



**Coastal Bottlers Limited v Acqualine Distributors Limited (Civil Application  
Eo62 of 2021) [2022] KECA 35 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 35 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION EO62 OF 2021  
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**COASTAL BOTTLERS LIMITED ..... APPLICANT**

**AND**

**ACQUALINE DISTRIBUTORS LIMITED ..... RESPONDENT**

*(An application for stay of proceedings in the High Court pending an appeal from  
the ruling and orders of the High Court of Kenya at Mombasa (P. J. Otieno, J.)  
delivered on 29th May 2020 in Mombasa High Court Miscellaneous No. 330 of 2019)*

**RULING**

1. This application is brought pursuant to Rules 1 (2), 5(2) (b) and 47 of the *Court of Appeal Rules*, Section 3 of the *Court of Appeal (Organization and Administration) Act*, Articles 47(1), 48, 50 (1) and 159 (2) of the Constitution and all enabling provisions of the law. The applicant seeks an order to stay the proceedings in Mombasa HCCC No. 53 of 2020 Acqualine Distributors Ltd v Coastal Bottlers Limited pending the hearing and determination of Mombasa Civil Appeal No. E067 of 2021, and that the costs of this application be provided for.
2. The application is premised on the grounds as enumerated on the face of the application and supported by the affidavit of Kevin Kinuthia Advocate dated 7th September 2021: The respondent filed Mombasa High Court Misc. Civil Application No. 330 of 2019 seeking to have Mombasa CMCC No. 418 of 2012 withdrawn from the subordinate court and transferred to the High Court. The appellant opposed the application on the grounds, inter alia, that the respondent's suit having been presented before a court lacking the requisite pecuniary jurisdiction, the matter is a nullity in law and therefore there was nothing to transfer to the High Court.
3. The High Court allowed the respondent's application by its ruling dated 29th May 2020. Aggrieved by that ruling, the applicant filed a notice of appeal dated 29th May 2020 and thereafter lodged its record



of appeal on 13th August 2021. On 22nd December 2020, the applicant filed an application seeking orders of stay of proceedings in the suit pending the hearing and determination of the appeal, which application was disallowed and dismissed in a ruling delivered on 12th July 2021.

4. The applicant contends that the appeal raises serious, fundamental and eminently arguable issues for determination, and unless the proceedings pending in the High Court are stayed, the appeal would be rendered nugatory by reason of the fact that the issues raised in the appeal go to the jurisdiction of the High Court to entertain the suit which issues ought to be determined in limine. That there has been no unreasonable delay in the lodging of the application and in the interests of justice, there should be a stay of all proceedings in the suit pending the hearing and determination of the appeal.
5. The respondent opposed the application vide the replying affidavit of Hazel Koitaba, the Director of the respondent.

The Director deponed that in dismissing the applicant's application for stay, the High Court found that stay of proceedings is not necessary as it will only serve the purpose of delaying the matter, in the event the appeal succeeds, the court will lay down its tools, whereas if the appeal fails, there would be regrets of delay in the suit.

From the respondent's point of view, the application is frivolous, vexatious and an abuse of court process as the High Court exercised its discretion under Section 18 of the *Civil Procedure Act* in allowing the respondent's application.

6. The Director further deponed that the applicant's supporting affidavit dated 7th September 2021 sworn by Kevin Kinuthia Advocate is bad and incompetent in law as it does not conform to the mandatory provisions of Order 19 of the *Civil Procedure Rules*. In the said affidavit, the applicant's advocate, particularly at paragraph 9, has deponed to evidentiary and contentious facts which are not within his knowledge. That there is no appeal pending in this Court or any other court as the applicant has admitted that the record of appeal was filed on 13th August 2021, 13 months after the mandatory period stipulated under Rule 82 of the Court of Appeal Rules. In the absence of proper documents on record since filing the notice of appeal, the prayers should not even be considered and this Court ought to down its tools.
7. The Director contended that the stay of proceedings will seriously interfere with the right of the respondent to conduct litigation as it impugns on its right of access to justice, right to be heard without delay and right to a fair trial. That this application is a deliberate effort by the applicant to cause further delay and intentionally frustrate the respondent. In any case, no prejudice will be occasioned upon the applicant if the application is not allowed as it will still have its day in a court seized with jurisdiction to hear the matter.
8. Counsel for the applicant submitted that the crux of the applicant's appeal is that the High Court acted without jurisdiction in ordering the withdrawal of the suit from the subordinate court and transferred it to itself; despite the court making a finding that the suit was before a court without jurisdiction to entertain it. Counsel cited the case of *Parliamentary Service Commission v Okoiti and another* [2021] KECA 120 (KLR) where this Court in considering an application for stay of proceedings pending an appeal challenging the jurisdiction of the Employment and Labour Relations Court held that the issues as to the jurisdiction of that court raised on appeal were arguable.
9. Regarding whether the appeal would be rendered nugatory if the application is not allowed, Counsel submitted that if the application is not allowed and the High Court proceeds to hear and determine the suit and thereafter the appeal succeeds, this will be of no benefit to the applicant and will amount to



