



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sea Angel Services Ltd v Abdul (Civil Application  
E011 of 2020) [2022] KECA 594 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 594 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E011 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JUNE 24, 2022**

**BETWEEN**

**SEA ANGEL SERVICES LTD ..... APPLICANT**

**AND**

**YUSUF ABDUL ..... RESPONDENT**

*(An application for stay of execution of the decree in Mombasa RMCC 2957 of 2006 pending hearing and determination of the appeal against the judgment of High Court at Mombasa (Justice P.J. Otieno) in Mombasa High Court Civil Appeal No 108 of 2013 dated and delivered on 3rd May 2017)*

**RULING**

1. The application before this Court for ruling is a Notice of Motion dated 27<sup>th</sup> October 2020, which seeks orders that pending hearing and determination of the intended appeal against the decision of the High Court (P.J. Otieno J.) delivered in Mombasa High Court Civil Appeal No 108 of 2013, there be a stay of execution of the decree in Mombasa CMCC 2957 of 2006. The application is supported by an affidavit of even date sworn by Gulamhussein Fakrudin Gulamhussein, the Applicant's Director, and is based on the fact that the Respondent has obtained a certificate of costs in Mombasa CMCC 2957 of 2006 which he intends to execute, pursuant to the impugned judgment of the High Court which granted the Respondent costs of the suit in Mombasa CMCC 2957 of 2006 and of the appeal therefrom in Mombasa High Court Civil Appeal No 108 of 2013. Further, that the Respondent has also indicated his intention to tax the Bill of Costs in Mombasa High Court Civil Appeal No. 108 of 2013.
2. In response, the Respondent apposed the instant application by way of a replying affidavit he swore on 25<sup>th</sup> February 2021. The Respondent's case is that under Rule 75 of the *Court of Appeal Rules* of 2010, the instant application herein should be premised on a valid Notice of Appeal, and that the filing of an application by the Applicant for extension of time to file a Notice of Appeal repudiates



- the existence of a valid notice of appeal. The Respondent explained that after the Applicant filed its Record of Appeal in the substantive appeal being in Mombasa Civil Appeal No 116 of 2019 on 26<sup>th</sup> August 2019, he subsequently filed an application dated 30<sup>th</sup> September 2019 to strike out the Record of Appeal, whereupon the Applicant filed the application for extension of time to file a fresh Notice of Appeal on 27<sup>th</sup> November 2019, and that the said applications are pending hearing. The Respondent annexed copies of the said applications.
3. A brief background to the application is that the Applicant had filed a suit in the subordinate Court in Mombasa RMCC 2957 of 2006 against the Respondent, for the sum of Kshs. 281,604/= and interest thereon, and judgment was awarded in his favour. On appeal, the High Court, by the impugned judgment delivered in Mombasa High Court Civil Appeal No. 108 of 2013 set aside the subordinate Court's judgment on account of the Applicant's suit being time-barred, and awarded the Respondent the costs of the suit in the subordinate court and of the appeal, which is the decision being challenged in the appeal filed in this Court.
  4. Learned counsel Mr. Atancha appeared for the Applicant during the hearing of the instant application on 14<sup>th</sup> March 2022, and relied on his respective written submissions, while noting that he filed a Notice of Appeal which was in his Record of Appeal of the substantive appeal. There was no attendance on behalf of the Respondent, although we note that his advocates filed written submissions dated 25<sup>th</sup> February 2021, which we have relied on. The main issue for determination in this application is whether the Applicant has met the threshold for grant of the prayers sought.
  5. The Respondent has in this respect challenged the jurisdiction of this Court' to grant the orders sought by the Applicant, on the ground that there is no valid Notice of Appeal, since the Applicant moved this Court to withdraw the said Notice of Appeal. It is indeed the position that this court is properly seized of an application for stay of execution under Rule 5(2) (b) where a notice of appeal has been lodged in accordance with Rule 75 of the *Court of Appeal Rules*. The said rule requires the said Notice of Appeal to be lodged within 14 days of the judgment intended to be appealed against. This position was also confirmed by this Court in *Halai & Another v Thornton & Turpin* [1963] Ltd. [1990] KLR 365.
  6. There was no Notice of Appeal annexed to the affidavit in support of the instant application, nor in the Record of Appeal in Mombasa Civil Appeal 116 of 2019, which the Applicant's counsel referred us to. However, the Applicant did annex a copy of a Notice of Appeal lodged on 17<sup>th</sup> May 2017 against the impugned judgment delivered by the High Court on 3<sup>rd</sup> May 2017, in its application dated 27<sup>th</sup> November 2019 filed in Mombasa Civil Application 110 of 2019, in which it sought to have the said Notice of Appeal withdrawn and leave to file a fresh Notice of Appeal. We also note that a ruling dated 9<sup>th</sup> July 2021 was delivered by M. Warsame J.A., dismissing the said application. We therefore find that since the Notice of Appeal dated 17<sup>th</sup> May 2020 was lodged within time, is still on record, and no evidence has been brought that it has not been struck out, we are properly seized of the instant application.
  7. We will therefore proceed with an examination of whether the Applicant has satisfied the twin limbs restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR, namely that it has an arguable appeal, and that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. On the first limb, the Applicant's counsel urged that the Applicant has an arguable appeal, as the High Court erred in addressing the issue of limitation of time, which had not been raised on appeal, and that his appeal is therefore not idle or frivolous. The Respondent's counsel on his part submitted that costs are the only element of the impugned judgment capable of being executed, and the instant application is therefore an aberration. We are however cognisant of the fact that in the first limb of an arguable appeal, the Applicant need only



