



**Co-operation (Group) Co. Ltd v Mshanga (Civil Application
E49 of 2021) [2022] KECA 394 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 394 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E49 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 4, 2022**

BETWEEN

CO-OPERATION (GROUP) CO. LTD APPLICANT

AND

GILBERT CHARO MSHANGA RESPONDENT

(An application for stay of execution pending appeal from the Judgment and Decree and the Ruling of the Environment and Land Court at Malindi (Olola, J.) dated 31st January 2019 and dated 22nd January 2021 respectively in ELC Case No. 245 of 2017)

RULING

1. In judgement delivered on the 31st January 2019, the Environment and Land Court at Malindi (Olola, J.) (ELC) found that the respondent had established his claim that the applicant had trespassed on approximately two acres of his property known as Kilifi/Gede/Mijomboni/973 and wrongfully established a site office and stored it's machinery and equipment thereon. The court ordered the immediate ejection of the applicant from the said property and awarded the respondent general damages of Kshs.2,000,000 and mesne profits of Kshs.4,800,000.
2. According to the applicant, despite having instructed an advocate to defend respondent's suit, it only became aware that an ex parte judgement had been granted against it when auctioneers attached its vehicles in execution of the decree. Thereupon, the applicant made an application dated 16th December 2019 before the trial court to set aside the judgement. That application was dismissed in a ruling delivered by the ELC on 22nd January 2021.
3. Aggrieved by both the judgement and the ruling, the applicant applied before this Court on 26th February 2021 for extension of time to file a notice of appeal out of time and for its notice of appeal filed on 22 February 2021 to be deemed to have been properly filed. Leave was granted by the Court (J. Mohammed, JA) in a ruling given on 30th June 2021. We note, however, from the respondent's



replying affidavit that the respondent has applied for rescission of the orders of the learned single Judge given on 30th June 2021 on grounds that the application of 26th February 2021 was not served and the respondent was not heard and it would appear that that application is pending determination.

4. In its present application dated 1st July 2021 brought under Rule 5(2)(b) of the *Court of Appeal Rules*, the applicant seeks an order of stay of execution of the ex parte judgement of the ELC as well as of the ruling dismissing its application to set it aside pending the hearing and determination of its appeal.
5. To succeed, the applicant is required to demonstrate that its intended appeal is arguable; that if the orders sought are declined, the appeal, if successful, will be a pyrrhic victory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & others [2013] eKLR*. In that regard, learned counsel Charles Dulo for the applicant, referred to the grounds in support of the application, the supporting affidavit of Wu Peng Chao, and the respondent's written submissions which he orally highlighted. It was submitted that the intended appeal is arguable; that based on the draft memorandum of appeal, it will be demonstrated at the hearing of the appeal that respondent having sold the property to one Leonard Mbonani, in respect of whom an application for joinder was before the ELC, the respondent's claim for trespass against the applicant could not be sustainable as the applicant had the permission of the said Leonard Mbonani to use the land; that the awards of general damages and mesne profits by the ELC were excessive; and that no valuation report supported those awards.
6. On the nugatory aspect, it was urged that respondent has proclaimed the applicant's fleet of vehicles; that the amount involved is a large sum standing at Kshs.10,452,554 as at 25th January 2021 and if paid over to the respondent it would adversely affect the applicants of operations; and that the respondent is not a man of means who can be able to refund the money in the event that the appeal succeeds.
7. Mr. Tindi, learned counsel for the respondent in opposing the application referred to the replying affidavit sworn by the respondent as well as his written submissions which he also orally highlighted. It was submitted that the intended appeal is not arguable; that the judgment of the lower court is a regular judgment on account of the applicant having failed to enter appearance and file defence; that no sufficient reason was given for the failure to defend the suit; that respondent is undoubtedly the registered owner of the property and the applicant's remedy, if any, is against the said Leonard Mbonani; and that as regards the awards of damages, the appellate court is not in a position to assess the same.
8. On the nugatory aspect, it was submitted that the appeal will not be rendered nugatory if the orders sought are declined; that the respondent is not a man of straw as he is the owner of the suit property with a value of Kshs.24 million.
9. We have considered the application, the affidavits, the submissions and authorities cited. On whether the intended appeal is arguable, there is for instance the question as to how the amounts awarded were arrived at. There is also the issue whether the learned Judge properly exercised the court's discretion in declining to set aside the judgment in the circumstances presented. Bearing in mind that an arguable appeal is not one that must necessarily succeed, (See *Joseph Gitabi Gachau & another vs. Pioneer Holdings (A) Limited & 2 others [2009] eKLR*), we do not think that the intended appeal is frivolous. It is arguable.
10. As to whether the appeal will be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds, what may render the success of an appeal nugatory must be considered within the circumstance of each particular case as stated by this Court in *Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 E. A. 227*. The applicant demonstrated that the process of execution was already under way and asserted that four of its vehicles were irregularly auctioned; that another twelve of its vehicles and its equipment were also under threat of sale and disposal with the risk of adversely



affecting its operations. Furthermore, in reply to the claim by the applicant that the respondent would not be in a position to refund the decretal amount, the respondent's answer is that he is the registered owner of the property in question which he said is valued at Kshs. 24 million though he did not demonstrate how he arrived at that valuation. Faced with the claim that he would not be in a position to refund the decretal amount, the respondent has not in our view adequately demonstrated that he would be in a position to do so. As this Court stated in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR:

“...while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

11. All in all, we are satisfied that the applicant has satisfied both limbs for the grant of the orders sought. We allow the application dated 1st July 2021 to the extent that we hereby order a stay of execution of the judgment of the ELC delivered on 31st January 2019 pending the hearing and determination of the applicant's intended appeal.
12. The costs of the application shall abide the outcome of the intended appeal.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

