



Thika School of Medical and Health Sciences Limited (Under Administration) & another v Rao & 2 others (Civil Application E004 of 2022) [2022] KECA 382 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 382 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E004 OF 2022
RN NAMBUYE, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
MARCH 4, 2022**

BETWEEN

THIKA SCHOOL OF MEDICAL AND HEALTH SCIENCES LIMITED (UNDER ADMINISTRATION) 1ST APPLICANT

THIKA NURSING HOME LIMITED (UNDER ADMINISTRATION) 2ND APPLICANT

AND

RAMANA RAO (P V R RAO) 1ST RESPONDENT

SWAROOP RAO PONANGIPALLI 2ND RESPONDENT

BANK OF BARODA KENYA LIMITED 3RD RESPONDENT

(Being an application for injunction pending the hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (A. Mabeya, J.) dated 29th December 2021 in Insolvency Cause No. E092 of 2021 as heard together with Insolvency Cause No. E093 of 2021)

RULING

1. Before us is a Notice of Motion dated 5th January, 2022 under Rule 5(2)(b) of the [Court of Appeal Rules](#).
2. In the main, the applicants seek a temporary injunction to be issued restraining the respondents, their agents, employees, servants or any other person or entity claiming through them from dealing in any way whatsoever operations of the applicants and or their properties and/or conducting any other business in regard to the applicants pursuant to the appointment of the 1st and 2nd respondents as administrators of the applicants on 22nd November, 2021 by the 3rd respondent pending the hearing



and determination of the intended appeal together with an attendant order that the costs of and incidental to the application be in the cause.

3. The Motion is supported by the grounds set out on its body, a supporting affidavit of Dr. Barham Dev Vasisht, a Managing Director of the applicant companies together with annexures thereto, written submissions dated 10th January, 2022 and legal authorities dated the same date.
4. It has been opposed by a replying affidavit sworn by Swaroop Rao Ponangip Alli, the 2nd respondent on 13th January, 2022 on his own behalf and on behalf of the 1st respondent, annexures thereto, together with written submissions and legal authorities both dated the same date of 13th January, 2022. It has also been opposed by a replying affidavit by Andrew Lukuyani, Head of Credit of the 3rd respondent sworn on 12th January, 2022, written submissions and list of authorities dated the same date of 12th January, 2022.
5. The background to the application albeit in a summary form is that the 1st applicant, Thika School of Medical and Health Sciences Limited, is a limited liability company carrying on the business of, and operating, a medical training institution in which it offers Certificate and Diploma courses in Thika, Kisumu, Kitui and Mombasa. The 2nd applicant (a sister company of the 1st applicant) is also a limited liability company carrying on business as a health service provider in the name and style of Thika Nursing Home. The 1st and 2nd respondents (Ponangip Alli Venkata Ramana Rao and Swaroop Rao Ponangip Alli) are duly licenced insolvency practitioners in Kenya, and who were at all material times holders of Insolvency Practitioner License Nos. OR/IP/001 and OR/IP/032. The 3rd respondent (Bank of Baroda Kenya Limited) is a limited liability company duly incorporated in accordance with the provisions of the *Companies Act*, Chapter 486 of the Laws of Kenya (now repealed), and which was at all material times duly licenced to carry out the business of banking in Kenya.
6. In 2014, 2015 and 2018, the applicants secured financial facilities from the 3rd respondent amounting in the aggregate to more than KShs. 800,000,000. The stated loan facilities were extended or restructured from time to time and were secured by legal charges over LR Nos. Thika/Mun/Block 9/631 and 632, Thika/Mun/Block 15/100, and Thika/Mun/LRN 4953/1175/81; and 3 “debentures on future and present assets of the applicants”. The legal charges and debentures aforesaid were further secured by respective Guarantees and Undertakings of the individual directors of the applicants, as more particularly set out in paragraphs 5 and 6 of the affidavit of Andrew Lukuyani (the 3rd respondent’s Head of Credit) sworn on 10th December 2021 in opposition to the 2nd applicant’s Notice of Motion dated 25th November 2021, which is the subject of the impugned Ruling.
7. We hasten to observe that the contractual terms of the legal charges and mortgages from which the applicants’ financial obligations, as well as the 3rd respondent’s right to enforce the securities, arose are not in issue. From the incomplete record before us and, in particular, paragraph 7 of Mr. Lukuyani’s affidavit aforesaid, it is apparent that the applicants failed to meet their financial obligations as they became due from time to time thereby defaulting in payment of various sums, which stood in arrears at KShs. 262,820,000.00 as at 10th December 2021, and which continues to attract contractual interest until payment in full.
8. In consequence of continued default, the 3rd respondent appointed the 1st and 2nd respondents on 22nd November 2021 as joint administrators of the 1st applicant’s school pursuant to section 537(2) (a) of the *Insolvency Act*, 2015. The 3rd respondent’s Notice of Appointment of Joint Administrators and the accompanying Statutory Declaration of the 3rd respondent’s Directors (both of which are dated 22nd November 2021) specify the debentures pursuant to which the appointment was made and the maximum amounts thereby secured, amounting in the aggregate to KShs. 767,250,000.00.



