



Roysambu Distributors Limited v Kenya Breweries Limited (Civil Application E285 of 2021) [2022] KECA 882 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KECA 882 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E285 OF 2021
K M'NOTI, F SICHALE & S OLE KANTAI, JJA
JUNE 10, 2022**

BETWEEN

ROYSAMBU DISTRIBUTORS LIMITED APPLICANT

AND

KENYA BREWERIES LIMITED RESPONDENT

(An Application under Rule 5 (2) (b) of the Court of Appeal Rules for Stay of Execution of the Judgment and Decree of the High Court of Kenya (Majanja, J) dated 26th March 2021 IN HCCC No. Comm 648 of 2005)

RULING

1 Roysambu Distributors Limited (the applicant herein), has moved this Court vide a motion dated 12th August 2021, pursuant to provisions of Rule 5 (2) (b) of this Court's Rules seeking the following orders:

- “1. Spent.
2. THAT pending hearing and determination of the current Civil Appeal, a temporary stay of execution be issued staying execution of the decree in Nairobi High Court Civil Case No. Comm 648 of 2005 involving Roysambu Distributors Ltd versus Kenya Breweries Limited contained in the judgment dated 26th day of March 2021.
3. THAT costs of this application be provided for.”

2 The motion is supported by the grounds on the face of it and an affidavit sworn by James Maina Muchami, the applicant's Director, who deposed *inter alia* that the suit proceeded ex-parte on 10th



February 2021, without his presence whereupon his claim was dismissed without being heard and judgment entered for the respondent in the sum of Kshs 7,541,480/= on 26th March 2021.

- 3 He further deposed that he was aware about the hearing date but he did not participate in the trial owing to the failure by the Court to connect him through the link provided on the cause list for *Majanja J*, on 10th February 2021 and that as such, failure to participate in the trial was excusable and the Court should exercise its discretion by granting him an opportunity to prosecute his claim.
- 4 On 11th April 2022, the motion came up before us for hearing “**via GoToMeeting video link**” on account of the Covid-19 protocols. Mr. Wachakana learned counsel appeared for the applicant whereas Miss Gatuhi appeared for the respondent. The parties further sought to fully rely on their written submissions.
- 5 It was submitted for the applicant that the pending appeal is meritorious as it raises several serious issues of law based on excusable mistakes of law and that the same would be rendered nugatory and superfluous if the decree of the High Court is executed before the hearing and determination of the pending appeal.
- 6 On the other hand, it was submitted for the respondent that the relief sought by the applicant under Rule 5 (2) (b) of the rules of this Court does not issue as a matter of course and that this Court should note the background in this matter as held by the High Court and dismiss the application with costs for the reasons *inter alia* that the applicant had approached the Court with unclean hands and that based on the applicant’s conduct, there were real doubts as to the arguability of the appeal.
- 7 On the nugatory aspect, it was submitted that the respondent was a going concern and the applicant had not proved that it will not be in a position to refund the decretal amount if execution proceeds and the appeal succeeds.
- 8 We have carefully considered the motion, the grounds thereof, the supporting affidavit, the rival written submissions, the authorities cited and the law.
- 9 The applicant’s motion is brought *inter alia* under Rule (5) (2) (b) of this Court’s Rules. Rule 5 (2) (b) of the Rules, which guides the Court in applications of this nature provides:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

- a.
- b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

- 10 The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant or not to grant an order of stay of execution or injunction are now well settled. Firstly, an applicant has to satisfy the court that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal will be rendered nugatory. These principles were summarized by this



Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR as follows:

- 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.***
- v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- viii. An applicant must satisfy the Court on both the twin principles.
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- x. 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.
- xi. 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.
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

11 With regard to the first limb, it was submitted by the applicant *inter alia* that the trial judge acted in violation of Article 50 of *the Constitution* of Kenya by proceeding in the absence of the applicant and denied it a right to have the issues of law and fact decided in a fair manner. The applicant’s director at paragraph 4 of the supporting affidavit deposed *inter alia* that he was personally aware of the hearing date but contended that the reasons why he did not participate in the trial was because of failure by the Court to connect him through the link provided on the cause list for Majanja, J. on 10th February 2021. No evidence was however tendered to support this contention.

12 We have carefully perused the record and it is indeed apparent that the applicant was accorded several chances to be heard which unfortunately it did not utilize. Similarly, the alleged serious issues of law that the appeal raises have not been stated.

13 From the circumstances of this case, we are not satisfied that the applicant has demonstrated that it has an arguable appeal. As we had alluded to earlier, an arguable appeal is not one that must necessarily succeed. Of course we are mindful of the fact that we should not say more regarding this issue at this stage lest we embarrass the bench that will eventually be seized of the matter. Consequently, the applicant has not satisfied this Court on this limb.



14 On the nugatory aspect, it is indeed not in dispute that the respondent is a going concern and one of the largest companies in the country with a high turnover and it has not been demonstrated that it will not be in a position to refund the decretal amount if the appeal succeeds. Ultimately therefore, we are not satisfied that the applicant's appeal would be rendered nugatory if the orders sought are not issued.

15 In view of the above, and the applicant having failed to establish the twin principles for consideration by this Court in an application under Rule 5(2) (b) of this Court's Rules, the applicant's motion dated 12th August 2021 is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

K. M' INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

