



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abachi & 4 others v Ethics & Anti-Corruption Commission & 2 others (Civil Application E169 of 2021) [2021] KECA 110 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 110 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E169 OF 2021  
MSA MAKHANDIA, J MOHAMMED & KI LAIBUTA, JJA  
OCTOBER 22, 2021**

**BETWEEN**

**PATRICK OCHIENO ABACHI ..... 1<sup>ST</sup> APPELLANT  
ROSALINE WANJIRA ABACHI ..... 2<sup>ND</sup> APPELLANT  
BENJAMIN MAKOKHA ABACHI ..... 3<sup>RD</sup> APPELLANT  
MOSES ODUORI ..... 4<sup>TH</sup> APPELLANT  
LORIAN JUMA ..... 5<sup>TH</sup> APPELLANT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
ODEAR NASEWA HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT  
RICHAIR TRAVEL AGENCIES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of the appeal from the judgment of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated 10th May 2021 in Anti-Corruption and Economic Crimes Case No. 15 of 2019)*

**RULING**

1. By Notice of Motion dated 16<sup>th</sup> April 2021, the applicants have moved this Court under Section 3A, 3B and 5 of the *Appellate Jurisdiction Act*, Rules 5(2) (b), 41, 42, 43 and 47 of the *Court of Appeal Rules* seeking an order of stay of execution of the judgment and decree dated 10<sup>th</sup> May, 2021 by Mumbi Ngugi, J (as she then was) and for an interim preservative order to conserve the assets the subject matter of the judgment and decree pending the hearing and determination of the appeal.



2. The application is based on the grounds that by the said judgment and decree the applicants were found to be in possession of unexplained assets and that the said assets be forfeited to the State. Being dissatisfied with the said judgment and decree the applicants have filed an appeal in this court on the grounds inter alia that the Learned Judge erred in law and misdirected herself in construing the text and import of Section 55 of the *Anti-corruption and Economic Crimes Act* resulting in a wrong decision, denied the applicant the right to a fair hearing as guaranteed under Article 50(1) and (2) of the *Constitution*, misapprehended the provisions of the law as to the meaning of unexplained assets; proceeded to hear the main suit without dealing first with inter-locutory applications that had been filed by the applicants. That there is imminent threat that the 1<sup>st</sup> Respondent will sell and dispose off the applicants' property and known assets which include the family home being Kajiado/Kitengela 6491, in execution of the judgment and decree which act if not stayed by an order of this Court will render the appeal nugatory as the properties will be sold to third parties.
3. The application is further supported by the affidavit of the 1<sup>st</sup> applicant who depones on his own behalf and on behalf of the other applicants that the judgment of the trial court decreed that the following properties owned by them,
  - a. Ngong/Ngong/xxxxx situated within Kajiado District registered in the name of the applicant.
  - b. LR No.xxxxx Mavoko Municipality Council Registered in the name of the applicant.
  - c. L.R No.xxxxx Mavoko Municipality Council Registered in the name of the applicant.
  - d. Kajiado/Kitengela/xxxx Kajiado District registered in the name of the applicant
  - e. Apartment No.4-Block A5 LR No. xxxxx Parkview South C, situated within Nairobi and registered in the name of the applicant.
  - f. Apartment No. 7 Block 4 Block A5 LR No. xxxxx Parkview south C, situated within Nairobi and registered in the name of the applicant.
  - g. House No. Hg 60 LR xxxxx Mugoya Estate situated within Nairobi and registered in the name of the applicant.
  - h. Kajiado/Kitengela/xxxxx situated within Kajiado District and registered in the 3<sup>rd</sup> respondent.
  - i. Kajiado/Kitengela/xxxxx situated within Kajiado District and registered in the 3<sup>rd</sup> respondent.
  - j. Kajiado/Kitengela/xxxxx situated within Kajiado District and registered in the 5<sup>th</sup> respondent.
  - k. Kajiado/Kitengela/xxxxx situated within Kajiado District and registered in the 4<sup>th</sup> respondent.
  - l. Motor vehicle No. KAS xxxx Toyota pick up registered in the name of the applicant.



