



REPUBLIC OF KENYA



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**Ganjoni Properties Limited & 10 others v Al-Riaz International Limited;
Kamundi & another (Affected Party) (Civil Appeal (Application)
E090 of 2022) [2022] KECA 1347 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1347 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E090 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
DECEMBER 2, 2022**

BETWEEN

**GANJONI PROPERTIES LIMITED 1ST APPLICANT
LALITCHANDRA DURGASHANKER PANDYA 2ND APPLICANT
RAMESHCHANDRA DURGASHANKER PANDYA 3RD APPLICANT
JOEL TITUS MUSYA 4TH APPLICANT
JONATHAN MUSYA TITUS 5TH APPLICANT
JULIUS MAITHYA TITUS 6TH APPLICANT
KAMBUA MAITHYA 7TH APPLICANT
KYALO TITUS 8TH APPLICANT
MICHAEL KITILI TITUS 9TH APPLICANT
DIANA TITUS 10TH APPLICANT
RUTH MULEH (T/A MAKURI AUCTIONEERS LIMITED) 11TH APPLICANT**

AND

AL-RIAZ INTERNATIONAL LIMITED RESPONDENT

AND

**F. KINYUA KAMUNDI AFFECTED PARTY
MUYAA D. T (T/A KINYUA MUYAA & CO. ADVOCATES) . AFFECTED PARTY**

(An application for stay of proceedings pending the appeal from the ruling and orders of the High Court of Kenya at Mombasa (Njoki Mwangi J.) dated 15th July 2022 in Mombasa HCCC 158 of 2014)



RULING

1. There are two requirements that need to be met by the Applicants herein, so as to obtain a stay of proceedings in the High Court matter they have appealed from pending the hearing and determination of their appeal, being Civil Appeal No E091 of 2022, that they have filed in this Court. The first requirement is that the Applicants need to demonstrate that they have an arguable appeal, and second that the said appeal will be rendered nugatory if the stay is not granted. These two tests are settled by various decisions by this Court on applications for stay of proceedings brought under Rule 5 (2) (b) of the *Court of Appeal Rules, 2022*, as is the Applicants' application. The restatement and amplification of the applicable principles was aptly captured in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
2. The Applicants have sought the stay of proceedings in a Notice of Motion application dated September 26, 2022, which is supported by an affidavit sworn on September 26, 2022 by Kamlesh L. Pandya, a Director of Ganjoni Properties Limited, the 1st Applicant herein. The 2nd and 3rd Applicants are directors of the 1st Applicant, while the 4rd to 11th Applicants are business partners trading as Makuri Auctioneers. The Affected Parties, F. Kinyua Kamundi and Muyaa D. T. (trading as Kinyua Muyaa & Co Advocates), are the advocates for the 1st to 11th Applicants. The said application is in turn opposed by Al-Riaz International Limited, the Respondent herein, by way of a replying affidavit sworn on October 27, 2022 by its director, Rehan Riaz Malik.
3. What then is the Applicants' case in this regard? In summary, the Applicants state that the High Court, in a ruling delivered on July 15, 2022 refused to determine the issue of its jurisdiction, despite being directed to do so by this Court, and despite decided judicial authorities on the manner that the issue of jurisdiction is to be addressed. The Applicants relied on twenty-one (21) grounds of Appeal in their Memorandum of appeal, which they stated were arguable and not frivolous, and had overwhelming chances of success. That as a result, they would suffer irreparable loss by being forced to submit to a Court that had no jurisdiction. Additionally, that their appeal would be rendered nugatory should the learned Judge proceed to hear and determine a pending application for contempt before determining the issue on jurisdiction.
4. The Respondent on its part averred that the intended appeal was frivolous and only intended to delay the expeditious hearing of the jurisdictional issues and the suit in the High Court; that this Court, by directing that the jurisdictional issue be considered and determined on a priority basis as soon as reasonably practicable, did not in any manner dictate or direct to the High Court to entertain a Notice of Preliminary Objection that was not limited to pure issues of law, nor the manner of that determination of the Preliminary Objections; and that the High Court did not decline to determine the jurisdictional issue, which is yet to be determined by the court. Therefore, that the Applicants would not suffer any prejudice if the proceedings before the High Court are not stayed, since the Court will determine the jurisdictional issue when determining the application for contempt of court dated February 28, 2018.
5. The application before us is brought against the backdrop of the Applicants' appeal against the ruling delivered on July 15, 2022 by the High Court (Njoki Mwangi J.), in which the learned Judge dismissed two preliminary objections raised by the 4rd to 11th Applicants and the Affected Parties on the Court's jurisdiction, and directed that a contempt of court application dated February 28, 2018 filed by the Respondent against the Applicants and Affected Parties be heard and determined together with the



jurisdictional challenge. A brief procedural history of this matter is necessary, to put the said ruling and the instant application in context.