demonstrate one arguable ground, and further that an arguable appeal is not necessarily one that will succeed. The Applicant has raised concerns on whether its suit in the subordinate court was time barred, which in our view is an issue of law that merits consideration by this Court. To this extent we find that the Applicant’s intended appeal is arguable.

8. On the second limb, the Applicant’s counsel submitted that the subject matter of the appeal, which according to him is the costs, should be preserved, and urged this Court to find that the Respondent will be unable to refund the costs in the event the Applicant’s appeal is successful. The Respondent’s counsel submitted that it has not been shown how the intended appeal will be rendered nugatory should the stay be refused, and no offer of security has been put forth by the Applicant.
9. In this regard, we note that the instant application is firstly seeking a stay of execution of “the decree in Mombasa CMCC 2957 of 2006”. This prayer for stay is misplaced and cannot be granted, as the said decree was set aside by the impugned judgment of the High Court on appeal, which judgment has not been overturned. The said decree is in effect non-existent, and there is nothing to be stayed to this extent. In his submissions, the Applicant’s counsel submitted that he is seeking to stay the certificate of costs issued in in Mombasa CMCC 2957 of 2006, so as to preserve the appeal from the High Court’s judgment. It is also notable in this regard that the impugned judgment by the High Court was a negative order which is incapable of stay, as held by this Court in *National Cereals and Produce Board v Errad Supplies & General Contractors Limited*, Nairobi Civil Application No. Nai 48 of 2012 and *Nguruman Limited v Shompole Group Ranch & Another*, Civil Application No. Nai 90 of 2013, [2014] eKLR.
10. Lastly, it was held in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. It is not evident how the Applicant’s appeal will be rendered nugatory as the judgment of the High Court appealed against was a negative order, and as costs are a money judgment, it is our view that the Applicant can also be adequately compensated by damages if his appeal is found to be successful. We therefore find that the Applicant has not met the threshold for the second limb for these reasons.
11. We accordingly find that the Applicant’s Notice of Motion dated 27<sup>th</sup> October 2020 is not merited, and the said application is accordingly dismissed with costs to the Respondents.
12. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF JUNE, 2022.**

**S. GATEMBU KAIRU (FCI Arb)**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**



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

**DEPUTY REGISTRAR**

