



**Safaricom PLC v Laiser Communications Limited & 4 others (Civil Application E463 of 2021) [2022] KECA 800 (KLR) (29 July 2022) (Reason)**

Neutral citation: [2022] KECA 800 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E463 OF 2021  
HM OKWENGU, S OLE KANTAI & F TUIYOT'T, JJA  
JULY 29, 2022**

**BETWEEN**

**SAFARICOM PLC ..... APPLICANT**

**AND**

**LAISER COMMUNICATIONS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WIRSOFT AGENCIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AYOON COMMUNICATIONS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**EMERALD LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**SASHAMONEY LIMITED ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree of the High Court at Nairobi (Mabeya, J) delivered on 12th November, 2021 in HC. Commercial & Tax Division No. 196 of 2011)*

**REASON**

1. By a notice of motion dated 17<sup>th</sup> December 2021, the applicant Safaricom PLC sought orders under section 3A of the [Appellate Jurisdiction Act](#), and Rule 5(2)(b) of the [Court of Appeal Rules](#), to stay execution of the Judgment and Decree of the High Court (Mabeya, J), delivered on 12<sup>th</sup> November 2021, pending the hearing and determination of an intended appeal against the said judgment.
2. The application was supported by grounds stated on the motion and an affidavit sworn by Daniel Mwenja Ndaba (Ndaba). The suit leading to the judgment of the High Court, arose from a business arrangement between the applicant and the respondents, pursuant to which the respondents were dealers of the applicant's products including distribution of airtime and M-pesa transactions. In the course of the business, the respondents interacted with one Abdifatah Ali Alio (Abdifatah), who made various transactions involving the applicant's products. Payments purportedly made directly



to the applicant by Abdifatah were reflected in the respondents' dealer portals and goods delivered to Abdifatah by the respondents. It turned out that Abdifatah was a fraudster who colluded with the applicant's employees as no payments were in fact made to the applicant. When the applicant discovered the fraud it reversed all the transactions, froze the respondents' accounts and terminated the dealer agreements with the respondents, holding them responsible for the fraud.

3. The respondents jointly filed a suit in the High Court against the applicant, for breach of the dealership agreements, to which the applicant filed a defence denying liability. Upon hearing the suit, the learned Judge found *inter alia*, that as a result of the suspension and termination of the dealership and Mpesa agreements with the applicant, the respondents' business were completely destroyed. The learned Judge therefore, gave judgment in favour of the respondents for compensation for losses as follows:
  - i. 1<sup>st</sup> respondent – Kshs. 40,695,527
  - ii. 2<sup>nd</sup> respondent – Kshs. 31,220,708
  - iii. 3<sup>rd</sup> respondent – Kshs. 30,854,361
  - iv. 4<sup>th</sup> respondent – Kshs. 14,115,760
  - v. 6<sup>th</sup> respondent - Kshs. 47,962,452
  - vi. Interest at court rates from the date of filing suit until payment in full.
4. The applicant who was aggrieved by this judgment, filed a notice of appeal, and the motion now before us seeking stay of execution of the judgment. We heard this motion on 30<sup>th</sup> March 2022, and delivered a decision under Rule 32(5) of the *Court of Appeal Rules* 2010, granting the applicant's motion for stay of execution of the judgment and decree of the High Court pending the hearing and determination of Civil Appeal No. E104 of 2022 which the applicant had filed against the said judgment), and reserved the reasons for our decision. We now give the reasons.
5. The applicant maintained that it had an arguable appeal. A total of 16 grounds intended to be raised in the appeal were listed in the affidavit sworn by Ndaba. The applicant also provided a copy of a draft memorandum of appeal setting out the same grounds.
6. The applicant urged that the substratum of the appeal may be lost if an order of stay was not granted; that the decretal sum as per the award made by the learned Judge was Kshs 372,558,324.00 and it would suffer irreparable loss if the execution of the judgment is not stayed; that the means of the respondents is unknown and if payment is made to them and the appeal is successful, it would be difficult to recover the amount. The applicant indicated its willingness to provide security for the decretal sum.
7. The respondents opposed the motion through a replying affidavit sworn by Shukri Salat (Shukri), a director of the 5<sup>th</sup> respondent. Shukri deposed that the applicant's intended appeal is frivolous and not arguable; that the respondents will suffer significant prejudice if the order of stay is granted as they have been kept away from transacting business for the last 10 years, and that the Court should allow them to realize the fruit of their judgment by ordering the applicant to at least pay two thirds of the decretal sum directly to them, and provide security for the balance.
8. Further, Shukri deposed that the applicant had not satisfied the nugatory aspect of the application, as the decretal sum is not too large for the applicant who is one of the large telecommunications company in Kenya; that no reason had been given as to why the appeal would be rendered nugatory as the claim is a liquidated claim capable of being recovered from the respondents companies if necessary; and that the respondents companies are still in existence and no proof has been provided to show that they cannot repay the decretal sum if required to.



