



**Young Traders Limited v Gumchem (K) Limited (Civil Application
E006 of 2021) [2022] KECA 719 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 719 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E006 OF 2021
DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA
JULY 22, 2022**

BETWEEN

YOUNG TRADERS LIMITED APPLICANT

AND

GUMCHEM (K) LIMITED RESPONDENT

(Being an application brought under Section 3, 3A of the Appellants Jurisdiction Act and Rule 5 (2) (b) of the Court of Appeal Rules seeking stay of execution and stay of further proceedings from the judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 6th November, 2020 in HCCC No. 804 of 2000)

RULING

1. Before us is a notice of motion dated 31st December 2020 in which Young Traders Limited herein referred to as “the applicant” seeks an order of stay of execution and further proceedings pending the hearing and determination of Civil Appeal No. E523 of 2020, Young Traders Limited Vs. Gumchem Kenya Limited. The appeal is from the judgment and decree of the trial court which awarded the respondent Kshs.11, 090,530 in damages.
2. The application is brought under Sections 3, 3A of the *Appellate Jurisdiction Act* and Rule 5 (2)(b) of this Court’s Rules. It is predicated on the grounds that: the applicant has to satisfy the judgment and decree; the applicant has already filed an appeal against the said judgment and decree which is arguable as can be seen from the memorandum of appeal; among the key issues to be canvassed before this Court is the fact that judgment was entered in favour of the respondent when it did not exist in law as it had been dissolved by the Registrar of Companies and a dissolution notice issued vide Gazette Notice No. 2217 of 24th March 2006; hence making it incapable of sustaining any legal suit; and that a company that has been dissolved cannot maintain a suit or any action and obtain and/or execute a judgment against any party? All these issues according to the applicant, make the appeal arguable with high chances of success and the orders sought ought therefore to be granted. That if the non-



existent respondent is paid the decretal sum, the applicant will not be able to recover the same hence, rendering the appeal nugatory. Further, that it will suffer irrecoverable loss; due to the current financial difficulties, the said amount which is colossal will be hard to raise at once and that the same is in any event disputed.

3. The application is further supported by the affidavit of Monica Wambui Kinuthia, a director of the applicant. In the affidavit she merely reiterates and expounds on the grounds above which we wish not to rehash. Suffice to add that the applicant, is apprehensive that the respondent may proceed to execute the judgment and decree to its detriment. That the respondent had been dissolved 14 years ago, a fact that was made public during the hearing of the suit in the trial court. Thus, it is a non-existent company. By virtue of this fact, the suit in the trial court was incompetent and a none-starter. The applicant further deposed that it was willing and able to obtain a Bank guarantee to secure the principal sum of Kshs.11,090,530 pending the hearing and determination of the appeal.
4. The motion is opposed by the respondent through a replying affidavit of John Peter Kamau Ruhangi, a director of the respondent. He deposed that: the respondent was a tenant of the applicant for 13 years before it was illegally, unlawfully and brutally evicted; the action necessitated the filing of the suit for damages in the trial court by the respondent; the suit was successful and an award of Kshs.11,150,530 in favour of the respondent was made; that the applicant is a rich company that owns several assets and thus it cannot be heard to claim that it is unable to raise the decretal sum; the deregistration of the respondent was an error that had been committed by the Registrar of Companies and which error had since been rectified after the High Court issued an order for the rectification of the register following a suit filed by the respondent being HCCC Comm. Misc. No. E733 of 2021; that in any event, the competency of the respondent's suit was never an issue in the trial court; the application does not meet the threshold for grant of prayers sought as it had not been demonstrated by the applicant what prejudice it will suffer if execution was to proceed before the hearing and determination of the appeal; the appeal is not arguable considering the evidence tendered and the judgment of the trial court; given the fact that the applicant had caused the delay of the hearing and determination of the suit in the High Court, it was still exploiting the same method to ensure that it does not satisfy the decree.
5. The applicant filed a further affidavit dated 9th March 2022 in which it denied knowledge of the existence of Miscellaneous Application No. E733 of 2021 and the order which rectified the purported error in the company records. That the issue of the respondent having been dissolved was equally brought to the attention of the trial court through the production of the Kenya Gazette Notice but was not considered by the trial court.