9. In resistance to the appointment by the 3rd respondent of the 1st and 2nd respondents as joint administrators, the 1st applicant filed Insolvency Cause No. E092 of 2021 against the respondents while the 2nd applicant filed Insolvency Cause No. E093 of 2021 against the three respondents, both in the High Court of Kenya at Nairobi. It is in the two insolvency causes that the applicants filed their Motions (both of which were dated 25th November 2021) seeking inter alia: an order to restrain the respondents from interfering with the affairs of the applicants; and an order terminating and revoking the appointment of the 1st and 2nd respondents as joint administrators of the applicants' undertakings. In view of the fact that the two Motions sought identical orders, the trial court heard them together and delivered its Ruling on 29th December 2021 dismissing the applicants' applications with costs to the respondents.
10. Aggrieved by the ruling of the High Court, A. Mabeya, J. dated 29th December, 2021, the applicants filed a notice of appeal and memorandum of appeal dated 5th January, 2022 on which the application under consideration is anchored.
11. Supporting the application cumulatively, the applicants rely on the decision of this court in the case of *Chris Munga N. Bichage vs. Richard Nyakaka Tongi & 2 Others [2013]* on the threshold for granting relief under Rule 5(2)(b) of the Court of Appeal Rules, namely demonstration of existence of an arguable appeal, that is to say that the appeal or intended appeal is not frivolous or an idle one. Secondly, that if the relief sought is not granted the appeal or intended appeal will be rendered nugatory.
12. The applicants rely on fourteen (14) grounds of appeal set out in their memorandum of appeal annexed to the supporting affidavit in satisfaction of the first prerequisite under the Rule. They intend to argue on appeal that the learned Judge gravely erred in law and in fact in: finding that indeed, the 3rd respondent lacked power and authority to appoint the 1st and 2nd respondents as administrators of the applicants under the respective debentures without recourse to the courts but went ahead to allow them to illegally continue the administration against the dictates of section 534 of the *Insolvency Act*, purporting to legislate from the bench rather than interpreting and applying the law as it is; failing to address himself on the major question that was before him for determination being, the termination/revocation of the illegal and unprocedural appointment of the 1st and 2nd respondents as joint administrators of the applicants on 22nd November, 2021; failing to revoke the appointment of the 1st and 2nd respondents as administrators of the applicants upon determination that their appointment without recourse to the court was improper; departing from the well-established principles of appointing administrators under section 534 of the *Insolvency Act* and thereby causing inconsistency and uncertainty in the law; gravely misconducted himself by openly showing bias against the applicants and unlawfully favouring the respondents; helping the respondents patch up their case after contention by the applicants that the affidavits filed by the respondents in opposition of the applicants' application were forgeries and fraudulent; allowing the respondents to replace the forged and fraudulent affidavits without writing a proper ruling and without giving the appellants a chance to appeal against the reckless and biased decision whereas the propriety or otherwise of the respondents affidavits was a major issue for determination; by rushing in a lightning speed to conduct the hearing of the application to deny the applicants a chance to appeal his unreasonable decision and to sweep under the carpet the respondents illegal criminal activities; finding and holding that the appointment of the 1st and 2nd respondents as administrators of the applicant did not negate the principles of administration; finding and holding that no employee was sacked whereas there was clear evidence submitted by all parties indicating that all employees contracts were terminated by the 1st and 2nd respondents upon being appointed as administrators; ignoring the fact that the 1st and 2nd respondents were not qualified in law to manage the applicants; ignoring the malice and