- m. Motor vehicle No. KAV xxxxx Toyota Lexus registered in the name of the applicant.
  - n. Motor vehicle No. KAU xxxx Mitsubishi saloon registered in the name of the applicant
  - o. Motor vehicle No. KAS xxxx Toyota Saloon wagon registered in the name of the 3<sup>rd</sup> respondent.
  - p. Motor vehicle No. KAU xxxx Toyota station wagon registered in the name of the 3<sup>rd</sup> respondent.
  - q. Funds held in the following bank accounts
    - i. Barclays Bank of Kenya Queensway branch, account No/ 94878xxxx in the name of Rick Seaside villas
    - ii. Co-operative Bank limited, Co-operative house branch Account No. 01102xxxxxxxx
    - iii. Housing Finance company Kenya limited account No. 20000xxxxx.
    - iv. Cash in the sum of Kshs. 1,990,000 recovered from the applicant's premises and held by the 1<sup>st</sup> respondent be forfeited to the state as they were deemed to be unexplained assets.
4. Aggrieved by the judgment and decree, he instructed his advocates to file an appeal against the said judgment and decree. A notice of appeal was accordingly filed, that the applicants' properties may be sold at any time through Public Auction in execution of the judgment and decree hence the need for the orders of preservation and stay of execution. It is further deposed that the applicants have an arguable appeal as can be discerned from grounds set out herein above.
5. The application is opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn by Pius Muithya, a forensic investigator working with the 1<sup>st</sup> respondent. He depones that he was part of the team that was tasked with investigations in this matter. That after concluding investigation and commencing forfeiture proceedings in 2008, against the applicants' properties worth Kshs. 80,840,000.00, the 1<sup>st</sup> applicant was invited to explain the source of his finances and assets but failed to do so. That all through the applicant sought to have the matter adjourned on several occasions and was always accorded a hearing. That thus it was dishonest of him to claim that he was never given a fair hearing. That the interlocutory applications alluded to by the applicant were considered by the learned judge and directions given to the effect that the said applications and the preliminary objection respectively would be canvassed alongside the main suit. However, the applicants ignored the directions by failing to file written submissions with regard to the applications. Nonetheless the trial court considered the applications and dismissed them. That the applicants went through the trial, called and cross-examined witnesses and filed their written submissions. Thus, the court reached its findings based on consideration of all the evidence presented before it. That the applicants have no arguable appeal and is at best frivolous.
6. Further, it is the 1<sup>st</sup> Respondent's position that the appeal will not be rendered nugatory if the prayers sought are not granted as the state has the means to reconstitute the applicants in the event, they are successful in their appeal. That it is in the public interest, that the applicants should not continue



- holding onto the assets within the meaning of section 2 and 55 of the [Anti-Corruption and Economic Crimes Act](#). The other respondents did not file any papers in opposition to the application.
7. The application was canvassed by way of written submissions. The applicants in their submissions stated that this Court has a wide discretion when considering an application for stay of execution. The court has to consider whether the applicant has satisfied two limbs being whether the appeal is arguable and whether it will be rendered nugatory absent stay. See the case of [Co-operative Bank of Kenya Limited Vs. Banking Insurance & Finance Union \(Kenya\) \[2015\] eKLR](#). On the arguability aspect, the applicants reiterate the grounds on the face of the motion and supporting affidavit and state that they raise fundamental and cogent questions which go to the heart of the impugned decision and that this court should pronounce itself on the issues and provide clarity and guidance on the interpretation and application of the relevant provisions of the law. To buttress their arguments, the applicants relied on the following case law, [Stanley Kangethe Kinyanjui Vs. Tony Keter & others \[2013\] eKLR](#), [Cosmas Stephen Nabungolo v African Banking Corporation \[2020\] eKLR](#), [Damji Pragji Mandavia Vs. Sara Lee Household & Body Care \(K\) Ltd \(Civil Application No. Nai 345 of 2005\)](#).
  8. On the nugatory aspect, the applicants submit that in the event that the judgment and decree is executed, which execution is imminent, reversal of the new status with regard to the assets and properties thereafter would be impossible to implement as the assets would have been transferred to third parties. That the properties include the applicants' family home and also those acquired before the period the subject of the 1<sup>st</sup> Respondent's enquiry thus if not stayed, will occasion grave and irreparable injustice to the applicants. The applicants relied on [Reliance Bank Ltd. Vs. Norlake Investments Ltd \(2002\) IEA 232](#), [Kenya Airport Authority Vs. Multi-Bell Welfare Society & Another, CA No. 114 of 2013](#) and [Regnoil Kenya Limited Vs. Winfred Njeri Karanja \[2019\] eKLR](#) in asking the court to find a case had been made out on the nugatory limb. Lastly, the applicants added that no prejudice would be occasioned to the 1<sup>st</sup> respondent if the prayers sought were granted as it had already registered caveats on the properties.
  9. On its part, the 1<sup>st</sup> respondent in arguing that the Court should dismiss the application submitted, that the application is frivolous, unmeritorious and misguided and does not meet the threshold set under Rule 5(2) (b) of this Court's Rules and relied on the authorities of [Bob Morgan Systems Ltd & another Vs. Jones \[2004\] eKLR](#), [Amina Shiraz Yakub Vs. David Baburam Jagatram \[2017\] eKLR](#) and [Trust Bank Limited & Another Vs. Investech Bank LTD & 3 Others \[2000\] eKLR](#). On the arguability test the 1<sup>st</sup> respondent relied on the following cases; [Stanley Mambo Amuti Vs. Kenya Anti-Corruption Commission 2019 eKLR](#), [National Crime Agency Vs. Nrs. A 2018 Ewith 2534](#), [Elgin Fine Days Ltd. Vs Webb 1947 AD 744](#) and [Murphy V M \[2001\] IESC 82](#) and maintained that the intended appeal is frivolous.
  10. On the nugatory aspect, the 1<sup>st</sup> respondent posits that the applicants have a remedy in damages against it in the event that they are successful in their appeal. Reliance was placed on the case of [Nelson Andanyi Havi Vs. Law Society of Kenya & 3 others \[2018\] eKLR Civil Application No. Nai 28 of 2018](#) for the proposition.
  11. Lastly the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their written submissions supported the application. According to them, the orders sought by the applicants should be granted for they had also filed a cross-appeal in which they seek that the judgment and decree of the trial court be reversed and without the orders sought being granted, their quest in seeking to assert their constitutional and statutory rights to property under Article 40 & 50 of the Constitution will be thwarted. Such violation cannot be compensated by way of damages. They contend that they have an arguable cross appeal. They rely on several authorities among them Stanley Kangethe Kinyanjui Vs. Tony Keter & others [2013] eKLR, the Ugandan case of [Mugenyi & Co. Advocates Vs. National Insurance Corporation \(Civil Appeal No. 13 of](#)