9. The applicant filed written submissions in which it reiterated that its intended appeal is arguable as it raises several issues; that the intended appeal if successful would be rendered nugatory unless the stay order is granted; that although the impugned decree is a monetary decree, it is currently standing at a colossal amount of Kshs. 372,558,324; and that the applicant has reasonable apprehension that the respondents will not be able to repay the amount if execution proceeds and the appeal is subsequently successful.
10. The applicant relied on several authorities including *Kenya Hotel Properties Limited vs. Willesden Properties Limited* [2007] eKLR, and *Housing Finance of Kenya vs Sharrock Kber Mohammed Ali Hirji & Anor* [2015] eKLR.
11. The respondents opposed the application and filed written submissions in which they argued, amongst other things, that the applicant's proposed grounds of appeal are without merit, as the learned Judge of the High Court addressed all the issues that were raised; that the applicant had failed to establish that its appeal would be rendered nugatory as it did not demonstrate that the respondents are not in a position to refund the sum awarded by the court; and that the applicant has only relied on a bare statement that the respondents' companies are no longer in existence. The respondents urged the Court to weigh and balance the competing claims of both parties, and find that the respondents who have been in the corridors of justice for the past ten (10) years, should not be exposed to further loss by the Court issuing orders of stay.
12. The respondents cited *Kenya Shell Limited vs Benjamin Karuga Kibiru & Anor* [1986] eKLR, for the proposition that execution of a monetary decree cannot render an appeal nugatory, and urged the Court not to place them in a disadvantageous position by denying them the fruits of their judgment.
13. We carefully considered the notice of motion, the contending submissions and the authorities cited and this the position that we take in this matter. It is now well settled that the determination of an application under Rule 5(2)(b) of the *Court of Appeal Rules* depends on the applicant establishing that it has an arguable appeal, and that if the order sought is not granted, the appeal is likely to be rendered nugatory. (*Republic vs Kenya Anti-Corruption Commission and 2 others* [2009] KLR 31, *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR).
14. The applicant listed several issues that it intends to raise in its intended appeal. The issues are anchored on the agreement and arrangement between the applicant and the respondents that gave rise to the suit before the High Court. Determination of the issues will require interrogation as to whether the learned Judge properly analysed the evidence and applied the law. There is also the issue of the role of Abdifatah, his relationship with the applicant and the respondents in the dealership agreements, and the legal consequences that arise therefrom. In addition, the applicant has contended that the learned Judge fell in error in considering unpleaded issues. All these are not frivolous matters and we are satisfied that the appeal is arguable.
15. On the nugatory aspect, it was not disputed that the decree is a monetary decree. In *Kenya Shell Limited vs Benjamin Karuga Kibiru & Anor* (supra), this Court held that a monetary decree would not be rendered nugatory by the mere execution of the decree. However, this position has since shifted. In *Kenya Hotel Properties Limited vs. Willesden Properties Limited* (supra), this Court had this to say regarding monetary decree.

“The decree is a monetary decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a monetary decree so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal would be able to repay the decretal amount plus any interest to the applicant.



However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on the grounds that the decree is a monetary decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all. Hence the cases such as Oraro & Rachier Advocates vs Cooperative Bank of Kenya Limited – Civil Application No. NAI 358 of 1999 (unreported) where it was held by this Court that if an applicant is compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable.

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It does appear to us that in considering the question as to whether the success of the intended appeal will be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the Court with the background of ensuring justice in mind.”

16. With the above in mind, we note the decretal sum in the decree sought to be stayed is a colossal amount of Kshs. 372,558,324.08 excluding interest. The applicant is apprehensive that it may not be able to recover these monies from the respondents because the respondents’ capability to repay the decretal sum in the event that the intended appeal is successful, is doubtful as their means of income is presently unknown. This was disputed by the respondents without any substantive facts or information. As held by this Court in *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403, the onus was on the respondents to rebut the claim regarding their financial capacity to refund the decretal sum if the appeal succeeds.
17. Of importance is the finding made by the learned Judge in the judgment subject of the intended appeal, that the breach of the agreement by the applicant had virtually destroyed the respondents’ businesses. The finding sheds light on the precarious position of the respondents, and it has not been demonstrated to us that this position has since changed. The applicant’s apprehension that it may not be able to recover the decretal sum should it succeed on appeal, is therefore not unfounded.
18. Accordingly, we confirm the order that we made on 30<sup>th</sup> March 2022:
  - i. That an order of stay of execution of the judgment of the High Court delivered on 12<sup>th</sup> November 2021 do issue pending the hearing and determination of the applicant’s appeal.
  - ii. Costs of the motion shall be in the appeal.

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

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**



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

*Signed*

**DEPUTY REGISTRAR**