6. The Respondent filed a suit in the High Court on December 31, 2014 being High Court Civil Case No 158 of 2014 -Al-Riaz International Limited v Ganjoni Properties Limited against the 1st Applicant who was the owner of Plot no. Mombasa Block XX/340 and its landlord. It was the Respondent's case that the 1st Applicant had demanded a new monthly rent of Kshs 600,000/- as a condition for renewal of the tenancy agreement, failure upon which they would be required to vacate the suit premises by December 31, 2014. They argued that they had heavily invested in the suit premise and the forcible eviction would destroy their business and goodwill and additionally injure the innocent 3rd party customers. The Respondent thereby sought a declaration that the tenancy between the Respondent and the 1st Applicant was a controlled Tenancy as defined in the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), and the terms cannot be altered unless with the approval of the Business Premises Rent Tribunal; and an injunction order restraining the 1st Applicant from evicting the Respondent from Plot No. Mombasa Block XX/430.
7. The 1st Applicant on their part filed a defence and counterclaim dated February 24, 2015, where they denied the allegations in the Respondent's plaint and also counterclaimed for mesne profits at the rate of Kshs 900,000/= per month from January 1, 2015 to the time the Respondent would give vacant possession. They also prayed for vacant possession of the suit premises. Temporary orders of injunction restraining the 1st Applicant from evicting the Respondent pending the hearing of the suit were granted in a ruling delivered by the High Court (Kasango J.) on August 24, 2015, upon hearing an application that was filed contemporaneously with the suit. Various applications were subsequently made by the 1st Applicant and Respondent between 2016 and 2018 on the subject of the due rent and distress for rent, and various orders were made by the High Court in this regard, that culminated in the application dated February 22, 2018 for contempt of court application filed by the Respondent against the Applicants and Affected Parties. The Respondent alleged that various of its vehicles were attached and sold in a public auction, and it was evicted and locked out of the suit premises on various dates in January 2018 in disobedience of the various court orders granted by the High Court.
8. These allegations resulted in further orders by the High Court granted on 29th January 2018 for reinstatement of the status quo, and registration of a restriction against the transfer of any vehicles taken away and allegedly sold, and on February 1, 2018 for break-in orders to the suit premises, against which the 1st Applicant filed an interlocutory appeal to this Court, namely Civil Appeal No 14 of 2018 - [Ganjoni Properties Limited v Al-Riaz International Limited & Another](#). This Court (Visram, Karanja & Koome (as she then was) JJ.A) allowed the appeal in a judgment delivered on July 12, 2018, and set aside the orders granted by the High Court on 29th January 2018 and 1st February 2018. The Court in its judgment also observed as follows:

“26. We have considered the record, submissions by counsel and the law. The case at hand is an example of how matters can become convoluted as a result of applications being filed upon applications without any issue being conclusively determined. Be that as it may, jurisdiction is what clothes a court with the authority to determine a dispute before it. Without it a court is required to put down its tools otherwise any orders issued will be in futility. Owing to the significance of jurisdiction in any matter, once a challenge over the same is raised it should be addressed immediately. Nyarangi, JA. best put it in the celebrated case of Motor Vessel M.V. Lillian S v. Caltex Oil (Kenya) Limited [1989] KLR1:



“Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court.”

