



**Odidio Spark Limited v Kenya Commercial Bank (Civil Appeal (Application)
E422 of 2021) [2022] KECA 426 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 426 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E422 OF 2021
DK MUSINGA, RN NAMBUYE & F SICHALE, JJA
MARCH 4, 2022**

BETWEEN

ODIDIO SPARK LIMITED APPLICANT

AND

KENYA COMMERCIAL BANK RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya (S. Chitembwe,
J.) dated 31st May, 2021 in Nairobi Civil Appeal No. E295 of 2020)*

RULING

1. Before us is a Notice of Motion dated 29th July, 2021. It is brought under sections 3A, 3B of the *Appellate Jurisdiction Act*, Rules 5(2)(b), 47 of the *Court of Appeal Rules, 2010*, and all other enabling provisions of the law.
2. In the main, the application seeks a stay of proceedings in HCCA No. E295 of 2020 between KCB Bank of Kenya and Odidio Spark Limited and CMCC No. 4168 of 2019 between Odidio Spark Limited and KCB Bank Kenya Limited pending the hearing and determination of the appeal herein, together with an attendant order that costs of the application be in the cause.
3. It is supported by grounds on its body, a supporting affidavit sworn by Ernest Odhiambo Ombara, a Director of the applicant together with annexures thereto, written submissions dated 5th August, 2021 and legal authorities. It has been opposed by a replying affidavit sworn by Bonnie Okumu, Director legal services with the respondent, bank together with annexures thereto, written submissions and legal authorities both dated 11th August, 2021.
4. Cumulatively, the applicant submits that the respondent filed an appeal through HCCA No. E295 of 2020 against directions made in CMCC No. 4168 of 2019. Contemporaneously with the filing of the above appeal, the respondent filed an application for stay of proceedings in the CMCC case. The said application was allegedly found to be defective and therefore withdrawn. The respondent instead



of pursuing the application for stay filed in the lower court after withdrawing their application in the High Court, preferred an appeal against the default judgment on which they anchored an application for stay pending appeal which gave rise to the impugned ruling/orders of Chitembwe, J. made on 31st May, 2021.

5. In the said impugned ruling, the Judge made orders granting stay of execution of the proclamation of the attachment of movable goods against the respondent as per the warrant of execution issued by the trial court pursuant to the default judgment for a period of ninety (90) days. The respondent was directed to prosecute the application for setting aside the default judgment within the same period of ninety (90) days. There was liberty to apply granted to either party should the Magistrate's Court fail to hear the application for setting aside the default judgment within the stipulated ninety (90) days granted by the High Court.
6. The applicant was aggrieved by that ruling and filed a notice of appeal dated 11th June, 2021 intending to appeal against the whole of the said ruling. They have filed a memorandum of appeal dated 29th July, 2021 raising (9) grounds of appeal. It is intended to fault the trial Judge for erroneously: finding in favour of the respondent even after finding that the appeal before him was improper; failing to find that an appeal filed out of time without leave is invalid; ignoring conditions set out in law that must be satisfied before an order staying execution is granted; failing to find that so long as the appeal before the court was incompetent then an application premised on it could not stand/succeed; delving into matters which were not raised in the application for stay of execution and more particularly alluding that the appellant was a beneficiary of stolen public funds hence arriving at a biased and wrong decision; making a decision that is not founded on any known law; wrongfully invoking the doctrines of equity and applying them in a manner that elevates equity above the prevailing law and therefore, arriving at an erroneous decision; demonstrating outright bias against the appellant hence arriving at an erroneous and biased decision; and, lastly, by ignoring the authorities and submissions of the appellant.
7. It is on the basis of the above grounds that the applicant asserts that their appeal already filed is not only arguable but also has high chances of success. They have therefore satisfied the first prerequisite for granting relief under Rule 5(2)(b) of this Court's Rules, the applicant stated.
8. Turning to the second prerequisite, the applicant contends that they have also satisfied this prerequisite because if the stay orders sought are not granted, the lower court will proceed with the hearing and determination of the proceedings pending before it thereby rendering the appeal herein nugatory.
9. On case law, the applicant relies on the case of *Attorney General vs. Okiya Omtatah Okoiti & Another [2019] eKLR* on the principles for consideration in the exercise of the court's unfettered discretion under Rule 5(2)(b) of the Court of Appeal Rules to grant an order of stay, namely, demonstration by the applicant that he/she has an arguable appeal. By arguable is meant an appeal that will not necessarily succeed but one that is not frivolous or idle. Secondly, demonstration that unless the order of stay sought is granted, the appeal or intended appeal would be rendered nugatory. They also rely on the case of *Stanley Kang'ethe Kinyanjui vs. Tonny Ketter & 5 Others [2013] eKLR* for the same principles. The applicant therefore urges this court to grant the application as prayed.
10. Opposing the application, the respondent submits cumulatively that the applicant's application does not warrant the exercise of this Court's discretionary mandate in their favour. In support of the above position, the respondent has cited the case of *Re Global Tours & Travel Limited HCCC No. 43 of 2000* in which Ringera, J. (as he then was) set out factors falling for consideration in an application of this nature namely, the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one,



the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

11. Applying the above threshold to the grounds proffered by the applicant in support of the application under consideration, the respondent argues that the appeal is merely calculated to prevent the dispute pending in the Magistrates' Court from being heard on its merits by the trial court.

