



**Jambo East Africa Limited & another v Harit Sheth Advocates & 6 others (Civil Application E448 of 2021) [2022] KECA 480 (KLR) (25 March 2022) (Ruling)**

Neutral citation: [2022] KECA 480 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E448 OF 2021  
K M'INOTI, J MOHAMMED & KI LAIBUTA, JJA  
MARCH 25, 2022**

**BETWEEN**

**JAMBO EAST AFRICA LIMITED ..... 1<sup>ST</sup> APPLICANT**

**CATALYST BRITANIA BRANDS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HARIT SHETH ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**JAMBO BISCUITS (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**TRIUMPH DEVELOPMENT LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**KILIMANJARO FOODS LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**NITIN DAWDA ..... 5<sup>TH</sup> RESPONDENT**

**SACHIN DAWDA ..... 6<sup>TH</sup> RESPONDENT**

**COULSON HARNEY LLP ..... 7<sup>TH</sup> RESPONDENT**

*(An application for stay of execution of Ruling and Order of the High Court of Kenya at Nairobi (Mabeya, J.) dated 8th December, 2021) In Miscellaneous Civil Case No. E054 of 2020)*

**RULING**

**Background**

1. Before us is a Notice of Motion dated 10th December, 2021 in which Jambo East Africa Limited and Catalyst Britania Brands Limited (the applicants) seek an order of stay of execution of the ruling and order of Mabeya, J. delivered on 8th December, 2021 pending the hearing and determination of the intended appeal against the said ruling and order.



2. Harit Sheth Advocates, Jambo Biscuits (K) Limited, Triumph Development Limited, Kilimanjaro Foods Limited, Nitin Dawda, Sachin Dawda and Coulson Harney LLP are the 1st to 7th respondents respectively.
3. A brief background to the application is that, vide a BTA dated 24th June, 2016, as varied by the Deed of Variation dated 1st January 2017, the respondents agreed to sell and transfer their business to the applicants as a going concern for a total sum of KShs. 1,200,000,000. The parties agreed to have a portion of the purchase price, being the sum of KShs. 281,579,196 (the retention amount), deposited in an escrow account to cover any claims for warranties or indemnities that might arise after completion of the transaction. A dispute arose on 31st December 2016 between the parties to the BTA and the same was referred to arbitration under the Arbitration Rules of the London Court of International Arbitration (LCIA). On 14th November 2019, the LCIA delivered an award in favour of the applicants directing the 2nd – 6th respondents to procure the release of the retention amount to the applicants within 28 days of the final award.
4. On 21st February 2020, the 1st respondent herein filed an interpleader suit before the High Court seeking directions from the Court as to who between the applicants and the 2nd to 6th respondents were the rightful beneficiary of the retention amount. The High Court, in its ruling, held that the retention amount of KShs. 314,811,882.92 plus accrued interest be released to the 2nd to 6th respondents within 24 hours of the said order. Being aggrieved by the said ruling, the applicants filed and served a notice of appeal and the application herein for stay of execution of the ruling.
5. The application is brought under Rule 5(2) (b) of the Court of Appeal Rules (this Court's Rules) and is premised inter alia on the grounds that the learned Judge erred in law by finding that the High Court had jurisdiction to hear and determine the interpleader proceedings before it since both the Business Transfer Agreement (BTA) and the escrow letter provide that any claim relating to the agreement shall be referred and resolved by arbitration; that the learned Judge erred by finding that the 2nd to 6th respondents were the rightful beneficiaries of the retention amount. It is the applicants' contention that this finding amounts to an appeal through the backdoor since it overturns the finding of the London Court of International Arbitration (LCIA) that the retention amount belonged to the applicants. The applicants further contend that the learned Judge fell into error by finding that since the High Court found that the arbitral award was unenforceable in Kenya on grounds of public policy, the effect was that the arbitral award was ineffective and of no effect and, automatically, the 2nd to 6th respondents were the rightful beneficiaries of the retention amount.
6. The application was supported by the affidavit of Paul Kavuma, (Mr. Kavuma), a director of the 1st applicant in which he reiterated the grounds on the face of the application. Mr. Kavuma further deponed that, unless stay is granted, the applicants would be obligated to release the retention amount to the 2nd to 6th respondents, and the applicants were unlikely to recover the colossal sum which stood at KShs. 314,811,882.92 plus accrued interest. This, he attributed to the averment that the 2nd to 6th respondents are ailing financially and are in debt.