1984), Trans south Conveyors Ltd Vs. Kenya Revenue Authority & Another (2007) Civil Application No. 37 of 2007, Reliance Bank Ltd. Vs. Norlake Investments Ltd [2002] IEA 232 and lastly Retreat Villas Ltd Vs. Equatorial Commercial Bank Ltd & Others Civil Application No. NAI. 140 of 2006(ur) in support of the proposition. They also argue that the appeal would be rendered nugatory if the orders are not granted and that this case must be considered within its own special circumstances.

12. The law on the grant of orders under Rule 5(2) (b) of the *Court of Appeal Rules* is well settled. In the case of Chris N. Bichage Vs. Richard Nyagaka Tongi & 2 others [2013] eKLR this court succinctly restated the law thus: -

“... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

13. On the first limb, we have looked carefully at the six grounds of appeal raised in the memorandum of appeal and which we have already set out at the beginning of this ruling.
14. Being cognizant of the fact that the applicant needs only to demonstrate one arguable ground and not a multiplicity of them and further that an arguable ground is not necessarily one that will succeed, we have no hesitation whatsoever in finding that the applicants have an arguable appeal.
15. On the second limb, whether the appeal will be rendered nugatory absent stay will depend on whether or not 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. The applicants have stated that the danger that is imminent is that the properties are due to be sold by the 1<sup>st</sup> respondent through Public Auction which action if allowed to proceed would render their appeal nugatory as the properties will be registered in the name of third parties and reversing the same would be difficult. Further, some of the assets include their home and some of the assets had been acquired long before the period for which the 1<sup>st</sup> Respondent was investigating the 1<sup>st</sup> applicant.
16. We are convinced that the applicants’ fears are not idle more so when some of the assets comprise a family home, that may lead to their eviction therefrom, as well as money held in their accounts. No doubt this will cause hardship to the applicants. It is also clear that if the assets are sold to third parties as envisaged, the substratum of the appeal will have been lost as the third parties will have been introduced which will ideally make the reversal to the applicants difficult. We do not see the prejudice that may be suffered by the 1<sup>st</sup> respondent absent stay. The 1<sup>st</sup> respondent can wait until the determination of the appeal and then proceed with the execution process if the appeal is not successful. The 1<sup>st</sup> respondent would not have any hardship as per the applicant, a fact not controverted, that caveats have been placed on the assets by the 1<sup>st</sup> respondent meaning that the assets cannot be dealt with in a manner adverse to the 1<sup>st</sup> respondent. It is also not lost on us that there are cross appeals filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents also impugning the same judgment and decree. To preserve the substratum of the appeal and cross appeals, it is only fair and just that stay be granted.
17. In the end we come to the conclusion that the applicants have satisfied both limbs and have thus met the threshold. We allow the application dated 30<sup>th</sup> March 2021. Accordingly, there shall be stay of execution of the judgment and decree of the High Court dated 10<sup>th</sup> May 2021 pending the hearing and determination of the appeal. The costs of this application shall be in the appeal.



DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