Secondly, in the impugned orders, the Judge merely granted conservatory orders pending determination of an application dated 10th November, 2020 before the Magistrate's Court. Thirdly, the same is based on a misconception of the powers of the High Court in its exercise of its inherent, appellate and supervisory jurisdiction derived both from the statute law namely, the Appellate Jurisdiction Act and the Constitution. Fourthly, the applicant has sought to blatantly ignore the sentiments expressed by Onguto, J. (as he then was) in a ruling dated 17th February, 2017 in HC Civil Case No. 397 of 2016 wherein the applicant had sought to access funds, namely, Kshs.8,000,000.00 from the respondent. Declining to accede to that request, the Judge held that allegations having been made that the funds sought to be accessed by the applicant were proceeds of fraud, it was necessary for the matter to be heard on its merits before those funds could be disbursed, one way or another, hence the transfer of the matter from the High Court to the Magistrates' Court for hearing and determination on its merits.

12. The respondent continues to urge that the applicant sought and obtained interlocutory judgment in the Magistrates' Court which he sought to execute. It is the aforesaid applicant's move to execute the decree arising from the ex parte judgment that prompted the respondent to file in the Magistrates' Court an application dated 10th November, 2020 seeking to set aside the ex parte judgment and a temporary injunction to stay the execution process pending the hearing of the application inter partes. The Magistrates' Court declined to grant interim relief, prompting the respondent to file Civil Appeal No. E295 of 2019. The respondent therefore further contends that it is the above background information and which information the Judge properly appraised before granting orders in the impugned ruling.
13. It is also the respondent's position that the High Court's impugned orders were made in the interest of justice to both parties namely, in order to accord the respondent bank an opportunity to be heard on its defence. The Judge cannot therefore be faulted for exercising his supervisory powers over the Magistrates' Court judiciously.
14. In the respondent's opinion, this was a proper exercise of judicial discretion to prevent an injustice being occasioned to the respondent, a party which had been condemned unheard. The respondent argues further that the applicant's appeal is otiose as there are no live proceedings before the High Court, parties having been referred back to the trial court for final determination of the then pending application before the trial court for setting aside the default judgment. The intended appeal is further incompetent in so far as it seeks to invite this Court to stay proceedings before the Magistrates' Court as this Court has no direct supervisory powers over the trial magistrate's court.
15. The respondent further relies on the decision in the case of Kenya *Wildlife Services vs. James Mutembei [2019] eKLR* for the holding/proposition that a stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It also infringes on the right to access justice, right to be heard without delay and overall right to fair trial.
16. In light of the above exposition, the respondent submits that the test for stay of proceedings is therefore high and stringent and should only be exercised as the Court's last resort. It would therefore not be in the interest of justice to both parties herein to exercise the Court's discretion and grant stay as the same will only serve the purpose of delaying the hearing and disposal of the suit at the Magistrates' Court



in CMCC No. 908 of 2019 to the detriment of the respondent who is the real aggrieved party. It will also have the effect of blatantly assisting in the execution proceedings, which according to them were based on a dubious ex parte judgment with the concomitant effect of assisting the applicant obtain funds suspected to have been proceeds of a criminal enterprise from institutional accounts without the benefit of having the weighty issues therein heard through a viva voce hearing.

