



**Easy Hotel Kenya Limited & another v Osero & Co Advocates; Easy Properties Limited (Judgment debtor) (Civil Application E410 of 2021) [2022] KECA 1104 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1104 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E410 OF 2021  
DK MUSINGA, W KARANJA & S OLE KANTAI, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**EASY HOTEL KENYA LIMITED ..... 1<sup>ST</sup> APPLICANT**

**MELLAPHEN LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**OSERO & CO ADVOCATES ..... RESPONDENT**

**AND**

**EASY PROPERTIES LIMITED ..... JUDGMENT DEBTOR**

*(An Application for stay of execution of the Ruling and Orders of the Environment and Land Court at Nairobi (Komingoi, J.) dated 18th November 2021 in E.L.C. Misc. No. 279 of 2013)*

**RULING**

1. Before this Court is an application under rule 5 (2)(b) of the Court of Appeal Rules, 2010 dated 23<sup>rd</sup> November 2021 where the applicant seeks stay of execution against order (b) of the ruling and decree by Komingoi, J. in ELC Misc No. 279 of 2013 delivered on 18<sup>th</sup> November 2021, pending the hearing and determination of an intended appeal.
2. In the impugned ruling, the learned judge declared the attachment of two motor vehicles registration numbers KBU 647D and KBN 126T as wrongful, but under order (b) of her ruling allowed attachment to proceed in respect of items 3 to 11 of the proclamation schedule, which included motor vehicle registration no. KBW 010W, gas cylinders, floor carpets, assorted plastic chairs, fridges, jikos, dining tables with chairs, 20 televisions and a computer.
3. Aggrieved by the said ruling, the applicant filed a notice of appeal dated 19<sup>th</sup> November 2021 and subsequently filed the application for stay of execution.



4. The application is supported by the grounds set out on the face of the application and those found on the supporting affidavit of Vincent Dequare, Co-director of Tiganeb LLC, the major shareholder of the applicant, sworn on the 23<sup>rd</sup> November 2021. The deponent simply states that the applicant has an arguable appeal and is willing to provide such security for the performance of the decree as the Court may deem fit, and urges the Court to grant stay of execution as sought.
5. In reply, the respondent has filed its replying affidavit sworn on 6<sup>th</sup> December 2021 by Lewis Ndemo Osero, its proprietor. The respondent challenges the competence of the application and seeks its dismissal for failure to attach a certified copy of the impugned ruling and order. Secondly, he argues that the applicant lacks locus standi to move this Court as the impending attachment and sale is against property of the judgment debtor and not the applicant. Thirdly, the respondent argues that the applicant has not proposed to serve its application upon the judgment debtor, whom they work in close association, and this to him is a clear indication that the application is intended to prevent the respondent from executing against the judgment debtor and realizing the fruits of its judgment.
6. Lastly, the respondent argues that the application is devoid of merit and does not meet the threshold required under rule 5(2)(b) of this Court's Rules. The respondent further argues that the applicant has not deposited security for the decretal sum of Kshs.3,440,555/-. For those reasons the respondent prays that the applicant's notice of motion be dismissed with costs.
7. The matter proceeded by way of written submissions filed by both parties, with oral highlights of the respondent's submissions by its advocate, Mr Migele. The applicant's advocate was not in attendance, though duly served with a hearing notice.
8. We have considered the submissions on record and the substance of the application. It is trite law that in an application of this nature an applicant has to satisfy the Court that the appeal or intended appeal is arguable and that if the order sought is not granted, the appeal, if successful, shall be rendered nugatory.
9. See *Multimedia University & Another v. Professor Gitile N. Naituli* [2014] eKLR. Regarding the issues raised by the respondent about the competence of the application, we are satisfied that the applicant has filed a proper notice of appeal and that is sufficient to enable it to pursue the application for stay of execution. It is not necessary at this stage that the applicant files a certified copy of the impugned ruling. The applicant also has locus standi to file the application since it was an objector to the attachment and claims ownership of the attached items. We shall therefore proceed to determine the application on its own merits.
10. In the draft memorandum of appeal, the applicant has raised the issue of ownership of the attached items, saying, inter alia, that the learned judge erred in law in failing to appreciate that it has legal and equitable interest in the attached property; and that it was not a party to the suit. These, in our view, are arguable issues.
11. On the nugatory aspect, we re-state what has been summarized by this Court in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR, that 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. In the instant application the applicant has not demonstrated how its appeal would be rendered nugatory if stay is not granted. The value of the attached items is quantifiable. The applicant has not alleged that if the attached items are sold and the appeal succeeds the respondent will not be able to compensate it for the loss it may have suffered. For this reason, we find that this limb has not been satisfied.
12. In view of the foregoing, we find that the twin principles have not been satisfied and therefore this application fails and is hereby dismissed with costs to the respondent.



DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

