



Mulewa v Kenya Anti-Corruption Commission & another (Civil Application 13 of 2019) [2022] KECA 672 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 672 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 13 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JULY 8, 2022**

BETWEEN

JAMES MWATHETHE MULEWA APPLICANT

AND

KENYA ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

SHARKAT COMPANY LTD. 2ND RESPONDENT

(An application for stay of execution of the judgment of the High Court at Mombasa (E.K. Ogola J.) given on the 18th September 2017 in Mombasa HCCC Misc Application No 93 of 2011 (O.S))

RULING

1. James Mwathethe Mulewa, (“the Applicant”), has filed an application by way of a Notice of Motion dated March 14, 2019, wherein he seeks the following orders pending the determination of his intended appeal:
 - a) Stay of the execution of the judgment in High Court Miscellaneous Application Number 93 of 2011.
 - b) Release of all the properties and assets named in the orders given on the April 13, 2011 to the 1st Respondent, the said orders having lapsed.
 - c) In the alternative vacation of the orders given on 13th April 2011 restraining the “1st Respondent” (sic) from dealing with the parcels of land number MN/I/13483, MN/I/15351, MN/I/15275, and bank account numbers SV 1xxxxxxxxx TD 1xxxxxxxxx at Fina Bank, Nkurumah Road Branch and 0xxxxxxxxx at Prime Bank Mombasa Branch, on condition that the “1st Respondent” (sic) deposits with the Court the title documents of the property known as Kilifi/Viriko “A”/ 22 or such other terms as the Court may deem it just to impose in the circumstances.



2. The application is supported by an affidavit sworn by the Applicant of even date, and the grounds thereof are that a judgement was delivered on September 18, 2017 against the Applicant in High Court Miscellaneous Application Number 93 of 2011, where the Kenya shillings 63,688,794/=, being bank deposits made by the Applicant between August 31, 2008 and May 20, 2010, and parcels of land number MN/I/13483 and MN/I/15351 were found to be unexplained assets, and the Applicant was consequently ordered to pay to the Government the said sum of Kenya Shillings 63,688,794/=, and Kenya shillings 11,000,000/=, being the value of the immovable properties.
3. The Applicant's case in a nutshell, is that he was not given an opportunity to satisfy the court but the assets in question were acquired otherwise than as the result of corrupt conduct, and his right to a fair trial as expressly anticipated in Article 50 of the Constitution and section 55(5) of the Anti-Corruption and Economic Crimes Act was denied. According to the Applicant, section 55(5) of the Anti-Corruption and Economic Crimes Act require the trial Court to make a finding whether a plaintiff has established a prima facie case, before calling on a defendant to rebut the same, and that the High Court erroneously made a final judgment before exhausting this procedural requirement. The Applicant detailed the particulars and evidence he would have presented had he been given the chance to do so.
4. The Applicant contends that the Kenya Anti-Corruption Commission ("the 1st Respondent") has since made an application to execute the said judgment in the High Court by way of committal to civil jail, release of money in his bank accounts and attachment for sale of various parcels of land. Further, that he is ready to give as security his parcel of land known as Kilifi/Viriko "A"/ 22 which is valued at approximately Kshs 200,000,000/=.
5. The 1st Respondent apposed the instant application by way of a replying affidavit sworn on March 2, 2022 by its advocate, Francis O. Makori. The 1st Respondent's case is that the Applicant was invited to satisfy the High Court that the assets in question were acquired otherwise than as the result of corrupt conduct, and that the said Court gave appropriate directions and afforded the Applicant the opportunity to challenge evidence adduced by the 1st Respondent in its affidavits and to participate in the hearing. Further, that the 1st Respondent is obliged in unexplained wealth cases to demonstrate several things under section 55 of the Anti-Corruption and Economic Crimes Act, which duty it discharged, hence the outcome in the judgement delivered on September 18, 2017.
6. In addition, that the intended appeal will not be rendered nugatory if the prayers sought herein are not granted since the state has the means to reconstitute the Applicant in the event that he is successful, and that the public interest to permit the Applicant to retain that which has been found to be unexplained and acquired through corruption and which ought to be restored to the citizens of Kenya. Lastly, that as at December 5, 2018 the 1st Respondent had recovered Kshs. 1,336,304.25/= being part of decretal sum from the 2nd Respondent, and had recovered Kshs 20,817,082.35/= from the Applicant as at April 30, 2021. The 1st Respondent annexed copies of letters and documents from the Applicant's banks as evidence.
7. The 2nd Respondent herein, Sharkat Company Ltd, did not file any response to the application.
8. Learned counsel Mr. Wameyo for the Applicant, learned counsel Mr. Songole for the 1st Respondent, and learned counsel Mr. Gwahalla holding brief for Mr. Gikandi for the 2nd Respondent were present during the hearing of the application on March 8, 2022. Mr. Wameyo and Mr. Songole relied on their respective written submissions, while Mr. Gwahalla informed us that the 2nd Respondent did not file any submissions.
9. It is in this regard notable that the Applicant's application is brought pursuant to Rule 5(2)(b) of the Court of Appeal Rules of 2010, under which this court assumes jurisdiction to grant orders of stay of



execution, injunction or a stay of any further proceedings in any civil proceedings, where a notice of appeal has been lodged in accordance Rule 75 of the *Court of Appeal Rules of 2010*, which requires a 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; Civil Application 15 of 1990; [1990] KECA 17 (KLR).

