAILWAYS STAFF RETIREMENT
BENEFITS SCHEME APPLICANT**

AND

MILLIMO, MUTHOMI & CO. ADVOCATES 1ST RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 2ND RESPONDENT

KCB BANK OF KENYA LIMITED 3RD RESPONDENT

*(Being an application for stay of execution of the Ruling and Orders
of the High Court of Kenya at Nairobi (G. W. Ngenye, J.) delivered
on 8th July, 2021 in H.C. Misc. Application No. 130 of 2018)*

RULING

1. This ruling is in respect of the application dated 18th March, 2021 which is predicated on Rule 5(2)(b) of the *Court of Appeal Rules*. The applicant seeks orders of stay of execution of the Ruling and Orders of the High Court of Kenya at Nairobi (G. W. Ngenye Macharia, J.) delivered on 8th July, 2021 in High Court Misc. Application No. 130 of 2018. The ruling was in respect of two applications dated 8th March, 2021 and 28th April, 2021 filed by the Decree Holder and the Judgment Debtor respectively.
2. In a nutshell, the genesis of this matter is that the firm of Milimo Muthomi and Company Advocates (1st respondent) was engaged by the applicant, a Registered Retirement Benefits Scheme, to represent it in Nairobi HCCC No. 294 of 2012, Edermann Properties Limited vs The Registered Trustees of Kenya Railways Retirement Benefit Scheme & Kenya Railways Corporation (hereinafter “the primary suit”). We do not wish to delve into the particulars of the said suit for purposes of this ruling, save to say that the matter appears not to have gone to full hearing. However, the 1st respondent raised a Bill



of costs running to a tidy sum of over Kshs. 400 million. Out of ignorance, inadvertence or for other reasons, no reference was filed to challenge that Bill within the statutory timelines.

3. The applicant applied for extension of time to enable it file a reference to challenge the amount awarded as costs. By a ruling dated 28th May 2020, the High Court giving its reasons as “balancing the scales of justice”, allowed the application so that the reference could be heard and determined on its merits. The learned Judge nonetheless imposed some stringent terms or conditions which had to be met if the applicant was to enjoy extension of time for 30 days. The terms were as follows: “That the applicant pays the first respondent 50% of the decretal amount within 30 days from the date thereof pending the hearing and determination of the reference; the applicant secures the entire sum with a bank guarantee of the total sum awarded within 30 days from the date of the ruling and then the applicant deposits the entire sum in an interest earning account in the name of the parties’ counsel within 30 days from the date of the said ruling; upon complying with above provisions the applicant was to have 21 days within which to file the reference and, in default of compliance, the judgement and decree issued on 18th October, 2019 would stand reinstated for execution.”
4. Unfortunately, the applicant was unable to meet the set conditions due to serious liquidity problems, and the first respondent moved to execute the decree. The first respondent moved the High Court again seeking a further extension of time and asked the court to review, vary or set aside the earlier orders requiring it to comply with what the appellant thought were onerous conditions. The court dismissed that application for review.
5. In the meantime, the government compulsorily acquired one of the properties owned by the applicant as a result of which it paid some monies into the applicant’s bank account. Upon learning of this development, the 1st respondent filed an application dated 8th March, 2021 seeking garnishee orders to attach the money that had been paid into the applicant’s bank accounts by the Government.
6. Undeterred, the applicant moved back to the High Court vide an application dated 28th April, 2021 seeking orders that the ruling of 12th April, 2021 be set aside, discharged or varied, and that the time to file a reference be extended by a further 90 days to enable the appellant comply with the conditions that had been given earlier. The two motions were heard together, but the court took exception to the applicant’s application to extend time, saying that the applicant’s conduct amounted to abuse of court process and that, instead of filing the application for extension of time, the applicant ought to have complied with the conditions that had been given earlier. On the other hand, the court allowed the application by the 1st respondent.
7. It is important that we clearly set out the orders issued pursuant to that ruling as it is against those orders that the appeal herein was filed, which orders this application seeks to stay. The orders were as follows:
 - “ a. The Judgment Debtor’s application dated 28th April, 2021 is dismissed with no orders as to costs.
 - b. Prayer 6 and 7 in Decree Holder’s application dated 8th March, 2021 are allowed in the following terms:
 - i. The garnishee order nisi is hereby made absolute.
 - ii. The 1st garnishee is ordered to pay forthwith to the Decree Holder the sum of Kshs. 114,584.20/= plus such other sums that have been paid into account number 011xxxxxxxxxxx from the date it was served with the Order Nisi to date.



