



**Hassan v Ali & 3 others (Civil Application E046 of 2021)  
[2021] KECA 190 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 190 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E046 OF 2021  
HM OKWENGU, SG KAIRU & J MOHAMMED, JJA  
NOVEMBER 19, 2021**

**BETWEEN**

**NUH ABDILLE HASSAN ..... APPLICANT**

**AND**

**HALIMA MAHMOOD ALI ..... 1<sup>ST</sup> RESPONDENT**

**AMAL PLAZA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**CENTER STAR LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**HUSSEIN HASSAN BOOD ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of further proceedings of the order of the Environment and Land Court at Nairobi pending the hearing and determination of the appeal against the said order (Okong'o, J.) delivered 28th January, 2021 in ELC No. 775 of 2017)*

**RULING**

[1] The applicant, Nuh Abdille Hassan who was the 3rd defendant in the Environment and Land Court (ELC), is aggrieved by orders that were made by the ELC (Okong'o J) on 28th January, 2021. We produce herein verbatim the orders that were made by the learned judge:

- “(i) That Center Star Limited, Nuh Abdille Hassan and Hussein Hassan Bood are added to this suit as 2nd, 3rd and 4th defendants respectively.
- ii. The plaintiff shall amend the plaint in terms of the draft amended plaint annexed to the plaintiff's affidavit sworn on 5th March, 2018 to effect the joinder.
- iii. Pending the hearing and determination of the suit, the 3rd defendant, Nuh Abdille Hassan shall pay to the plaintiff as and when it falls due the rent



that was agreed upon by the parties in the joint venture agreement dated 10th November 2014 and the lease dated 1st January 2015 in respect of LR. 36/460/VII (the suit property).

- iv. Pending the hearing and determination of the suit, the 3rd defendant, Nuh Abdille Hassan shall from 1st February, 2021 render to the plaintiff a true account on a quarterly basis of the monies collected or received from the suit property as rent and goodwill.
- v. Pending the hearing and determination of the suit, the monies collected or received from the suit property as good will, shall with effect from 1st February 2021, be deposited in a joint bank account in a reputable bank in Nairobi in the names of the advocate on record for the plaintiff and the 3rd defendant, Nuh Abdille Hassan as and when the same is received by the 3rd defendant Nuh Abdille Hassan.
- vi. The cost of the application shall be in the cause.”

- [2] The applicant has filed a notice of appeal dated 3rd February, 2021 intending to appeal against part of the ruling and orders that were made by the ELC. By a notice of motion dated 12th February 2021, the applicant has moved this Court under Rule 5(2)(b) of the Court Rules, for an order of stay of execution of the orders that were made by the ELC pending the hearing and determination of his intended appeal. The applicant also seeks stay of further proceedings in the ELC pending the hearing and determination of his appeal against the orders issued on 28th January, 2021.
- [3] It is the applicant’s contention that the orders that were made by the ELC denied him an opportunity to ventilate the dispute by way of arbitration, as provided in the joint venture agreement dated 14th November, 2014. He maintains that he has an arguable appeal with high chances of success, and that if the orders sought are not granted, he will suffer irreparable loss as he will be expected to deposit goodwill when the 1st respondent has already collected the same.
- [4] The applicant has also filed written submissions in which he reiterates that the learned judge erred in granting the orders in view of the joint venture agreement, and the lease which provided an arbitration clause. The applicant cited *Attorney General vs. Samuel Chege Gitau & 283 others [2010] eKLR*; and *Mumias Sugar Company Limited vs. Mumias Outgrowers Company [1998] 2014 eKLR*, maintaining that he has satisfied the conditions for granting orders of stay under Rule 5(2)(b) of the Court Rules.
- [5] The 1st respondent opposed the applicant’s motion through written submissions that were duly filed by her counsel. It is the 1st respondent’s contention that the applicant has never paid any rent since taking possession of the suit property, and that the interim orders were made by the ELC to maintain status quo on possession and that if the orders of stay are granted, the applicant who is in possession of the suit property will continue collecting rent from the building without accounting for the same, to the detriment of the 1st respondent. The 1st respondent maintains that the lease has not been terminated and that the applicant cannot request for enforcement of the lease, while at the same time applying for stay of execution of its terms; that the applicant will not suffer any damages as the goodwill will be deposited in a joint interest earning account; and that an order of stay will be inimical to justice and fairness and equivalent to dispossessing the 1st respondent of her property.
- [6] On the issue of arguability, the 1st respondent contends that Section 6 of the *Arbitration Act* expressly allows the Court to hear disputes even when the subject contract has an arbitration clause, and that the applicant did not invoke section 6(1)(b) of the *Arbitration Act* in applying for stay of the proceedings, as



he did not move the Court after filing his notice of appointment, and in fact withdrew his application seeking to refer the matter to arbitration.

- [7] We have carefully considered the motion before us and the submissions made by the parties. The principles applicable under Rule 5(2)(b) of the Court Rules are clear. An applicant must satisfy the twin requirements, that is, that the appeal is arguable and that if the orders sought are not granted, the appeal would be rendered nugatory.
- [8] In *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR*, this Court reiterated that a single bonafide arguable ground of appeal was sufficient to satisfy the requirement that the appeal is arguable, and that it is not necessary that the ground must succeed, but it must be one which is not frivolous. In the same case, the Court also stated that nugatory aspect not only means that the appeal will be rendered useless or futile, but also trifling. Whether an appeal is nugatory would also depend on whether or not what was sought to be stayed if allowed to happen, would be irreversible or if it was not reversible, whether damages would reasonably compensate the parties aggrieved. (See also *Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227*; and *Ahmed Musa Ismael vs Kumba Ole Ntamorua & 4 Others [2014] eKLR*).
- [9] In this case, the applicant has exhibited a draft memorandum of appeal. The 6 grounds stated therein are all anchored on the issue of jurisdiction, it being maintained that the agreement between the applicant and the 1st respondent provided for arbitration, and the court misdirected itself in giving the interim orders.
- [10] On the issue of jurisdiction, it is arguable whether in light of section 6 of the *Arbitration Act*, the learned Judge had jurisdiction to make the orders sought. That is a matter that will have to be canvassed in the substantive appeal and it would be premature for us to make any definitive findings at this stage. It suffices that for the purposes of this application, the issue as raised by the applicant, cannot be said to be frivolous. The applicant has therefore satisfied the requirement of arguability.
- [11] As regards the nugatory aspect, we have considered the applicant's contention that the orders issued, if not stayed, would render his appeal nugatory. Apart from the joinder, the learned Judge ordered the applicant to pay rent to the 1st respondent and to provide a true account on quarterly basis of monies collected or received from the suit property as rent and goodwill, and to deposit in a joint bank account monies collected or received from the suit property. We do not see how the execution of these orders would render the applicant's appeal nugatory as the orders are indeed reversible and any monies paid pursuant to the orders, once accounted for can easily be recovered. The applicant has not made any allegation of any difficulties that the 1st respondent would have in refunding any monies or payment of damages. Moreover, the applicant's contention is that the orders were made without jurisdiction. Should the applicant succeed in his appeal, these orders will simply be set aside and any monies paid recovered.
- [12] For these reasons, we find that the applicant has not satisfied us that his intended appeal would be rendered nugatory if the orders sought are not granted. As Rule 5(2)(b) of the Court Rules requires that both arguability and the nugatory aspect must be satisfied, the applicant's motion fails. It is accordingly dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**



**S. GATEMBU KAIRU (FCIArb.)**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