- highhandedness of the respondents against the applicants and, lastly, that the Judge gravely erred in law and in fact in rendering an unreasonable retrogressive and uninspiring decision.
13. The applicants also intend to rely on section 534(1) – (2) of the *Insolvency Act* to fault the trial Judge for failing to find that on 22nd November, 2021, the 3rd respondent illegally and invalidly appointed the 1st and 2nd respondents as joint administrators of the applicant on account of three debentures dated 19th March, 2014, 9th July, 2015 and 14th September, 2018 by falsely and fraudulently describing itself as a holder of a qualifying floating charge in respect of the 1st applicant’s assets.
 14. Likewise, on the same 22nd November, 2021, the 3rd respondent again illegally and invalidly moved to appoint the 1st and 2nd respondents as joint administrators on account of three debentures dated 15th July, 2015, 11th February, 2016 and 21st July, 2017 also by falsely and fraudulently describing itself as a holder of a qualifying floating charge in respect of the 2nd applicant’s assets. That clauses 19 of the debenture dated 19th March, 2014, 11 of the further debenture dated 9th July, 2015, 7.2.2.2 of the third further charge dated 14th September, 2018 and 8.2 of the further debenture dated 21st July, 2017 respectively only grant power to the 3rd respondent to appoint a receiver, not an administrator.
 15. Further, that there exists no debenture dated 15th July, 2015 and registered on 17th July, 2015 to secure an amount of KShs. 370 Million by the 3rd respondent against the assets of the 2nd applicant as alleged by the 3rd respondent in its statutory declaration or at all. Neither is the 3rd respondent a holder of a qualifying floating charge in respect of the 2nd applicant’s assets over the further debentures dated 11th February, 2016 and 21st July, 2017.
 16. Lastly, it is also intended to take up on appeal that the Judge failed to appreciate that the 1st and 2nd respondents were unqualified to manage a technical and vocational education and training institution (TVET) like the 1st applicant herein, firstly for want of approval or appointment as such by the technical and vocational education and training authority under the Technical and Vocational Education and Training Act. Secondly, for want of no knowledge in medicine coupled with lack of registration and or licensing by the Kenya Medical Practitioners and Dentists Council in order to be issued with a license in terms of the *Medical Practitioners and Dentists Act* and Medical Practitioners and Dentists (Inspection and Licensing) Rules 2014.
 17. On the satisfaction of the second prerequisite under the Rule 5(2)(b) of the Court of Appeal Rules, the applicants cite irreversible danger of likelihood of possible failure to recognize the documents obtained by students from the 1st applicant namely, Diplomas and Certificates for want of accreditation or licence of the institution by reason of the appointment of persons not qualified under the law to run such an institution. Secondly, irreversible danger of patients within the 2nd applicant unnecessarily losing lives or sustaining lifetime/permanent injuries and/or damage due to poor management of the institution by the 1st and 2nd respondents who, according to the applicants, are not only unqualified in law but also lack expertise in the operation of medical institutions and facilities. Lastly irreparable reputational damage which would even make it impossible for the applicants to repay their debts due to the decline in business.
 18. Opposing the application, the 1st and 2nd respondents submit that the procedure adopted by the applicants in presenting their grievances to this Court of fusing the rulings arising from separate applications in Insolvency Cause Nos E092 and E093 of 2021 into one appeal and application renders the entire process defective, incurable under Article 159(2)(d) of *the Constitution* of Kenya, 2010 and should therefore be dismissed in limine.
 19. Without prejudice to the foregoing, the 1st and 2nd respondents’ assert that they possess the requisite expertise to run the applicants’ institutions. Secondly, that they were properly, regularly, procedurally



