



Samson Ngugi Ichungwa t/a Grenair v National Industrial Credit Bank & 2 others (Civil Appeal (Application) E341 of 2021) [2022] KECA 1139 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1139 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E341 OF 2021
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA
OCTOBER 21, 2022**

BETWEEN

SAMSON NGUGI ICHUNGWA T/A GRENAIR APPLICANT

AND

NATIONAL INDUSTRIAL CREDIT BANK 1ST RESPONDENT

RAJU DHANANI 2ND RESPONDENT

JOSEPH GIKONYO T/A GARAM INVESTMENTS 3RD RESPONDENT

(An application for stay of proceedings in H.C.C.C No. 86 of 2010 pending the hearing and determination of the appeal against the entire ruling and orders of the High Court of Kenya (Ngenye, J.) dated 29th April, 2021 in Nairobi HCCC No. 86 of 2010)

RULING

1. Before us is a notice of motion dated 23th June, 2021 in which Samson Ngugi Ichungwa t/a Grenair (“the applicant”) seeks an order of stay of proceedings of HCCC No. 86 of 2010 pending the hearing and determination of the intended appeal. The application is made pursuant to Rule 5(2)(b) of the Court of Appeal Rules (“this Court’s Rules”). The grounds upon which the motion is based are inter alia, that: on 14th February, 2014 an interlocutory judgment on the counterclaim was entered in favour of the 2nd respondent against the applicant; the counterclaim was neither a liquidated claim nor seeking pecuniary damages that would warrant the entry of an impugned default judgment as mandatorily required under Order 10 Rule 4, 5, 6, 7 and 8 of the Civil Procedure Rules; the default judgment and the intended formal proof proceedings are unconstitutional and contra-statute; the applicant filed an application dated 6th November, 2019 seeking to set aside the interlocutory judgment which application equally sought to challenge the constitutionality and legality of the interlocutory judgment and the consequential orders. The application was however dismissed with costs on 29th April, 2021.



2. Aggrieved by the ruling and order, the applicant lodged a notice of appeal, which he followed up with the instant application. The application is supported by his affidavit dated 30th June, 2021 in which he deposes inter alia, that: he has a meritorious appeal with a high probability of success as it raises serious and arguable, factual, evidentiary and legal issues; he is reasonably apprehensive that unless the orders sought are granted, his constitutional right to fair hearing will continue to be infringed and will be subjected to illegal formal proof proceedings not supported by the law; the proceedings in the trial court were defective and the same had deprived the applicant of his inalienable and unlimited right of fair trial and that if the same are not quashed and set aside, he would irredeemably be condemned unheard; lastly, that the trial court had already fixed the suit for formal proof.
3. The respondents opposed the application by filing a replying affidavit. The 1st and 3rd respondents' replying affidavit is dated 8th July, 2021 and sworn by one, Stephen Atenya. It is their response that the application is res judicata as the issues raised were previously raised by the applicant in Nairobi Civil Appeal No. 38 of 2016 and equally raised in several other suits and applications, all of which were dismissed. That on the issue of setting aside the interlocutory judgment, this Court had upheld the ruling of the High Court declining to set aside the interlocutory judgment and found that the trial court did not err in dismissing the application. That the suit did not raise any constitutional issues, rather it was purely a commercial transaction. That the applicant lacked capacity to litigate issues of constitutional rights over the suit property as he was not a registered owner of the same. The case by the applicant against the respondent having been marked as overtaken by events by a ruling dated 31st July, 2015 and confirmed by this Court, staying the proceedings will be of no consequence. Finally, they depose that the application was only meant to help the applicant evade, delay justice and abuse court process by endless litigation.
4. The 2nd respondent's replying affidavit is dated 13th July, 2021 and sworn by himself. It is his case that the ruling dismissed the applicant's application hence, it was a negative order incapable of being stayed. That the applicant's properties Kikuyu/Kikuyu Block 1/48 and Kikuyu/Kikuyu Block 1/55 were charged to the 1st respondent to secure a loan facility and when he defaulted in servicing the facility, the 1st respondent released the securities and sold the properties by way of a public auction. Efforts by the applicant to stop the sale of the suit properties were unsuccessful as the trial court declined to stop the auction in Civil Case No. 287 of 2009. Dissatisfied with the ruling and order, the applicant made his way to this Court by way of Civil Appeal No. 38 of 2016 Samson Ngugi Ichungwa t/a Grenair vs. National Industrial Credit Bank & 2 Others, but this Court upheld the decision of the High Court. That the issue of interlocutory judgment had thus been dealt with in both the High Court and this Court and the suit has been set down for formal proof. That he had continued to suffer prejudice after obtaining a loan from the bank to the tune of KShs. 20 Million to purchase the suit properties and, had intended to use them for rental purposes. That as per the valuation report dated 4th September, 2013, the suit property would have fetched him monthly income of KShs. 343,000.00 translating into KShs. 4,116,000.00 per annum. In the meantime, the applicant has continued to collect rent from the suit properties in excess of KShs. 42,830,000.00 which act continues to prejudice the 2nd respondent. That the applicant's intention is to delay the matter forever as he is in possession of the suit properties to his detriment. He therefore, prayed for the dismissal of the application.
5. The application was canvassed by way of written submissions with limited oral highlights. The applicant submitted that he has an arguable appeal inter alia, on the grounds that the trial court erred in law and in fact in failing to consider that: the ex parte interlocutory judgment was by dint of the Civil Procedure Rules 2010, irregular; and that the court erred when it upheld the otherwise irregular default judgment on a counterclaim that was neither liquidated nor pecuniary. On the nugatory aspect, the applicant submits that the appeal will be rendered nugatory if stay of proceedings is not granted.



This is because the applicant will be evicted from the suit properties pursuant to the court order as he is in possession of the same, being his matrimonial home. To the applicant, if this was to happen, the substratum of the appeal will be lost forever.

6. The 2nd respondent's submissions merely reiterated and expounded on depositions in his affidavit hence the need not to rehash. The 1st and 3rd respondents did not file written submissions nor did they orally submit.
7. We have considered the application, the grounds in support thereof, the rival affidavits, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2) (b) of this Court's Rules is discretionary and is guided by the interests of justice. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled. For example, this Court in the case of *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“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...”
8. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
9. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR where this Court described an arguable appeal in the following terms:

“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.”
10. In our view, we doubt whether the intended appeal will be arguable. We say so because having looked at the history of this matter, the grounds of appeal that the applicant intends to ventilate before this Court on appeal have been raised and adequately addressed in several other proceedings and even before this Court. It is also not lost on us that the formal proof has already been conducted and is pending judgment in November, 2022.
11. As it is required that an applicant demonstrates both limbs of arguability and nugatory aspects in order to succeed in an application of this nature, and the applicant having failed to satisfy us on the arguability aspect, the fate of this application is sealed. We need not therefore consider the nugatory aspect. Accordingly, the notice of motion dated 30th July, 2021 is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

ASIKE-MAKHANDIA



.....
JUDGE OF APPEAL

J. MOHAMMED

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

