



Kenya Power & Lighting Company Ltd v Animantu (Civil Appeal E044 of 2021) [2021] KECA 100 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 100 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E044 OF 2021
J MOHAMMED, A MBOGHOLI-MSAGHA & HA OMONDI, JJA
OCTOBER 22, 2021**

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD APPLICANT

AND

DANCUN ANIMANTU RESPONDENT

(Being an application for stay of execution of the judgment and/or decree from the judgment of the High Court of Kenya at Meru (F. Gikonyo, J.) dated 1st March, 2021 in Meru High Court Civil Suit No. 29 of 2018)

RULING

1. Before us is a notice of motion dated 14th April, 2021 in which Kenya Power & Lighting Company Limited (the applicant) seeks inter alia orders in the main:
 - a) That this Court be pleased to order stay of execution of the judgment and/or decree from the judgment of F. Gikonyo, J dated 1st March, 2021 pending the hearing and determination of the appeal;
 - b) That subsequent to prayer (a) herein, the Court be pleased to order the applicant to deposit an insurance bond and/or bank guarantee/paying the decretal sum it deems reasonable as security for the order of stay of execution being set; and
 - c) That costs of this application be in the cause.Dancun Animantu is the respondent herein.
2. The application is brought under Rule5(2)(b) of the *Court of Appeal Rules* and is premised inter alia on the grounds that: the High Court delivered a judgment in favour of the respondent herein for the sum of Kshs. 15,729,500.00, interest on special damages of Kshs. 665,500.00 from the date of filing suit and interest thereon; that dissatisfied with the said judgment, the applicant filed a notice of appeal to this



Court; that the intended appeal raises arguable points of law and facts with a likelihood of success; that the applicant is apprehensive that unless the order of stay of execution is granted, the applicant will suffer substantial loss that will expose it to grave prejudice; that in an effort to execute the impugned judgment, the respondent has filed a bill of costs against the applicant and served the applicant with a Taxation Notice; that the applicant is apprehensive that the respondent will proceed to execute the said impugned judgment/decree; that the intended appeal will be rendered nugatory and an academic exercise if the orders sought are not granted; and that it is only fair and just if the orders sought are granted to preserve the substratum of the appeal herein.

3. The application was supported by the affidavit of Ms. Caroline Warui, the applicant's Legal Manager who deposed inter alia that the respondent had filed a bill of costs and served the applicant with a taxation notice; and that the applicant is apprehensive that the respondent will proceed to execute the said judgment/decree if stay of execution is not granted. In the further supporting affidavit dated 9th August, 2021, the applicant deposes that the respondent had initiated the execution process through View Line Auctioneers vide the proclamation and warrant of attachment of movable property dated 6th August, 2021 for Kshs. 1,997,033.00 (Auctioneers Charges) and the decretal sum of Kshs. 16,931,747.00; and that the applicant has an arguable appeal and unless stay of execution is granted, the said appeal will be rendered nugatory.
4. The respondent opposed the application and in a replying affidavit dated 23rd May, 2021, deposed that the applicant had, in an application for stay of execution of judgment/decree dated 14th April, 2021, moved the High Court for the said orders and the Court ordered the applicant to deposit half the decretal sum into Court within 14 days with a mention date on 5th May, 2021 to confirm compliance of the said orders; that on the said date, the applicant withdrew their application; that there is no competent appeal before this Court on grounds that the notice of appeal filed by the applicant was fatally defective. The respondent filed a further, further, further replying affidavit dated 7th September, 2021 deposing that he has successfully executed the decree of the High Court which the applicant seeks to stay; and that on 24th August, 2021 he received full payment of the decretal sum from the applicant in fulfilment of the decree.

Submissions by Counsel

5. The application was heard by way of written submissions due to the COVID-19 pandemic. M/S Kinyanjui Njuguna & Co Advocates are on record for the applicants. Counsel the averments in the face of the application. Counsel submitted that the applicant has an arguable appeal with high chances of success; that the memorandum of appeal raises weighty grounds of appeal which deserve consideration by this Court. Counsel further submitted that the intended appeal will be rendered nugatory if stay is not granted as the applicant has sufficiently demonstrated that the respondent intends to complete execution of the decree from the impugned judgment; that the respondent has already served upon the applicant a proclamation notice and warrants of execution for a decretal amount claimed in the sum of Kshs. 16,931,747.00; that unless the orders sought are granted, the respondent will complete execution against the applicant thus rendering the appeal nugatory and a mere academic exercise.
6. In the written submissions and further submissions filed by M/S Muia Mwanzia & Co Advocates on behalf of the respondent it is contended that the on 24th August, 2021, the decree was fulfilled by the applicant; and that execution of the decree was successfully levied against the applicant; and that the instant application has therefore been overtaken by events. Counsel relied on the decision of *Emilio Marangu M'Ndiiri v Angero Munene Marindi [2021] eKLR* where this Court found that the application had been overtaken by events as the decree had been executed. Counsel urged that in the circumstances, the application be dismissed as there is nothing for this Court to stay.



Determination

7. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
8. 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 as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court 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...
9. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR 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. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether the learned Judge erred by failing to apportion liability between the parties as per the evidence produced by the parties. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
11. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends 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.
12. In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. According to the respondent, the application has been overtaken by events as on 24th August, 2021 he received payment



of the decretal amount in full from the applicant in fulfilment of the decree of the High Court. Consequently, there is nothing for this Court to stay.

13. In the circumstances, the applicant having failed to satisfy the second limb of Rule 5(2)(b) of the Court of Appeal Rules, the application dated 14th April, 2021 is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL HELLEN OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

