



REPUBLIC OF KENYA



**Kihara v Ajele & 2 others (Civil Appeal E046 of 2021)
[2021] KECA 104 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 104 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E046 OF 2021
J MOHAMMED, A MBOGHOLI-MSAGHA & HA OMONDI, JJA
OCTOBER 22, 2021**

BETWEEN

JAYNE NJERI WANJIRU KIHARA APPLICANT

AND

CHRISTOPHER L. AJELE 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA 2ND RESPONDENT

JOEL MICHAEL NJENGA MUTUTHO 3RD RESPONDENT

*(An Appeal against the Judgment and Decree of the High Court of Kenya at Nakuru
(Joel Ngugi, J) dated 19th December, 2019 in Election Petition No. 2 of 2018)*

RULING

1. The application before this Court for consideration is the appellant/applicant's Notice of Motion application dated 13th August, 2021 brought under Certificate of Urgency and pursuant Rules 5 (2) (b), of *Court of Appeal Rules* 2010, Section 1A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Section 3A of the *Appellate Jurisdiction Act* and all other enabling provisions of the Law.

The Applicant seeks orders that: -

- (i) The application be certified as urgent and notice thereof be dispensed with in the first instance.
- (ii) That the honorable court be pleased to grant an order for stay of execution of the Orders/ Decree given on 19th December, 2019 and any of the subsequent orders be given in favor of the 3rd respondent pending the hearing and determination of the appeal.
- (iii) That in the alternative and/or in addition thereto this honorable court be pleased to grant an order of stay of execution and or any further execution by varying the time and one of the conditions granted by the High Court in the order dated 24th June, 2014 to the following effect,



‘Order 3 (1) and (11) -the applicant/intended appellant to deposit a bank guarantee (as already deposited) for the total sum of Kshs.7,523,107 until the hearing and determination of the intended appeal instead of paying to the 3rd respondent half of Kshs.7,523,107 within 45 days of 24th June, 2021.’

Order (iii)- this stay of execution shall remain in force until the hearing and determination of the intended appeal and/or further orders of this honorable court, instead of the previous paragraph (ii) that limited the stay of execution orders to only one calendar year from 24th June, 2021.

- (iv) That in the alternative and/or in addition to the above, the honorable court do issue an order stopping restraining or injuncting the 3rd respondent and/or any other persons taking instructions or authority from him regarding the decree/orders issued in the Nakuru Election Petition No.2 of 2008 on 19th December, 2019, from offering, alienating, transferring or selling by public auction or taking the goods subject to proclamation dated 3rd July, 2020 and/or any other subsequent proclamation pending the determination of the intended appeal, or further orders of this Court.
 - (iv) Such further orders as the court may deem fit.
 - (iv) Costs be provided for.
2. The application is supported by a certificate in support of urgency and a supporting affidavit sworn by the applicant dated 13th August, 2021. The parties were directed to file written submissions for hearing on 8th September, 2021.

The grounds in support of the application are as follows: -

- (i) Vide a judgment delivered on 19th December, 2019 the intended appellant’s chamber summons dated 2nd August, 2018 was dismissed in favor of the 3rd respondent herein and judgment entered based on disputed taxation of costs at Kshs.9,523,814 and auctioneer charges in excess of Kshs.600,000.
- (ii) That the ruling/orders of 19th December, 2019 were made without the intended appellant being given any notice.
- (iii) That the High Court on hearing the notice of motion dated 7th July, 2021 granted conditional orders of stay, which conditions were partially complied with and only for one year.
- (iv) That the intended appellant is yet to comply with part (i) which requires her to pay the 3rd respondent half of Kshs.7,523,107 within 45 days from 24th June, 2021.
- (v) The intended appeal has high chances of success.
- (vi) That if execution is allowed to proceed, the intended appellant’s attached goods shall be adversely undervalued, the intended appellant will be rendered destitute, bankrupt and her standing as member of parliament will be impaired and irreparably harmed, and the intended appeal would be a nullity.
- (vii) That if the application is not allowed the 3rd respondent (a non-qualified person) will benefit in ‘profit costs’ a contravention of Sections 37 & 40 of the Advocates Act.
- (viii) That the intended appellant has substantially complied with the High Court’s Orders.



