



**County Government of Kilifi v Raindrops Limited (Civil Application
E057 of 2021) [2022] KECA 10 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 10 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E057 OF 2021
A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA
FEBRUARY 4, 2022**

BETWEEN

COUNTY GOVERNMENT OF KILIFI APPLICANT

AND

RAINDROPS LIMITED RESPONDENT

(An application for stay execution of the judgment and decree of the High Court of Kenya at Malindi (Nyakundi, J.) dated 13th July 2021 in High Court Civil Case No. 9 of 2015)

RULING

1. In its application dated 25th September 2022, the applicant, The County Government of Kilifi seeks an order under Rule 5(2)(b) of the *Court of Appeal Rules* against the respondent, Raindrops Limited, for stay of execution of the judgment of the High Court at Malindi delivered on 13th July 2021 in Civil Case No. 9 of 2015.
2. In that suit, the respondent pleaded that the applicant was in breach of an agreement for collection of cess and parking fees revenue in Kilifi County that the parties had entered into. The respondent averred that the applicant had illegally, unlawfully, and in breach of the terms of the agreement purported to terminate the agreement. In addition to a prayer for a permanent injunction to restrain the applicant from terminating the agreement, the respondent also prayed for special and general damages.
3. On its part, the applicant averred that it terminated the agreement in line with express provisions thereof on account of the respondent's breach of the agreement by failing to fulfil conditions precedent. The applicant pleaded, in the alternative, that the said agreement violated the provisions of the Constitution of Kenya and the *Public Finance Management Act*. It counterclaimed against the respondent for, among other reliefs: an order that the agreement between was null and void for breach of the Constitution and the law; orders for the respondent to cease revenue collection within Kilifi



- County; an order for access to its books of accounts; and reimbursement of any surplus monies found to have been paid to the respondent by the applicant.
4. After trial, the High Court (Nyakundi, J.) delivered the impugned judgment on 13th July 2021 in which he found that the applicant was in breach of the agreement by purporting to terminate it without following the proper termination procedure; and that there were no grounds for holding that the agreement was voidable. The Judge ordered: the Chief Government Valuer to conduct a valuation of the infrastructure developed by the respondent and to file a report with the court within 30 days; the Auditor General to take accounts between the parties “including the monies collected in the joint escrow accounts and any other account wherein public funds accruing from the collection of cess and parking revenue in Kilifi County have been held” and to file a report with 30 days; that “damages for loss of profits and expenses incurred subject to obtaining of the Auditors Report on account of the consideration for services rendered” “be enforced at a ratio of 30%:70% underpinned on the net income matrix”; that “under the fact specific approach exemplary damages awarded at Kshs.2,500,000.00”; that as a consequence of repudiation by the applicant, “it shall be liable for monthly salaries and emoluments less any statutory deductions” to the respondent; that the respondent “to be compensated based on the valuation by the Government Chief Valuer”; and that “further orders of the court to await the filing of the above reports”.
 5. Aggrieved, the applicant lodged a notice of appeal on which the present application is hinged. We heard learned counsel for the applicant Mr. John Bwire and learned counsel for the respondent Mr. Odipo on 9th November 2021 when they orally highlighted their respective written submissions.
 6. For the applicant, counsel made reference to the draft memorandum of appeal and submitted that the intended appeal raises arguable grounds. It was urged that the learned Judge awarded exemplary damages of Kshs.2,500,000.00 when the circumstances did not warrant and when no prayer for the same was made. The case of *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR* was cited for the proposition that parties are bound by their pleadings. Other grounds of appeal to be urged include the complaint that the Judge erred in directing apportionment of income based on net as opposed to gross income; and that the Judge failed to appreciate that the termination of the agreement was stopped by the court.
 7. It was submitted that unless the orders sought are granted, the intended appeal will be rendered nugatory; that based on the judgment the respondent has demanded from the applicant payment of a total of Kshs.657,851,620.00 and an additional amount of Kshs.4,191,591.00 for salaries and emoluments, which, if paid may never be recoverable as the respondent has no known attachable assets; that the respondent will not be prejudiced if the prayers sought are granted because the money collected by the respondent is held in escrow account and if the appeal fails the funds will be released to the respondent. It was submitted further that public interest should also be considered as the amount involved is colossal, involves public funds and the payment of the said amount will greatly affect the daily operations of the applicant.
 8. On his part, learned counsel for the respondent submitted that application does not meet the threshold for the grant of orders of stay of execution. In particular, it has not been demonstrated that the intended appeal will be rendered nugatory unless the orders sought are granted; that the amount payable is 30% share to which the respondent is entitled while the applicant’s share of 70% of revenue collected has already been spent by the applicant; that despite the respondent collecting revenue for the applicant, it has not paid the respondent for the last 6 years and if the amount is not paid, the respondent will be unable to fulfil its obligations under the revenue collection agreement; that the applicant’s intention is to cripple the respondent to enable third parties to take over the revenue collection to the detriment of the people of Kilifi County.



