



**Chigwell Holdings Limited v Ogumo & 2 others (Civil Application  
E100 of 2022) [2022] KECA 953 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KECA 953 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E100 OF 2022  
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA  
JULY 29, 2022**

**BETWEEN**

**CHIGWELL HOLDINGS LIMITED ..... APPLICANT**

**AND**

**ERICK OTIENO OGUMO ..... 1<sup>ST</sup> RESPONDENT**

**JULIET NAKHANU KITUYI ..... 2<sup>ND</sup> RESPONDENT**

**JACKSON MWANGI WAMBUGU ..... 3<sup>RD</sup> RESPONDENT**

*(An application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Makau, J.) dated 3rd March 2022 in Constitutional Petition No. E249 OF 2020)*

**RULING**

1. The application before us is dated 28<sup>th</sup> March 2022 brought under the provisions of Section 3A of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of this Court's Rules. The application seeks interim orders of stay of execution against portions of the judgment and decree of Makau, J. in Nairobi Constitutional Petition No. E249 of 2020 *Erick Otieno Ogumo & 2 Others Vs. Chigwell Holdings Limited & 2 Others*. It further seeks stay of taxation of the respondents' party and party bill of costs.
2. The same is premised on the grounds on the face of the motion, the supporting affidavit of Nirish Shah and the applicants' submissions dated 13<sup>th</sup> April, 2022. In a nutshell, the applicant's case is that by the said judgment and decree, the applicant was ordered to amongst others, provide a play area for the children in houses in phases 1, 2 and 3 of Phenom Park Estate, Langata ("the estate") and install water filtration systems in houses in phases 1 and 2 of the estate; all within ninety (90) days from the date of judgment. That being dissatisfied by the judgment and decree above, it proceeded to lodge a notice of appeal dated on 4<sup>th</sup> March 2022 in this Court. Apprehensive that it might be caught up by



- the strict timelines aforesaid, the applicant has approached this Court under Rule 5(2)(b) seeking for stay of execution of the said orders pending the hearing and determination of the intended appeal.
3. The applicant maintains that the intended appeal is arguable and not frivolous. To this end it has annexed the draft memorandum of appeal which raises eight grounds; amongst them, that the learned judge erred; in assuming jurisdiction in a dispute that was purely contractual; in finding that there were constitutional issues raised in the petition; in directing the applicant to install water filtration systems whereas it was not a licensed treated and or filtered water supplier and lastly, that the Court applied a restrictive interpretation of the provisions of *the Constitution*. The applicant also raises the issue of taxation of the party and party bill of costs which is in excess of Kshs.4,000,000 and if allowed to proceed, the respondents will move with alacrity to execute against the applicant to its detriment as there is no guarantee from the respondents that if the money is paid and the appeal succeeds, the same shall be recoverable from the respondents.
  4. The applicant relied on the cases of *Stanley Kangethe Kinyanjui Vs. Tony Keter & 5 Others* [2013] eKLR and *Gatirau Peter Munya Vs. Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR regarding the threshold an applicant in an application of this nature must attain before being granted the prayers sought. First, that he must demonstrate that the appeal or intended appeal is arguable and not frivolous. Secondly, that the appeal or intended appeal, if successful will be rendered nugatory absent the orders sought. It was its submission that it had met the threshold and ought therefore to be granted the prayers sought.
  5. The respondents did not file a replying affidavit or any documents in opposition to the application. Instead they filed written submissions. It is the respondents' submissions that, the notice of motion should be dismissed as it offends Rule 75(3) of this Courts Rules to the effect that every notice of appeal should state whether it is intended to appeal against the whole or part only of the judgment. In the instant case, the notice of appeal states that the applicant intends to appeal against the whole of the decision of the High Court whereas in the notice of motion under consideration, the applicant is seeking a stay of execution of portions of the judgment and decree. They rely on the decision of the Supreme Court in the case of *Apungu Arthur Kibira Vs. IEBC & 3 Others* [2019] eKLR for the proposition that where a Notice of Appeal is defective, the Court of Appeal in exercising its discretion cannot allow parties to hide behind
  4. Article 159(2) of *the Constitution* to cure the defect. Further, that the applicant had failed to demonstrate that it has an arguable appeal as the issues raised in the purported grounds were all settled in the trial court.
  5. That if the application is allowed, the injury that will be suffered by the respondents will be great and irreversible as the lives of the residents and their children will continue to be in danger as they will continue to rely on toxic water daily exposing them to health hazards and equally that, the children play on the roads which are used by motor vehicles, hence exposing them to the danger of being knocked down by the said motor vehicles. That the applicant on the other hand has not demonstrated the nugatory aspect in case the prayers sought are not granted. Lastly, that the purported attempt to stay taxation of the party and party bill of costs is premature as it is not imminent. In the premises, they pray that the application be dismissed with costs.
  6. We have carefully considered the application, the rival submissions and the law. There is a notice of appeal duly filed, which grants this Court jurisdiction to entertain the application. See: *Safaricom Ltd Vs. Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR.
  7. The principles applicable in the exercise of this Court's unfettered discretion in dealing with applications brought under Rule 5(2) (b) are now well settled. Firstly, an applicant has to satisfy the