10. The impugned judgment intended to be appealed against was delivered on September 18, 2017, and the fourteen days for lodging the Notice of Appeal therefore expired on October 2, 2017. The Applicant annexed a copy of a Notice of Appeal, which while dated October 2, 2017, shows that it was lodged out of time on October 9, 2019. However, no application was filed to strike out the Notice of Appeal as required by Rule 84 of the *Court of Appeal Rules of 2010*.
11. In the circumstances, we will proceed with a determination of the merits of the application, and in particular whether the Applicant has satisfied the twin applicable principles set out in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR; Civil Application 31 of 2013; [2013] KECA 378 (KLR) as to whether he has an arguable appeal, and if so, whether the intended appeal would be rendered nugatory if the orders of stay are not granted.
12. The Applicant's counsel reiterated that the trial Court erred by rendering a final judgment without a prima facie case having been established, and without providing the Applicant an opportunity to explain how he acquired the properties in issue as envisaged by section 55(5) of the *Anti-Corruption and Economic Crime Act* of 2003. In addition, that considering the fact that the cumulative value of Applicant's assets held by the 1st Respondent covers the decretal sum herein, the intended appeal stands the risk of being rendered nugatory in the event that the 1st Respondent executes the decree, and the 2nd Respondent stands to suffer no prejudice as since the value of Plot No. Kilifi/Viriko /"A"/ 22 which the Applicant offers as security is enough to secure the entire decretal sum if the intended appeal is not successful.
13. Mr. Wameyo pointed out during the hearing that the 1st Respondent is seeking to sell various additional properties of the Applicant in execution of the decree of the High Court, and referred us to a copy of the 1st Respondent's application for execution in the High Court, that was annexed in the affidavit in support of the instant application.
14. The 1st Respondent's counsel on his part submitted that the Applicant's application does not raise serious questions of law or a reasonable argument deserving consideration as the Applicant had the opportunity to defend the case before the trial court but failed to do so. The counsel reiterated that, the instant matter is reversible because the state has the means to restore the Applicant to the position he was in before the filing of the suit if his appeal is successful, and that the Applicant can therefore be compensated by way of damages. While citing the decision by the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & others*, Application No. 5 of 2014, the counsel further submitted that public interest in the present application does not lie in favour of the Applicant, and pointed out during the hearing that the properties that are the subject of execution were acquired from the unexplained assets.
15. In meeting the threshold for stay under Rule 5(2) (b) of the *Court of Appeal Rules of 2010*, the Applicant need only demonstrate one arguable ground of appeal, and further an arguable appeal is not necessarily one that will succeed. The Applicant has in this respect raised an issue as regards the procedure to be followed under the *Anti-Corruption and Economic Crime Act* of 2003 in the hearing of suits on unexplained assets and forfeiture of the same, which in our view merit consideration by this Court. To this extent we find that the Applicant's intended appeal is arguable.



16. On the second limb, it was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR added the public interest as an element to be considered in stay applications.
17. It is not disputed that the 1st Respondent has already secured substantial amounts of funds in the Applicant's accounts in execution of the decree, and in our view, even if the intended appeal may be arguable, it emerges from the replying affidavit of Francis Makori that recoveries of approximately Kshs. 20 million have already been made from the Applicant in partial fulfilment of the judgment for forfeiture of unexplained wealth of approximately Kshs. 74 million. We are persuaded that damages would adequately compensate the Applicant in the event of the appeal succeeding, and there is no suggestion that the 1st Respondent would not be in a position to make good such award. We therefore find that the Applicant has not met the threshold for the second limb for a grant of stay for these reasons.
18. Lastly, as regards the prayers on the interim orders given by the High Court on April 13, 2011, it is notable that most of the properties that were the subject of the said interim orders were also the subject of the impugned judgement and execution proceedings in the High Court, and the orders have therefore been overtaken by events to this extent. In any event, the High Court would be the proper forum if the Applicant is desirous of vacating any of the said orders.
19. We accordingly find no merit in the Notice of Motion dated March 14, 2019, which is hereby dismissed with no order as to the costs.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