- iii. The 2nd Garnishee is ordered to pay forthwith the sum of Kshs. 12,142,836.65/= held in account number 110xxxxxxx plus such other sums that have been paid therein and to account number 110xxxxxxx from the date it was served with the Order Nisi to date.
 - iv. The costs of the Application shall be borne by the Garnishees.
 - c. The 1st and 2nd Garnishees are hereby ordered to produce in court updated statements of the subject's accounts for the period between the service of the order nisi on them to date, within FOURTEEN days from today.
 - d. The matter to be mentioned on 22nd July, 2021 for compliance and further orders.”
8. Being aggrieved by the above orders, the applicant filed an appeal and contemporaneously filed the instant application in which it seeks one principal prayer, which is:

“That a stay of execution order be issued to stay the enforcement and or implementation of the garnishee order absolute issued by the High Court on 8th July, 2021 pending hearing and determination of the appeal herein.”

The application is supported by the affidavit sworn by Isaac Savali Sila, the applicant's Chief Executive Officer, on 19th July, 2021 in which he deposes that the applicant has an arguable appeal with prospects of success; that in the event the impugned costs of Kshs. 411,573,757.70 and the accrued interest of Kshs. 134,447,427 is transferred from the applicant's bank accounts to the 1st respondent in execution and/or implementation of the garnishee order absolute, the said sums shall not be recoverable even if the applicant succeeds in the pending appeal; that if the orders sought are not granted, the applicant shall effectively be denied its right to access justice and the non derogable right to fair hearing; that the execution and implementation of the garnishee Order absolute shall lead to massive loss of public funds and render the appeal academic; that the application has been brought without delay, and no prejudice will be caused to the respondents if the Orders sought are granted.

9. The 1st Respondent filed a replying affidavit through Mr. S. J Saenyi, an Advocate for the 1st respondent. He depones, inter alia, that it engaged the applicant, in good faith, through her advocates and or directly, seeking that the Court decree be honoured; that in one of the correspondences, the applicant did expressly admit owing the subject legal fees as well as not paying the same despite it being due; that having noted the applicant's inclination not to honour the High Court judgment on fees voluntarily despite having the ability to do so, the 1st respondent was left with no option but to invoke the execution process by commencing garnishee proceedings vide the application dated 8th March, 2021; that the 2nd and 3rd respondents herein did release to the 1st respondent money in compliance with the High Court orders given in the ruling; the garnishee order absolute as granted by the High Court was wholly executed and there is nothing to stay; the garnishee proceedings were merely execution proceedings of the judgment of the High Court as issued on 14th October, 2019; that there is no appeal to this Court in respect of the said High Court judgment; that this Court lacks jurisdiction to entertain an application of stay whose effect and purpose, as is the instant application, is to stay an order of the High Court where no appeal has been preferred; the relevant portion of the decision of the ruling relating to the applicant's 3rd application was that the application suffered dismissal, which was a negative order; that there is therefore nothing required to be done therefrom and, accordingly, a stay order cannot lie.