Court that he 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 would be rendered nugatory if successful. These principles were restated and amplified by this Court in the case of *Multimedia University & Another Vs. Professor Gitile N. Naituli* [2014] eKLR wherein it was stated:-

When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of *Stanley Kangethe Kinyanjui Vs. Tony Ketter & Others* [2013] eKLR...”

8. We turn to determine whether the applicant has satisfied the twin principles. As stated earlier, an arguable appeal is one that is not frivolous but raises bona fide issue deserving determination by this Court and a single bona fide issue would suffice as was held in the case of *Kenya Tea Growers\* Association & Another Vs. Kenya Plantation and Agricultural Workers Union* [2018] eKLR.
9. We are in no doubt at all that the grounds of intended appeal enumerated elsewhere in this ruling are not idle. They are sufficient to engage this Court’s mind on appeal. We accordingly find that the intended appeal is not frivolous but arguable.
10. On the nugatory aspect, 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. See: *Reliance Bank (in liquidation) Vs. Norlake Investments Ltd*,(2002) 1 EA 227.
11. The learned judge ordered the applicant to provide a play area for the children in the house in phases 1, 2 and 3 of the estate, separate and distinct from the parking area and install water filtration systems in the houses in phases 1 and 2 of the estate all within 90 days from the date of the judgment. The applicants have submitted that they do not have any extra grounds that will enable it to comply with the decree, and therefore it means that it will have to forego some other amenities to ensure compliance with the said judgment and decree. The applicant has asserted and which has not been countered by the respondents that it does not have alternative unutilized parcel(s) of land to enable it comply with the court decree. We may also add that by the time the intended appeal is filed, heard and determined, the ninety days moratorium granted by the trial court to the applicant would have long expired thereby exposing the applicant to execution of the decree in whatever kind including but not limited to citing the directors of the applicant for contempt. Further, and as part of executing the decree, the respondents have already filed a party and party bill of costs in the sum of Kshs.4,676,480.00 that may be taxed any time. No doubt the amount may end up being colossal. The applicant has deposed which has not been controverted by the respondents that should the taxed amount be paid out to the respondents, it may pose challenges in recovering the same should the appeal eventually succeed. With all the foregoing in mind, we are persuaded that the nugatory aspect has been demonstrated.
12. Before we pen off, we wish to comment on the submission by the respondents that that the application is anchored on a defective notice of appeal on the grounds already stated elsewhere in this ruling. We find this not to be a plausible reason to hinder us from entertaining the application. The Court here is



dealing with an application under Rule 5(2)(b) and all that a party is required to do is to file a notice of appeal in order to invoke the jurisdiction of the Court. The defectiveness or otherwise of such notice is a matter that an aggrieved party may take up elsewhere at an appropriate time to have it struck out.

13. As the applicant is required to demonstrate both limbs, which it has, this consigns its application to success. Accordingly, and for the foregoing reasons, this application is allowed in its entirety. Costs shall however abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