17. Turning to the last issue of the appeal being rendered nugatory if the stay of proceedings order is not granted, the respondent submits that the applicant has not demonstrated in what way the appeal is likely to be rendered nugatory in the event that the application before the Chief Magistrates' Court was considered on its merit. Neither has the applicant also demonstrated how the ongoing lower court proceedings would cause it irreparable injury or harm since what the High Court order entailed was simply that a stay be granted and the application for setting aside the ex parte judgment be heard expeditiously within specific timelines. We were therefore urged to decline the applicant's application as sustaining it would be tantamount to allowing the applicant steal a match on the respondent by having the suit against the respondent determined summarily.
18. The respondent also relies on the case of *Katangi Developers Limited vs. Prafula Enterprises Limited [2018] eKLR* for the holding that an appeal will not be rendered nugatory where the opposite party can be compensated by way of costs. In the respondent's opinion, the circumstances prevailing herein are those where compensation by costs would be an adequate remedy for any inconvenience the applicant may experience if the court were to decline exercising its discretion in their favour in the manner sought.
19. Lastly, the respondent argued that the application has been overtaken by events as the lower court proceeded to hear the application for setting aside the ex parte judgment and delivered its ruling on 9th November, 2021. The respondent was granted leave to file a defence which is already filed. They intend to have the suit in the Magistrates' Court heard expeditiously.
20. In reply to the respondent's submissions, counsel for the applicant merely reiterated their earlier position and urged this Court to grant the relief sought.
21. Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited on its heading. Sections 3A and 3B enshrines the overriding objective principle of the Court. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)*; and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009*, in all of which the principles enunciated therein were summarized as donating power to the Court to dispense justice with greater latitude.
22. Rule 47 is merely procedural and requires no further interrogation. The substantive provision is Rule 5(2)(b) of the Court of Appeal Rules. It is now trite that the Court's exercise of its mandate under this rule is original, independent and discretionary. See *Githunguri vs. Jimba Credit Corporation Ltd No. (2) [1988] KLR 88*. It is a procedural innovation designed to empower this Court to entertain interlocutory applications for the preservation of the subject matter of the appeal where one has been filed or is intended. See *Equity Bank Ltd vs. West Link NBO Civil Application No.78 of 2011 (UR)*. The jurisdiction under Rule 5(2)(b) only arises where the applicant has lodged a notice of appeal. See *Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 others, Civil Application No. 327 of 2009 (UR)*.
23. The conditions to be met before a party can obtain relief under Rule 5(2)(b) have been numerously restated by the Court. In *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*, the



guiding principles for the Court's exercise of its mandate under Rule 5(2)(b) of the Court's Rules were summarized as hereunder;

- “(i) in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court. See *Reuben & 9 Others v Nderitu & Another* (1989) KLR 459;
- (ii) the discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;
- (iii) the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See *Halai & Another vs. Thornton & Turpin* (1963) Ltd. (1990) KLR 365;
- (iv) in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See *David Morton Silverstein vs. Atsango Chesoni*, Civil Application No. Nai 189 of 2001;
- (v) an applicant must satisfy the Court on both of the twin principles;
- (vi) on whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. 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. See *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008;
- (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. See *Damji Pragji* (supra);
- (ix) 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 Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232;
- (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;
- (xi) where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impunity, the onus shifts to the latter to rebut by evidence the claim. See *International Laboratory for Research on Animal Diseases v Kinyua*,___ [1990] KLR 403.”

24. We have applied the above principles to the rival arguments made before us herein. We are satisfied that our jurisdiction has been properly invoked under the applicable rule as there is a notice of appeal in place filed in accordance with Rule 75 of this Court's Rules dated 11th June, 2021 and lodged on 2nd July, 2021 on which the appeal is anchored. See *Githunguri vs. Jimba Credit Corporation Ltd.*



25. Turning to the merits of the application, the legal position is that in order to succeed in an application of this nature, a party has to demonstrate existence of an arguable appeal. An arguable appeal is not one that must succeed but one that warrants not only the Court's interrogation but also the Court's invitation to the opposite party to make a response thereto. The usual mode of demonstrating existence of an arguable appeal is usually through annexing of a draft or a memorandum of appeal. Alternatively, the intended grievances may also be set out either in the body of the application or in the supporting affidavit as the case may be.
26. In the instant application, there is already a memorandum of appeal on the record. The appeal is also already in place. We have revisited the grounds of appeal proffered by the applicant herein. We find them arguable, notwithstanding their ultimate success or otherwise. We are therefore satisfied that the applicant has satisfied the first prerequisite under the Rule 5(2)(b) of the Court of Appeal Rules.
27. On the second prerequisite of the intended appeal being rendered nugatory, the respondent has submitted that there is nothing to stay with regard to the High Court proceedings which became spent the moment the Magistrates' Court heard and determined the application for leave to defend, which subsequently resulted in an order granting the respondent leave to defend the suit in the trial court pursuant to which leave the respondent has already filed its defence. Secondly, that this Court has no direct supervisory jurisdiction over the Magistrates' Court.
28. The learned counsel for the applicant when given an opportunity to respond to the pertinent issues raised by the respondent in opposition to the application simply skirted them. Our take thereon is firstly, that the High Court proceedings became spent the moment the Magistrates' Court complied with the directions of the High Court. Secondly, it was correctly submitted by the respondent that we have no direct supervisory mandate over the Magistrates' Court. See Article 164 (3) of the [*Constitution of Kenya, 2010*](#) which provides as follows:

“(3) The Court of Appeal has jurisdiction to hear appeals from--

- (a) the High Court; and
- (b) any other court or tribunal as prescribed by an Act of Parliament.”

While section 3(1) of the Appellate Jurisdiction Act provides as follows:

“3(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.”

29. Our take on the above jurisdictional provision is that we have no supervisory mandate over the Magistrates' Court.
30. In light of the totality of the above assessment and reasoning, we find no merit in the application. It is accordingly dismissed with costs to the respondent.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

R. N. NAMBUYE



.....
JUDGE OF APPEAL

F. SICHALE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