- and lawfully appointed as administrators. The applicants fears and or complaints are therefore unfounded and should be dismissed.
20. The 3rd respondent's sum total of its submissions and case law relied upon in opposing the application herein on the other hand basically dwelt on principles that guide the court in exercise of its mandate in determining whether to grant or otherwise decline injunctive relief in normal civil processes alien to injunction reliefs envisaged under Rule 5(2)(b) of this Court's Rules. We therefore find it prudent not to assess them herein.
 21. We have considered the record in totality in light of the above assessed rival positions but, before we delve into the merits of the application, we find it prudent to deal with the preliminary issue raised by the 1st and 2nd respondents in their submissions that the applicants stand nonsuited on their application for fusing two rulings arising from IC No. E092 and IC No. E093 both of 2021 which were allegedly never consolidated at the trial into one appeal and the application under consideration.
 22. Our take on the above 1st and 2nd respondents' complaint is that the proper course for them to take should have been to file an application to strike out the alleged offending process. We know of no rule of procedure in this Court's rules that mandates us to act on submissions to vitiate a pleading. We therefore reject that invitation. We sustain the application and shall now proceed to determine its merits.
 23. Our invitation to intervene on behalf of the applicant has been invoked under Rule 5(2) (b) of this Court's Rules. The principles that govern the exercise of the above mandate have now been crystallized by case law enunciated by this Court. On the extend of our mandate, we take it from *Butt v Rent Restriction Tribunals [1982] KLR 417*, *Githunguri vs. Jimba Credit Corporation Ltd [1988] KLR 838*, among numerous others, all for holdings/propositions that the exercise of the Courts mandate under Rule 5(2) (b) of this Court's Rules is purely discretionary and which discretion is unfettered. The mandate only lies if a notice of appeal has been lodged against the decision or ruling appealed against. It is not only original but also a procedural innovation designed to empower this Court to entertain an interlocutory application for the preservation of the subject matter of the appeal in order to ensure the just and effective determination of the appeal. Lastly, it is exercised for the ends of justice to be met in favour of both parties.
 24. On the prerequisites that guide the exercise of the above mandate, we take to mind the decision in *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County of Nairobi Government & 3 others [2013] eKLR*; and *Stanbic Bank Kenya Limited v Kenya Revenue Authority [2008] eKLR*, among others, for holdings/propositions that: that there is no jurisdiction to grant relief under Rule 5(2) (b) of this Court's Rules where the High Court's order either resulted in a dismissal or a striking out orders or, alternatively, where the court did not order either party to do or refrain from doing something capable of being restrained; that under the said Rule, this Court has mandate to grant only three orders, namely an order staying the proceedings, an order staying execution of the Superior Court and, lastly, an injunction order; that where the court is not being asked to issue an order of status quo, there is no jurisdiction to grant relief under the said Rules; that in order for an applicant to succeed for grant of relief under the said Rule, the applicant is obligated to demonstrate that, firstly, that the appeal/intended appeal is arguable. By being arguable, it does not mean that the appeal or intended appeal must succeed, but one that raises a bona fide issue not only worthy of consideration by this court but also warrants the Court's invitation to the opposite party to respond thereto; that demonstration of existence of even one arguable point would suffice. Lastly, both limbs must be demonstrated to exist before one can obtain relief under Rule 5(2) (b).