### **Submissions by Counsel**

7. The application was heard by way of written submissions with oral highlighting. A preliminary objection was raised at the hearing of this application by learned counsel for the 2nd to 6th respondents, Mr. Sundeep Sarvia who submitted that the applicants do not have right of audience as they failed to purge their contempt; that the learned Judge of the High Court directed the parties to execute the impugned order within 24 hours; that subsequently, the applicants wrote a letter dated 15th December, 2021 urging parties to disobey the order of the court; that this amounts to contempt of



- court which this Court should not countenance; and that the applicants should not be heard until they purge the contempt.
8. Learned Senior Counsel for the applicants, Mr. Ahmednasir Abdullahi, submitted that the applicants have a right of audience; that counsel for the 2nd to 6th respondents has not clarified which court the applicants are in contempt of; that only the court which has been cited for contempt can purge the contempt; that the letter dated 15th December, 2021 was a demand letter in compliance with the usual communication procedure between advocates; and that counsel for the 2nd to 6th respondents did not file the appropriate application for contempt of court in the High Court.
  9. This Court directed that the hearing of the instant application proceeds and that the question of whether the applicants have a right of audience to this Court be determined in this ruling.
  10. Learned Senior Counsel for the applicants, Mr. Ahmednasir submitted that the applicants have an arguable appeal as they are challenging the jurisdiction of the High Court to entertain the interpleader proceedings. Counsel submitted that both the BTA and the Escrow letter expressly provided that any claim(s) arising therefrom shall be referred and finally resolved by arbitration in accordance with the LCIA Rules. Counsel further submitted that the learned Judge fell into error by finding that the 2nd to 6th respondents were the rightful beneficiaries of the retention amount despite having recognized that the retention amount was set aside for the purpose of settling any claims for breach of warranties or indemnities instituted by the applicants after completion of the transaction. It was counsel's further submission that the said respondents conceded to have been in breach of the said warranties, but the Court erroneously held that they were the rightful beneficiaries to the retention amount.
  11. On breach of warranties, counsel submitted that the 2nd to 6th respondents presented a misleading picture of the business to the applicants prior to entering into the BTA; and that the financial documents that were presented to the applicants were inaccurate and misleading. Counsel submitted that this was orchestrated through the falsification of financial statements and other crucial documents, which indicated that the true value of the business was KShs. 1.2 billion as opposed to KShs. 126,000,000, and thus the said respondents acted in breach of the BTA.
  12. On the question as to whether the intended appeal will be rendered nugatory, counsel submitted that if the orders sought herein are not granted and the retention amount is released to the 2nd to 6th respondents, the release will be irreversible. Counsel further submitted that the 2nd to 6th respondents are financially ailing and are in debt and, consequently, should the retention amount be released to the 2nd to 6th respondents, then the applicants' chances of recovering the same are minimal.
  13. Mr. Sarvia submitted that the applicants have failed to demonstrate that they have an arguable appeal. Counsel submitted that the applicants' contention challenging the jurisdiction of the High Court is frivolous since this Court has held in *Niazsons (K) Ltd V China Road & Bridge Corporation Kenya (2001) eKLR* that the existence of an arbitration clause does not oust the jurisdiction of the Court. Further, that the applicants willingly submitted to the jurisdiction of the High Court by filing several affidavits making claim to the retention funds. The applicants cannot, therefore, challenge jurisdiction after submitting to the High Court.
  14. On the arguability of the intended appeal, the 2nd to 6th respondents submit that the only basis that the applicants rely on in their claim for the retention amount is the arbitral award which was declared unenforceable and unrecognizable by the High Court on grounds of public policy.
  15. On the question whether the intended appeal will be rendered nugatory if the orders sought herein are not granted, counsel submitted that this being an order for a money decree, the applicants have failed to demonstrate to this Court that the 2nd to 6th respondents are incapable of refunding the



retention funds in the event that the intended appeal succeeds. Counsel further submitted that the 5th respondent had confirmed that they will be able to make any refund if required. Finally, on the contention by the applicants that the 5th and 6th respondents were likely to abscond from the jurisdiction of the Court, counsel submitted that the 5th and 6th respondents are both Kenyan citizens and that they duly produced their national identity cards in the replying affidavit.

