



Bell Estate Agency Limited & another v Sifa Towers Management Limited (Civil Application E124 of 2021) [2022] KECA 95 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 95 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E124 OF 2021
RN NAMBUYE, W KARANJA & J MOHAMMED, JJA
FEBRUARY 4, 2022**

BETWEEN

BELL ESTATE AGENCY LIMITED 1ST APPLICANT

SIFA INSURANCE BROKERS LIMITED 2ND APPLICANT

AND

SIFA TOWERS MANAGEMENT LIMITED RESPONDENT

*(Being an application for stay of execution of the judgment and/
or decree from the judgment of the High Court of Kenya at Nairobi
(Tuiyott, J.) dated 29th April, 2020 in H.C.C.C. No. 439 of 2017)*

RULING

Background

1. Before us is a notice of motion dated 23rd April, 2021 in which Bell Estate Agency Limited and Sifa Insurance Brokers Limited (the applicants) seek orders in the main: that there be a stay of execution of the judgment delivered by (Tuiyott, J. as he then was), in Nairobi HCCC No. 439 of 2017 on 29th April, 2020 and any consequent decree thereon pending the hearing and determination of Nairobi COA CA No. E225 of 2021; that there be a stay of execution of the impugned judgment and any consequent decree thereon pending the hearing and determination of Nairobi COA CA No. E200 of 2021; and that costs of the application be granted to the applicants. Sifa Towers Management Limited is the respondent herein.
2. The application is brought under Rule 5 (2)(b) of the *Court of Appeal Rules* (this Court's Rules) and is premised on the grounds inter alia: that the High Court delivered a judgment in favour of the respondent which ordered the applicants to pay the sum of Kshs 8,757,815.00 being payment of service charge to the respondent; that the High Court granted a conditional stay of execution requiring that one third of the decretal sum be paid to the respondent and that the applicants furnish security for the



remainder of the decretal sum from a reputable financial institution within 60 days of the order; that the appeal raises arguable points of law and facts with a likelihood of success; and that unless the order of stay of execution is granted the appeal will be rendered nugatory and an academic exercise.

3. The application is supported by the affidavit of Mr. Robert Gogo, one of the directors of the 1st applicant who deposed that despite the respondent having received the sum of Ksh 1,000,000.00 from the applicants, the court failed to take this into consideration.
4. The respondent opposed the application and submitted that the applicant had sought similar orders in the High Court which granted conditional stay of execution requiring that one third of the decretal sum be paid to the respondent and that the applicants furnish security for the remainder of the decretal sum within 60 days of the order. However, the applicants failed to comply with the said conditions and therefore this Court should not entertain the application. The respondent further deposed that the applicants had not contended that the respondent had not proved its case on a balance of probabilities before the trial Court and further, that the applicants had failed to prove the type of loss they would suffer if the orders sought are not granted.

Submissions

5. The application was heard by way of written submissions with oral highlighting by the respective counsel. Counsel for the applicants Messrs Owino Kojo & Co. Advocates submitted that the applicants have an arguable appeal with high chances of success and that the draft memorandum of appeal raises weighty grounds of appeal which deserve consideration by this Court; that the 2nd applicant had no contractual relationship with the respondent and the impugned judgment was wrongfully entered against it. Counsel further submitted that the appeal will be rendered nugatory if stay is not granted as the applicants having failed to furnish the decretal sum within the stipulated time, face execution by the respondent; and that unless the orders sought are granted, the respondent will complete execution against the applicant thus rendering the appeal nugatory and a mere academic exercise.
6. The respondent opposed the application and filed written submissions. Counsel for the respondent Messrs Kimani & Munthi Associate Advocates submitted that the applicants did not comply with the orders of the High Court concerning payment of the decretal sum; that the applicants admit that they had a duty to pay service charge to the respondent; and that the applicants did not adduce any evidence to show that they were entitled to a lesser service charge but admit that they had a lease in which the respondent was a party and that there was an obligation on the unit holders, such as the applicants herein, to pay service charge. The respondent opposed the application on grounds that the applicants did not have an arguable appeal and that the intended appeal will not be rendered nugatory, absent stay.

Determination

7. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
8. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay



the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

9. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* this Court described an arguable appeal in the following terms:

“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. 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...”

10. We have carefully considered the grounds set out in the motion, the affidavit in support and the submissions filed by both parties. In our view, it is arguable inter alia whether the learned Judge erred by relying on unsigned minutes/resolutions to arrive at the impugned decision even after it was disclosed on cross examination that the minutes/resolutions were unsigned. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

11. On the issue of whether the appeal would be rendered nugatory, should it succeed after the Court declines to grant the orders sought, we associate ourselves with the holding in *Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR* wherein this court held that:

“The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. 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...”

12. Further, in determining whether or not an appeal will be rendered nugatory, depends on whether what is sought to be stayed, if allowed to happen, is reversible, or if it is not reversible, whether damages will reasonably compensate the parties aggrieved. In this case, the applicants admitted that they had a duty to pay service charge to the respondent and had previously paid service charge to the respondent. We therefore find that if the decretal amount is paid to the respondent and it is established on appeal that it ought not to have been paid, the amount can be recovered from the respondent or prorated for the benefit of the applicants. The application will therefore not be rendered nugatory, absent stay.

13. From the circumstances of the application, the applicants have satisfied only one limb of the requirements under Rule 5(2)(b) of this Court’s Rules. As the applicants are required to satisfy both limbs of arguability and the nugatory aspect in regard to the requirements, the notice of motion dated 23rd April, 2021 is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA



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JUDGE OF APPEAL
J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