10. As regards the arguability of the appeal, he deposes that failure to obtain mandatory leave to appeal from the High Court, coupled with the omission of documents in the Record of Appeal, renders the entire appeal incompetent and, therefore, an undisputed candidate for dismissal; that there cannot be said to be an arguable appeal over an appeal which this Court lacks jurisdiction to entertain in the first place; that, secondly, there is no dispute that the applicant did file the 1st, 2nd and 3rd applications, all of which were essentially seeking leave to file a reference out of time and anchored on the same and or similar grounds; that there is also no dispute that the applicant's 1st application was allowed on terms; that the 2nd application which sought to vary and or review the High Court orders given in respect of the 1st application was dismissed, and no appeal was preferred against this 2nd ruling of dismissal; that the appellant's 3rd application which sought similar prayers as those of the 2nd application premised on the same and or similar grounds was indeed an outright abuse of court process, and was a best suited candidate for dismissal; that the Court cannot validly be faulted for having found as much.
11. As regards the appeal being rendered nugatory, he deposes that, firstly, in the appeal, the appellant seeks that the Court allows her 3rd application, which essentially sought leave to file a reference; that if the sought stay is denied, and in the unlikely event that the appellant succeeds on appeal, then the appellant will simply proceed to file her reference before the High Court; that, therefore, there is nothing that can render the appeal nugatory if the stay order herein is to be rightfully denied by this Court; that, secondly, the monies subject of the garnishee orders absolute sought to be stayed were long released by the 2nd and 3rd respondents; that there is therefore nothing that can render the appeal nugatory by failure to grant the stay orders; that, thirdly, it is not true that the 1st respondent is a person of no and or unknown means, the 1st respondent has the ability and means of refunding the garnishee amount subject of this appeal, including by way of set off on the part of the appellant herself. There can therefore be no way that failure to grant a stay order can render the preferred appeal nugatory.
12. The applicant has filed submissions which amplify the contents of the supporting affidavit, which we have rehashed above in detail and we shall not therefore repeat the same here. The appellant urges that it has an arguable appeal as can be seen from the memorandum of appeal annexed to the affidavit in support. We have noted the grounds of the said memorandum, five of which revolve around the learned Judge's comment that the application was dismissed for being an abuse of the court process, which the applicant refutes.
13. The 1st respondent has also filed submissions which have reiterated and amplified the contents of the replying affidavit as outlined above. The issue of want of jurisdiction on the part of the Court to entertain the matter, and the decree having already been executed have been emphasized, and so is the point that a negative order cannot be stayed.
14. As to the appeal being rendered nugatory, they reiterate the depositions in the replying affidavit and submit that there is nothing capable of being rendered nugatory if the stay was to be declined and, secondly, the 1st respondent has means and ability to refund the garnisheed amount if the Court was to so order; that the appellant owes the 1st respondent unpaid legal fees to the tune of over Ksh.180 million in relation to other matters and which amount can easily be set off the garnisheed amount subject of this appeal.
15. When the application came up for plenary virtual hearing on 8th November, 2021 learned counsel Mr. Fred Ngatia (SC) appeared with Mr. Kibicho for the applicant while Mr. Milimo appeared for the 1st respondent. There was no appearance for the second and third respondents though duly served with the hearing notice for that day. Both learned counsel reiterated the contents of their submissions and highlighted some of the salient points. In view of the comprehensive summary we have given above, we shall not repeat the contents of the oral highlights. Suffice it to say that we have considered the



application in its entirety along with the submissions both written and oral and the applicable law, more particularly as espoused in the authorities cited before us by learned counsel.

16. Having done so, we remind ourselves that we must eschew making any determinative final orders or findings on issues that have been raised in this application lest we embarrass the court that will be seized of the appeal itself. In that regard, we shall leave some of the issues raised herein for determination on appeal. Among such issues are the question as to whether the applicant's application was an abuse of the court process; the completeness or otherwise of the record of appeal and also the jurisdictional issue. We will leave those for the bench that will hear the substantive appeal. For purposes of this ruling, we shall apply the well settled principles of arguability of the appeal and the nugatory aspect to determine whether this application meets the threshold set for applications under Rule 5(2) b of the Rules of this Court.
17. We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences vs Oranga & Others* (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.”

Further, in the more recent case of *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

- “16. In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others*__ [1976] KLR 63 at page 66 paragraph C).”

18. The orders dismissing the applicant's application to review, set aside or otherwise vary its earlier conditions extending time within which to file a reference against the Bill of costs cannot be stayed. The second aspect of the ruling was in respect of the application by the 1st respondent seeking garnishee orders against the 1st respondent, which orders were granted. The applicant challenges the said orders on appeal and asks us to stay their execution.



19. On the principle of arguability, we bear in mind that an arguable appeal is not necessarily one that will succeed, but simply one that is deserving of the court's consideration, (See [*Dennis Mogambi Mang'are vs Attorney General & 3 Others*](#) [2012] eKLR. We have considered the grounds of appeal and, in our view, they mainly question the learned Judge's exercise of discretion in dismissing the applicant's application on the grounds that the application demonstrated abuse of the court process. This is arguable in our view, in the event the issue of jurisdiction is ultimately determined in favour of the applicant.
20. Has the second limb on nugatory aspect been demonstrated? We have it on record, on oath, that the applicant has voluntarily paid out a substantial amount of the decretal amount, and it is therefore doubtful that there's anything to stay. Secondly, the respondent avers that it is able to refund any money if required to do so in the event the applicant's appeal succeeds. The respondent also states it has other matters with the applicant where its fees amounting to about Kshs. 108 million have not been paid, and any money paid to it in this matter can be set off any fees owed in the other matters. In other words, the respondent maintains that the nugatory aspect has not been demonstrated, and that this application is therefore for dismissal.
21. Whereas the applicant's appeal could be arguable, we are not persuaded that the nugatory aspect has been demonstrated. A substantial amount of money has already been paid, but we have not been told how much remains unpaid. We are not persuaded that the respondent is impecunious and will be unable to refund the money in the event the appeal herein succeeds. As the twin principles are conjunctive, demonstrating only one and not the other does not aid the applicant. Accordingly, our view is that this application is for dismissal. The same is hereby dismissed with costs being in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