### Determination

16. In *Communications Commission of Kenya vs. Terra Radio Limited [2013] eKLR*, this Court stated as follows:

“We have no doubt in our minds that our courts have inherent power to ensure compliance with their orders, that is, the unwritten or implied power which emanates from the very nature of the institution of the court and without which the court cannot function properly or at all. Indeed, the Supreme Court, in *The Board of Governors, Moi High School, Kabarak vs Malcom Bell & Another (supra)* recognized the power of the court “to safeguard itself against contemptuous or disruptive intrusion from elsewhere” as one of the indisputable attributes of its inherent power. In a suitable case, the court will even refuse to hear a contemnor before it, until he has purged the contempt. See *Hadkinson Vs Hadkinson*, (1952) 2 ALL ER 567.

However, we ask ourselves, is the application before us such a case? With profound respect to the applicant, we do not think so. No court of competent jurisdiction has adjudged the respondent guilty of contempt of court. The respondent itself does not admit that it is in contempt of court and has put forth several grounds why it is not in contempt of court (including, in particular, the stay of execution of the order in question); grounds which, on the face of it cannot be described as frivolous. It is, in other words, not an open and shut case of contempt of court on the part of the respondent. The application before us is not a contempt of court application; Mr Mwenesi readily admits as such, and states that he does not see the reason why he should institute contempt of court proceedings when he can approach the court the way he has done. We have thus not been requested to, and we cannot, even with the best of charity, transform the application before us into an application for contempt of court. However, before us is an application, at the heart of which lies a presumption that the respondent has already been adjudged guilty of contempt of court or at the very least, has admitted being in contempt of court. So, we are not being asked to hear and determine whether the respondent is in contempt of court, we are being asked to visit upon it the consequences of contempt of court without any application for such order ever having been made, let alone a court of competent jurisdiction having pronounced it.

We do not think it is necessary for us to address the many side issues provoked by this application; if the applicant is serious about upholding its rights under the order of the High Court or the dignity of the court, it must, in the absence of the respondent admitting to being in contempt of court, first initiate proper contempt of court proceedings. As and when a competent court has adjudged the respondent to be in contempt of court; and only then, can we be moved to consider the orders sought in this application.” (Emphasis supplied.)

17. By parity of reasoning, in the absence of the applicants admitting to being in contempt of court, the 2nd to 6th respondents must first initiate proper contempt of court proceedings. As and when a competent court has adjudged the applicants to be in contempt of court can this Court be moved



to consider the 2nd to 6th respondents' application to deny the applicants audience to this Court. Accordingly, we dismiss the preliminary objection raised by the 2nd to 6th respondents.

18. Before we determine the merit of the instant application, we will determine the question whether the applicants have a right of audience to this Court. Counsel for the 2nd to 6th respondents submitted that the applicants are in contempt of court for disobeying the impugned orders of the High Court and should not be heard until they purge the contempt. The straight forward question is whether we should hear the applicants in their application for stay of execution of the order of the High Court ordering the release of the retention amount to the 2nd to 6th respondents within 24 hours of the order.

19. This Court in *AB & another vs. RB [2016] eKLR* stated as follows:

We affirm that under our constitutional framework, there is no general rule that a court cannot hear a person in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster. Way back in 1952, Lord Denning, LJ. articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril. In *Hadkinson v. Hadkinson*, [1952] 2 All ER 567; the eminent Law Lord stated:

"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".

In this jurisdiction, this Court has emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, Githinji, JA expressed himself as follows in *Rose Detho v. Ratilal Automobiles Ltd & 6 Others*, CA No. 304 of 2006 (171/2006 UR):

"Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case."

The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened. The Constitutional Court of South Africa, in *Burchell v. Burchell* Case No 364/2005 underlined the importance to the rule of law, of compliance with court orders in the following terms:

"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives



everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.” (Emphasis supplied.)

20. 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.
21. 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 the case of *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...”

22. 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 applicants 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:

- “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.
- viii). 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.”

23. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether the High Court had jurisdiction to entertain the proceedings upon which the interpleader ruling arises; and further, which of the parties is entitled to the retention amount. 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.

24. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeals succeeds, in *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others (supra)* this Court stated that:

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



x). 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.”

25. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and each case has to be considered on its merits. We find that, in the circumstances of the instant application, should this Court decline to grant the orders sought and the retention amount is released to the 2nd to 6th respondents, the release will be irreversible should the applicants’ intended appeal succeed.
26. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal which would be rendered nugatory if the orders sought are not granted.
27. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction and stay of execution pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange’the Kinyanjui (*supra*).
28. The upshot is that the application dated 10th December, 2021 is allowed. Costs shall abide the outcome of the intended appeal.
29. We also direct that the intended appeal be heard on priority basis.

**DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2022.**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