9. Moreover, counsel urged, the High Court is yet to make final orders and there is a risk of prejudicing the outcome of the High Court matter should this court pronounce itself at this stage; that the application is in any case premature and speculative as the High Court is yet to pronounce final orders and the matter is sub judice.
10. We have considered the application, the affidavits and the submissions including the authorities cited by learned counsel on both sides against the legal principles applicable in applications of this nature. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR*. As to whether the intended appeal is arguable, there is, for instance the question whether the holding by the trial Judge that the applicant breached the agreement between the parties by terminating it without following the proper procedure is erroneous. There is also the question whether the award of exemplary damages is well founded; and whether apportionment of income should be based on net or gross income. We are mindful that a single arguable ground is sufficient and that an arguable appeal is not one that will necessarily succeed. The applicant has in our view established that the intended appeal is not frivolous. It is indeed arguable.
11. On whether the intended appeal will be rendered nugatory unless the orders sought are granted, the applicant states that it received a demand issued by the respondent on 24th September 2021 for a total of Kshs.657,851,620.00; that based on orders of the lower court and of this Court, all revenue collected by the parties is deposited in a joint escrow account, which amount is sufficient security for the decretal amount and no prejudice will be occasioned to the respondent if the orders sought are granted; that in the event the appeal succeeds and judgment of the High Court reversed, the respondent is unlikely to be able to refund the amount. The respondent on the other hand says that there is no risk of execution as Section 21 of the *Government Proceedings Act* has not been invoked; that there are no final orders as the High Court ordered audit of the applicant's bank accounts by the Auditor General and valuation and reports in that regard are yet to be furnished.
12. Having considered the rival arguments on this issue, there is no contest that all the revenue collected by the respondent is held in an escrow account. The amount demanded is large by any standards and in answer to the claim by the applicant that the respondent might not be in a position to refund it if it is paid over and the appeal eventually succeeds, the respondent asserts that "it is a going concern" and has invested millions of shillings into the infrastructure and operations of the revenue collection operations and is able to pay back the funds required in case the appeal succeeds. The respondent has not however offered any evidence to support that assertion. It had the burden to do so. See *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another [2006] eKLR*. More recently in *Attorney General vs. James Hoseah Gitau Mwaru [2014] eKLR*, this Court stated that:

“...where an applicant alleges the respondent's inability to refund the decretal sum if the appeal ultimately succeeds, the burden is shifted onto the respondent to prove ability to refund by showing list of assets, bank accounts inter alia.”
13. As to the contention that the application is premature because final reports as ordered by the High Court are yet to be furnished, we note that the entire judgment is under challenge including the finding, on which the orders for audit and valuation are based, that there was wrongful termination of the agreement.
14. All in all, we are persuaded that this is a proper case for us to exercise the Court's discretion in favour of the applicant. We allow the application in terms of prayer 3 and order that there will be a stay of execution of the judgment in Malindi High Court Case No.9 of 2015 pending the hearing and determination of the applicant's intended appeal. This order is conditional upon the applicant filing and serving the substantive appeal, the memorandum and record of appeal, if it has not already done



so, within 45 days from the date of delivery of this ruling, failing which the order granted herein will automatically lapse.

15. The costs of the application shall abide by the outcome of the intended appeal.

15. Orders accordingly.

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

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