Parties filed respective written submissions. It was the applicant's submission that, the main issue in the appeal will be whether the respondent had capacity to maintain the suit before the trial court despite the fact that it had been dissolved. Further that the trial court relied on the assessment report by a person who did not appear before it to testify on his assessment report, which again makes the appeal arguable.

6. On the nugatory aspect the applicant submitted that without the order of stay, the respondent would proceed to execute the judgment to its detriment, as it will not be able to recover the amount considering that the respondent is none existent in law.
7. On the other hand, the respondent submitted that the applicant had not satisfied the twin principles for the grant of the prayers sought. That the issue of damages ought to have been raised in the trial court but the applicant failed to do so, and raising it before this Court does not demonstrate the arguability of the appeal. That the respondent was a juridical person as at the time the suit was instituted and



even at the time the trial court delivered its judgment on 6th November 2020. Accordingly, this makes oblique the applicant's assertion regarding arguability of the appeal.

8. On the nugatory aspect, the respondent submitted that the applicant had not made any effort to prove how failure to grant the orders sought would render the appeal nugatory but merely stated that without the stay order, the appeal will be rendered nugatory. The respondent relied on the cases of Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia [2021] and Chumo Arap Songok v David Kibiego Rotich [2006] eKLR to buttress the fact that an applicant filing an application under Rule 5(2) (b) must satisfy the twin limbs of arguability and nugatory aspect to be able to get the reliefs.

9. We have considered the motion before us, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited and the law. The jurisdiction under Rule 5 (2)(b) of this Court's Rules is discretionary and guided by the interests of justice. Therefore, in the exercise of this discretion, the Court must be satisfied that the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. The above principles were reiterated in the case of Trust Bank Limited & Another Vs. Investech Bank Limited & 3 Others [2000] eKLR in which this Court stated as below: -

“The jurisdiction of the court under Rule 5 (2)(b) is original and discretionary and it is trite law that to succeed, an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal if successful will be rendered

nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case.”

10. We start with the first limb. In order to arrive at an apt answer, we are guided by the holding in the case of Stanley Kang'ethe Kinyanjui v Tony Keter & 5 others [2013] eKLR where the Court stated as follows:

“(vii) 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.

(viii) 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.”

11. Bearing the above principles in mind and considering the grounds set out in the motion and the memorandum of appeal, we are of the view that the appeal is arguable for reasons inter alia, whether the respondent company was in existence at the time of filing the suit in the trial court, and the effects of its dissolution and deregistration by the Registrar of Companies are all questions that would require consideration by this Court thereby making the appeal arguable.

12. On the nugatory aspect, whether an appeal will be rendered nugatory depends on whether 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) v Norlake Investments Ltd [2002] 1 EA 227. The applicant has stated that the respondent is a company that had been deregistered 14 years earlier by the time the matter was before the trial court and as such, the judgment was given in favour of a non-existent person in law.



13. That if the respondent was to be paid the decretal amount plus interest the same would render the appeal nugatory for if it succeeded, there would be no way of recovering the money from a non-existent respondent.
14. Ordinarily a money decree if satisfied will not render an appeal or intended appeal nugatory. See the case of Kenya Hotel Properties Ltd v Willesden Investments Ltd [2007] eKLR. We note though that the applicant is willing and able to give a bank guarantee in its plea to have the stay order. We are satisfied that this is a proper case for the grant of a conditional stay.
15. We therefore grant a conditional stay to the extent that the applicant will provide a bank guarantee from a reputable financial institution of Kshs.20,000,000 within the next forty-five (45) days from the date of this ruling failing which the stay hereby granted shall automatically lapse. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY,2022.

D. K. MUSINGA, (P)

JUDGE OF APPEAL

.....

W. KARANJA

JUDGE OF APPEAL

.....

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

.....

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