wastage of precious resources of the courts and parties which this Court is bound to consider pursuant to Section 3B of the [Appellate Jurisdiction Act](#).

10. Regarding whether the appeal is arguable, Counsel for the respondent submitted that the stay of proceedings is seemingly a delay tactic as the appellant has opportunity to fully ventilate their case at the High Court. Counsel submitted that the principles guiding this Court when determining whether to interfere with the exercise of such discretionary power have been crystalized in case law, such as in *United India Insurance Company Limited v East African Underwriters Kenya Ltd* [1985] KLR 898 where it was held that the court will interfere with such discretion where it is established that the judge misdirected himself in law; misapprehended the facts; took account of consideration which he should not have taken; failed to take into account a consideration which he should have taken; and where his decision, albeit discretionary, is plainly wrong. Counsel submitted that the appeal had not met this threshold.
11. Counsel submitted that Article 159 of the Constitution as read with Sections 1A and 1B of the [Civil Procedure Act](#) enjoin this Court to foster and facilitate the overriding objective of the Act to render justice to parties in a just, expeditious, proportionate and affordable cost to parties; and to guard against the multiplicity of applications meant to delay the finalization of matters which go against the spirit of Article 159. Counsel cited the case of [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR where the court held that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation and therefore the test is high and stringent. Counsel submitted that it would not be in the interest of justice for this Court to grant stay of proceedings as it would only serve the purpose of delaying the determination of the suit.
12. This Court exercises unfettered original, independent and discretionary jurisdiction to order a stay of execution, an injunction, or a stay of further proceedings in civil proceedings where a Notice of Appeal has been lodged. The objective of this discretionary power is to preserve the subject matter of the appeal. See [Equity Bank Limited v West Link Mbo Limited](#) [2013] eKLR.
13. Applications seeking the exercise of this Court's discretion under Rule 5 (2) (b) are subjected to a two-pronged test, as stated in *Bob Morgan Systems Ltd & another v Jones* [2004] eKLR:

“The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”
14. Regarding the consideration of whether the appeal is arguable, this Court in [Stanley Kang'ethe v Tony Keter & 5 others](#) [2013] eKLR elaborated as follows:
  - “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
  - 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”
15. In the instant case, as can be discerned from the applicant's motion and supporting affidavit, the applicant's appeal is grounded on the issue of whether the High Court could transfer the respondent's suit from the subordinate court to the High Court. The importance of jurisdiction arising in the first



instance before it can be transferred pursuant to Section 18 of the *Civil Procedure Act* was underscored by this Court in *George C. Gichuru v Senior Private Kioko & another* [2013] eKLR. The questions as to the jurisdiction of the High Court in the appeal are similarly important and cannot simply be waved away. The appeal is therefore arguable.

As stated in *Owners of The Motor Vessel "lillian's" v Caltex Oil Kenya* [1989] KLR 1:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. In as much as the respondent laments that the applicant’s appeal does not comply with Rule 82 of the Court of Appeal Rules, the respondent did not demonstrate that it had invoked Rule 84 by applying to strike out the notice of appeal within the 30 days from the date of service of the record of appeal.
17. On the nugatory aspect, the Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders against any suffering the respondent might undergo while awaiting the hearing and determination of the appeal. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. See *Reliance Bank Limited Norlake Investments Ltd* [2002]1 EA 227.
18. In the circumstances of this case, we are not persuaded that the appeal will be rendered nugatory if the order for stay of proceedings is not granted. Should the applicant ultimately be aggrieved by decision of the lower court, upon hearing and determination of the matter on merits, the avenue for challenging such determination including the matters presently complained of, will be available to the applicant.
19. Accordingly, we dismiss the application and order that each party shall bear their own costs.

**DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