27. Mr. Ngonze mentioned that the parties had already put in written submissions with respect of the jurisdiction issue which is pending for determination. Without pre-empting the High Court’s decision on the same all we can direct is that the issue be considered and determined on priority basis as soon as reasonably practicable.”
9. A number of applications had in this regard been made in the High Court on the question of the jurisdiction of the Court to hear the suit, and of note was an application dated February 27, 2017 filed by the Respondent which sought inter alia, to transfer the suit to the Business Premises Tribunal for the assessment of the exact rent that the Applicant was entitled to pay; a preliminary objection filed by the 1st Applicant dated November 20, 2017 objecting to the jurisdiction of the High Court pursuant to the provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010, section 2 of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act and Section 13 (2) of the Environment and Land Court Act, 2011; and an application by the 1st Applicant dated December 18, 2017, where it sought inter alia, stay of proceedings in High Court Case No. 158 of 2014, pending the hearing and determination of ELC Suit No 458 of 2017- Ganjoni Properties Limited v Al- Riaz International limited, Rehan Riaz Malik and Usman Riaz Malik.
10. After the contempt of court application dated February 28, 2018 was filed by the Respondent, the Affected Parties, who were the 11th and 12th Respondents in the contempt of court application, also filed a Notice of Preliminary Objection dated March 5, 2018 contesting the jurisdiction of the Court to hear and determine any aspect of the suit, as did the 4th to 11th Applicants (who were the 3rd to 10th Respondents in the contempt of court application), in a Notice of Preliminary Objection dated March 8, 2018. These preliminary objections were the subject of the impugned ruling of the High Court dated July 15, 2022 that is appealed by the Applicants.
11. Coming back to the instant application, learned counsel, Mr. Kinyua Kamunde appeared for the Applicants during the virtual hearing held on November 7, 2022, and while relying on written submissions dated September 28, 2022 and submissions in rejoinder dated November 3, 2022, reiterated that the Applicants have an arguable appeal, since jurisdiction once challenged must be determined before any Court takes any further step in the proceedings as without jurisdiction all the proceedings are null and void. Further, that all judges of the High Court are bound by decisions and directions of the Court of Appeal and the Supreme Court of Kenya, and the trial judge failed to consider and to be bound by the decisions of these two Courts, and in particular by the express directions by the Court of Appeal that jurisdiction be determined without delay. Further, that without having determined the issue of jurisdiction, the learned Judge intends to hear an application by the Respondent against the Appellants and the Affected Parties for alleged contempt who would suffer severe prejudice by being compelled to submit to themselves to a court with no jurisdiction.
12. The position taken by Mr. Kinyua was supported by learned counsel Mr. Tukero Ole Kina who appeared for the Affected Parties, who added that the High Court was bound by the principle of stare decisis, otherwise there would be a breakdown of law and order.
13. Learned counsel Mr. Mwanzia appeared for the Respondent, and while relying on written submissions dated October 27, 2022, reiterated that the Applicants’ appeal has no chance of success and the Applicants will not be prejudiced if a stay is declined. The counsel placed reliance on the decision



by Ringera J. (as he then was) in *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause no 43 of 2000 that the sole question in an application for stay of proceedings is whether it is in the interest of justice, and the Court should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time, and whether the application has been brought expeditiously. The counsel's position was that the High Court directed that the application dated February 28, 2018 would be heard and determined together with the jurisdictional challenge, thus it had not declined to deal with the issue.

14. We have considered the submissions made by the Applicants, Affected Parties and Respondent. At this stage what needs to be demonstrated is whether the test for stay that we alluded to in our introductory paragraph has been met. It is notable in this regard that Rule 5(2)(b) of the *Court of Appeal Rules* of 2022 governs orders for “a stay of execution, an injunction or a stay of any further proceedings”, and the applicable principles stated in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [supra] therefore equally apply to stay of proceedings.
15. On the first limb as to whether the Applicants have an arguable appeal, it is evident from the submissions that parties do not contest the fact that the High Court did not make a determination on the issue of its jurisdiction. In our view, the arguments made by the Applicants and Affected Parties do raise arguable points as to whether the High Court was bound to determine the issue of jurisdiction, in light of the decision made by this Court on July 12, 2018 in Civil Appeal No 14 of 2018 and applicable judicial precedent.
16. This arguable points are demonstrated by the Applicants in their lengthy Memorandum of Appeal, in which they raise various issues, including whether the High Court correctly applied the directions given by this Court in Civil Appeal No 14 of 2018; whether it failed to consider that the 1st Appellant had raised the same issue of jurisdiction in its Preliminary Objection dated November 20, 2017 and that the Preliminary Objection which had not been determined and inspired the directions in Civil Appeal No 14 of 2018; and whether the High Court properly considered and applied the judgments of the Supreme Court of Kenya in Petition no 5 of 2015 (*Republic v Karisa Chengo & 2 others* [2017] eKLR), and Petition No 3 of 2016; (*Albert Chaurembo Mumba & 7 others v Morris Munyao & 148 others*), the judgment of the Court of Appeal in the *Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited* and the decision in *Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited* on the question of jurisdiction. We are in this regard mindful that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court.
17. On the second limb of whether the Applicant's appeal will be rendered nugatory if a stay of proceedings is not granted, it is evident that the appeal challenges the jurisdiction of the High Court, and if indeed the High Court does proceed with the hearing and determination of the matters pending before it, then hearing the appeal will be rendered an academic exercise. In addition, it is notable that the Applicants and Affected Parties are faced with an application for contempt of Court in the High Court, and will be affected by the findings on the issue of jurisdiction in terms of further proceedings in the matter. It is thus our finding that the Applicants have met the threshold for the second limb.
18. The result is that Applicants' Notice of Motion application dated September 26, 2022 is found to be merited. We accordingly grant an order of stay of further proceedings in High Court Civil Case No 158 of 2014 - *Al-Riaz International Limited v Ganjoni Properties Limited*, pending the hearing and determination of Civil Appeal No E091 of 2022 filed by the Applicants in this Court. As the application arises from the ruling made by the High Court, we make no order as to costs of the application.



19. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR//

