



**Kakoompe v Ogola t/a Ogola Okello and CO. Advocate & 4 others (Civil Application E328 of 2021) [2022] KECA 903 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 903 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E328 OF 2021  
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA  
APRIL 28, 2022**

**BETWEEN**

**ELIKANA KURASH KAKOOMPE ..... APPLICANT**

**AND**

**D.O. OGOLA T/A OGOLA OKELLO AND CO. ADVOCATE .. 1<sup>ST</sup> RESPONDENT**

**KCB BANK KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MBUKOE INVESTMENTS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED .... 4<sup>TH</sup>  
RESPONDENT**

**DIRECTOR DCIO ..... 5<sup>TH</sup> RESPONDENT**

*(An application for stay pending the lodging, hearing and determination of an intended appeal from the whole ruling of the High Court at Nakuru (Matheka, J.) delivered on 2nd September 2021 in Nakuru Misc. Civil Application No. E028 of 2021)*

**RULING**

1. The applicant seeks an order of injunction on property LR No. 8395 staying any further transactions in any manner whatsoever and suspending withdrawal of the funds totalling KShs. 16,800,00/= held at Kenya Commercial Bank, KICC Branch, by the 1st Respondent, a firm of advocates.
2. The grounds forming the basis of the application are set out on the face of the application as follows: The applicant is aggrieved by the ruling/order issued by Matheka J on September 2, 2021 in Nakuru Misc. Civil Application No. E028 of 2021 and intends to appeal against the whole ruling. The ruling dismissed the applicant's notice of motion applications dated February 11, 2021 and March 12, 2021 with costs to the respondents.



3. The appellant contends that the ruling offends the provisions of *the Constitution* of Kenya as it has denied the applicant the right to be heard. The applicant filed the notice of appeal on 8th September 2021. It is the applicant's case that there is imminent risk that the respondents may transfer the said property and withdraw the said funds. That the appeal raises a substantial issue of law and facts, is arguable and has overwhelming chances of success. That no prejudice will be visited upon the respondents if the prayers sought are granted. The application is supported by an affidavit sworn by the applicant on September 10, 2021.
4. In their submissions, Counsel for the applicant submitted that the applicant has satisfied the twin principles of arguability and the nugatory aspect to entitle him to the orders sought. That the intended appeal is arguable, as it deals with the question of the withdrawal of the funds totalling KShs 16,800,000/= and further dealing with the suit property. On the nugatory aspect, Counsel submitted that if the orders sought are not granted, the respondents will withdraw the colossal funds and deal with the suit property in a negative way.
5. The 1st and 2nd respondents opposed the application through a replying affidavit sworn by the 1st respondent. The respondents averred that the alleged funds were withdrawn prior to the commencement of the suit in the superior court and paid to the intended beneficiary, a fact which was disclosed to the honourable court before the hearing and determination of the application. That the superior court having dismissed the application, the orders issued are thus incapable of execution. The respondents contended that there is nothing to stay in this matter as the funds sought to be preserved were not in the possession of the 1st and 2nd respondents prior to the commencement of the suit in the superior court. That the applicant has not demonstrated that he has an arguable appeal due to the fact that ownership of L.R. No. 8395 was not an issue for determination before the superior court. That the intention of the application is to vex the respondents with litigation.
6. Counsel for the 1st and 2nd respondents filed written submissions. Counsel reiterated that the applicant does not have an arguable appeal and that there is no evidence that the applicant will suffer substantial loss and, further, that the applicant has not established any interest he has over L.R. No. 8395. On the nugatory aspect, Counsel submitted that the applicant is seeking to stay the dismissal of their application filed in the superior court which is a negative order.
7. That the applicant was not ordered to do anything or refrain from doing anything. Counsel relied on the cases of *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR and *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR for the proposition that no stay orders can arise from orders dismissing a suit or an application where there is no positive order capable of execution, and that the issues of substantial loss or the appeal being rendered nugatory do not arise. He urged this Court to dismiss the application.
8. As provided under Rule 5(2) (b) of the Court of Appeal Rules, this Court exercises unfettered original, independent and discretionary jurisdiction to order a stay of execution, an injunction or a stay of any further proceedings in civil proceedings where a notice of appeal has been lodged. The objective of this discretionary power is to preserve the subject matter of the appeal. See *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR.
9. Applications seeking the exercise of this Court's discretion under Rule 5 (2) (b) are subjected to a two-pronged test, as stated in *Bob Morgan Systems Ltd & another v Jones* [2004] eKLR:

“The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly,



that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory”.

10. Regarding the consideration of whether the appeal is arguable, this Court in [Stanley Kang’ethe v Tony Keter & 5 others](#) [2013] eKLR elaborated as follows:

- “vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v 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. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”

11. In the present application, the applicant did not annex a draft memorandum of appeal to assist in revealing the issues that the applicant desires to raise before the Court in the intended appeal. Failure to annex a draft memorandum of appeal, however, is not a fatal omission in so far as the arguability of the intended appeal can be assessed from the grounds set out on the face of the application. See [Somak Travels Ltd v Gladys Aganyo](#) [2016] eKLR.

12. The applicant averred that the ruling runs against the provisions of [the Constitution](#) as it had denied him his right to be heard. The applicant however failed to point out the specific errors of the superior court’s ruling that support his averment. The applicant has therefore not demonstrated any arguable ground, and has essentially kept this Court in the dark about the grounds to be set forth in the intended appeal. This application therefore has not satisfied the arguability requirement.

13. Regarding whether the appeal would be rendered nugatory in the absence of the orders sought for stay of execution, it was held in [Stanley Kang’ethe v Tony Keter & 5 others](#) [supra] that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved. In *Reliance Bank Limited v Norlake Investments Ltd* [2002]1 EA 227, it was held that this Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders on the applicant against any suffering the respondent might undergo while awaiting the hearing and determination of the appeal.

14. In the present application, the applicant’s interest in L.R. No. 8935 is not clear from the evidence and material on record. The applicant has not demonstrated the injury or loss he will suffer should there be any dealings with the property. Furthermore, the applicant has not demonstrated that the disbursement of the KShs 16,800,000/= would be irreversible if his appeal succeeds. In fact, the evidence on record indicates that the funds may have already been disbursed even before the applicant brought his application in the superior court. The upshot is that the application also fails to satisfy the nugatory aspect.

15. The applicant having failed to establish the two limbs required in such applications, this application fails and is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**HANNAH OKWENGU**

.....

**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**