- (ix) That execution threat is real and imminent, and the sale is scheduled from any time from 12th August, 2021.
 - (x) That the conditional stay limit of one year is oppressive as the intended appellant cannot control the Court of Appeal's diary.
3. Whether the Applicant has satisfied the requirements necessary for granting an order for stay of execution. The Supreme Court in Civil Application 12/15-*Deynes Muriithi & 4 Other v LSK & Another [2016] e KLR* stated that Rule 5 (2) (b) applications arise at an interlocutory stage and the orders issued thereunder are for the purpose of protecting the subject matter of an appeal, the Court of Appeal having yet to finally determine the appeal.
 4. In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, Sup. Court App 16/2015 [205] e KLR “[23] It is clear to us that Rule 5(2) (b) is essentially a tool for preservation. It safeguards the substratum of the appeal in consonance with principles developed over the years.”

[“27] Rule 5 (2) (b) of the Court of Appeal Rules is derived Article 164(3) of the Constitution. It illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of the appeal/intended appeal.”
 5. This Court has set out the parameters to be met for an order of stay to be granted in an application under Rule 5 (2) (b). In the case of *Alfred Mincha Ndubi v Standard Limited [2020] eKLR*.
 6. This Court quoted with approval the case of *Ishmael Kangunyi Thande vs Housing Finance Company of Kenya Limited Civ. Appl. No. Nai 157/2006* “to succeed in an application in 5 (2) (b) the applicant has to establish that:
 - (i) The Appeal is arguable.
 - (ii) The appeal is likely to be rendered nugatory if the injunction is not granted and appeal succeeds.
 7. These principles were restated by this Court *Multi Media University & Another v Prof. Gitile N. Naituli (2014) eKLR* ‘...from the long line of decided cases on Rule 5(2)(b)the jurisprudence is underlined in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others (2013) eKLR* as follows:
 - (i) In dealing with Rule 5 (2) (b) the court exercises original and discretionary jurisdiction.
 - (ii) The discretion is wide and unfettered if it is just to do so.
 - (iii) Court becomes seized of the matter only after Notice of Appeal is filed under Rule 75.
 - (iv) In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - (v) An applicant must satisfy the twin principles.
 - (vi) Whether appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - (vii) Arguable appeal is not one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous.
 - (viii) The court must not make a definitive/final finding as to facts of law in an application under Rule 5 (2) (b).



- (ix) Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.
8. A) Is the Appeal arguable? In the case of *Wasike vs Swala [1984] 591* this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court.
 9. In the case of *Attorney General v Okiya Omtata & Anor [2019] eKLR* this Court held “the principles for our consideration in exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay is well settled. Firstly, the applicant must satisfy that it has an arguable appeal. However, this is not to say that the appeal will necessarily succeed but suffice it that the appeal is not idle or frivolous.”
 10. This Court has held in *Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union Kenya [2014] e KLR* ‘it is sufficient that the issues raised are arguable.’ In *Kisumu Civil Appeal 74/2016, George O. Gache & Anor vs Judith Akinyi Bonyo & Others* this Court stated ‘at this stage the court is not expected to inquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as the existence of a single bona fide issue is sufficient.’ On the issue of an arguable appeal, perusal of the application and Memorandum of Appeal herein raises some arguable points concerning the taxed sum and failure of notice of delivery of the ruling.
 11. B) Will the Appeal be rendered nugatory should the injunction not be granted? On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited [2002] 1 EA 227* that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. (see also *Oraro & Rachier Advocates vs Co-operative Bank of Kenya [1999] LLR 1118*

In the case of *African Safari Club Limited vs Safe Rentals Limited, Nai. Civ. App 53/2010*** this Court held “...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.” In this the court is to decide which party’s hardship is greater.
 12. In the case of *Africa Eco Camps vs Exclusive African Treasures Ltd [2014] eKLR* this Court held ‘as was observed in *National Credit Bank vs Aquinas Francis Wasike and Another* – a legal duty is placed on the applicant to prove that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal. We are aware that this requirement is however not absolute, and is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them.
 13. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed as this is a matter likely to be peculiarly entirely within the respondent’s knowledge.’
 14. However, we take note that in the present situation, the applicant was ordered to pay half the costs within 14 days and secure a bank guarantee for the other half within 14 days, as a condition to the stay. Instead, she secured a bank guarantee for the entire sum in lieu of the cash payment, without seeking leave from the court to vary those terms.



15. We also note that there is no demonstration or claim that the 3rd respondent is incapable of reimbursing the decretal sum, if the same is paid to him. The applicant contended that she is likely to be rendered bankrupt and destitute should execution be allowed to commence. Further, that the execution will jeopardize her position as Member of Parliament, with the result that she is likely to lose her position if the orders sought are not granted.
16. In the circumstances, we find that the applicant has failed to satisfy the second limb so as to meet the threshold of applications under Rule 5 (2) (b) of the Court of Appeal Rules.
17. We consequently, dismiss the application and order that the costs shall abide by the outcome of the appeal.

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

J. MOHAMMED

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