25. The principles enunciated in the case law highlighted above have now been crystallized in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* and which we fully adopt in the determination of this application. We have applied the above crystallized threshold to the rival position herein. Our take thereon is that, while in their submissions learned counsel for the rival respective parties herein gravitated towards their perceived merits and demerits of the intended appeal, we steer clear of that path and refrain from pronouncing ourselves thereon lest in doing so we either preempt or embarrass the outcome of the intended appeal. In the circumstances, we shall confine ourselves to dealing with the single issue falling to be determined by this Court, namely whether the applicants' Motion satisfies the requirements for the grant of stay or injunction under Rule 5(2)(b) of the Rules of this Court.
26. Having considered in totality of the record as laid before us, we form the considered view that the Applicant's Motion stands or falls on two main grounds:
- a. whether the appeal is arguable, which is to say, it is not frivolous; and
 - b. whether the appeal, if successful, would be rendered nugatory if stay was not granted.
27. The principles that guide the discharge of our mandate in applications under Rule 5(2)(b) of the Court of Appeal Rules for stay of execution or an injunction pending appeal or intended appeal assessed above, and which we fully adopt, have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if such injunction restraining further administration of the appellants in consequence of the impugned Ruling were not granted. These principles have been enunciated in various judicial pronouncements of this Court, including those cited by the parties and which, as we have pointed out above, are as highlighted among numerous others.
28. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara & IEBC [2020] eKLR* that, for stay orders to issue in similar cases, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
29. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others [2014] eKLR* observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
30. The applicants have advanced fourteen (14) grounds of appeal which they intend to take up on appeal. We have considered these against the totality of the record as assessed above. We draw the conclusion that the applicant's grievance revolves around (a) the legality of the appointment of the joint administrators in enforcement of the Debentures and Charges in issue; (b) the qualifications of the joint administrators; (c) the meaning, intent and effect of the various debentures, charges and further charges executed between the applicants and the 3rd respondent;
- (d) the applicants' complaint relating to the manner in which their administration is being undertaken;
- (e) whether the alleged default on the part of the applicants is by any means excusable on account of the prevailing COVID-19 pandemic and the declining economic conditions; and (f) what sums (if any) are due for recovery, and by what means.



31. In view of the foregoing, we are satisfied and, accordingly, find and hold that the intended appeal is arguable. It is not frivolous. That satisfies the first limb of the twin principle for grant of the orders sought. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted.
32. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA p.227* at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. We have similarly applied this second threshold to the totality of the record as assessed above.
33. The position we take on this score is that we are not persuaded that the circumstances prevailing herein as portrayed by the rival position in the application before us call for temporary orders restraining the respondents from continuing with the administration of the applicants pending hearing and determination of the intended appeal. In our considered view, what is sought to be restrained has already taken effect. Granting an injunction in the manner sought for by the applicants would be tantamount to granting a mandatory injunction not provided in the rule as one of the reliefs falling both for consideration or grant under Rule 5(2) (b).
34. Further, as already pointed out, our mandate is limited to granting stay of execution or proceedings, or injunction in proper cases. We reiterate that a mandatory injunction is alien under the provision under which our mandate has been invoked. It is also our view that reversing the status quo currently obtaining on the ground may adversely impact negatively on the mutual interest of the parties in relation to the financial management of the applicants in the face of insolvency during the pendency of the determination of the appeal. Moreover, it might result in precisely what the applicants seek on appeal.
35. On the totality of the above assessment and reasoning, we find nothing to suggest that the continued administration of the applicants in the absence of stay or restraining orders would render the intended appeal nugatory in the event that the appeal succeeds. Our reason for holding this view is that it is evident from the record that the 1st and 2nd respondents are not only accountable to the 3rd respondent, but also to the applicants for the manner in which they administer and manage the business affairs of the applicants under insolvency. May we also add that any maladministration or mismanagement can be adequately compensated or redressed by an award of damages.
36. In conclusion, we find and hold that the correct position in law is that both limbs must be satisfied before a party can be granted relief under the above rule. Since the applicants have succeeded only on one limb, the application therefore fails. We therefore, make orders as follows:
 - a. The Applicant’s Notice of motion dated 5th January 2022 is hereby dismissed;
and
 - b. The costs of this application be costs in the appeal.
37. Orders accordingly.

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

R. N. NAMBUYE

.....

JUDGE OF APPEAL



A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

