



REPUBLIC OF KENYA



KENYA LAW
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**Githunguri v Githunguri & 3 others (Civil Application
E197 of 2020) [2021] KECA 208 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 208 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E197 OF 2020
MSA MAKHANDIA, J MOHAMMED & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

STANLEY MUNGA GITHUNGURI APPLICANT

AND

JOSEPH MUNGA GITHUNGURI 1ST RESPONDENT

LILIAN WANJIRU GITHUNGURI 2ND RESPONDENT

SARAH NJOKI MAINA 3RD RESPONDENT

ROSEMARY WANJIKU GITHUNGURI 4TH RESPONDENT

*(Being an application for stay of execution of the orders and proceedings
of the High Court of Kenya at Nairobi (Family Division) (M. Thande,
J.) delivered on 4th June, 2021 in Misc. Application No. 52 of 2020)*

RULING

1. Before us is a notice of motion dated 9th June, 2021 in which Stanley Munga Githunguri (the applicant) seeks orders in the main:
 - a. That this Court be pleased to issue an order of stay of execution of the orders issued on 4th June 2021 in Nairobi High Court Family Misc. 52 of 2020 pending the hearing and determination of the appeal.
 - b. That this Court be pleased to issue an order of stay of proceedings in Nairobi High Court Family Misc. 52 of 2020 Joseph Munga Githunguri & Others vs. Stanley Munga Githunguri pending the hearing and determination of the appeal herein.



- c. That the costs of this application be provided for.
2. The application is brought under Rule 5(2) (b) of the *Court of Appeal Rules* (this Court's Rules) and is premised inter alia on the grounds that: on 4th June 2021, the High Court found the applicant to be in contempt of court in the absence of an application or charge against the applicant in that regard; that the Court further directed the applicant to appear before the Court on 11th June 2021 without hearing the application in that regard; that the Court further barred the applicant inter alia from making any applications pending compliance with the said orders; and that the applicant is aggrieved by the said orders and intends to appeal against the said decision and towards that end he has filed a notice of appeal.
3. The applicant further contended that the intended appeal is arguable inter alia on the grounds that the learned Judge erred in principle in making an order that the appellant is in contempt of court without an application or charge against him being made; that the learned Judge erred in law in failing to find that since there was no evidence of service of any orders on the applicant, no order for contempt of court could be made; that the learned Judge erred in law and in fact in ordering for examination of the applicant by the Court on 11th June, 2021 and in default, warrants to issue, when there was a pending application seeking the same orders which had not been canvassed by the parties nor was it fixed for hearing on 2nd June, 2021 when the first order for the applicant to avail himself for examination; that the learned Judge erred in law and in fact in ordering the applicant to appear for examination by the Court on 11th June, 2021 even though the issue regarding the character of the applicant's counsel had been impugned as well as the authenticity of the documents filed on behalf of the applicant had not been determined, thereby violating the applicant's right to be heard as well as the right to be represented by counsel of his own choice, in violation of Article 50(1) and (2)(h) of the *Constitution*; and that the learned Judge erred in law and in fact in purporting to conduct a hearing for purposes of ascertainment of whether the applicant has dementia or not, considering that the court did not have the competency of determining whether or not a person has a mental disorder.
4. The application was further supported by the affidavit of Lilian Joy Nyagaki Githunguri, a daughter of the applicant in which she reiterated the grounds on the face of the application. The 2nd respondent averred inter alia: that she is the applicant's daughter and is duly authorized to instruct the applicant's lawyers in relation to this matter; that the applicant is of advanced years and is frail and ailing from a number of ailments including diabetes, blood pressure, has undergone a kidney transplant and is on immune suppressants among other ailments associated with old age; that the application is extremely urgent since the High Court found the applicant guilty in contempt of court without an application in that regard, the learned Judge clearly had no jurisdiction to issue the impugned order; that the applicant is now at risk of loss of liberty on account of the impugned orders and thus the need for the application herein to be heard forthwith so as to protect and preserve his constitutional rights; and that if the impugned orders are complied with, the appellant is at risk of serious health complications that may be fatal.
5. The application is opposed and in a replying affidavit sworn by the applicant's first born son (the 1st respondent herein) it was deponed inter alia that the respondents filed High Court Petition No. 52 of 2020 dated 30th April, 2020 under Sections 26, 27, 28 (1) & (2) of the *Mental Health Act* together with an application of even date; that the said Petition seeks inter alia: that the applicant be declared forthwith to be suffering from dementia and requires to be placed under immediate and urgent guardianship and care; that the impugned order required the applicant to present himself virtually before the High Court on 11th June, 2021; that the instant application has been overtaken by events as the applicant was presented virtually before the High Court on 11th June, 2021; that there were internet connectivity challenges on the said date and the objective of the order issued on 4th June,



2021 was therefore not achieved; and that the instant application is not urgent and lacks merit and is therefore incompetent, bad in law, misconceived and an abuse of the court process as the order given on 4th June, 2021 did not indicate that the High Court made any finding of contempt against the applicant. The respondents urged that the instant application be dismissed with costs.

Submissions by counsel

6. The application was heard by way of written submissions due to the Covid-19 pandemic. Messers Iseme Kamau and Maema Advocates represent the applicant and submitted that the appeal is arguable; that the draft memorandum of appeal indicates that the applicant intends to canvass grounds of appeal which raise weighty legal issues which are all arguable which are inter alia the competence and legality of the order finding the applicant to be in contempt of court in the absence of an application seeking to cite him for contempt; that the proceedings commenced under the *Mental Health Act* are civil in nature and are not criminal or quasi-criminal in nature as would necessitate the issuance of warrants of arrest to compel the attendance of a party; that the orders made by the learned Judge seriously violated and effectively deprived the applicant of his Constitutional and fundamental right to the protection of the law by directing him to participate in proceedings whose legitimacy has been questioned and not to file any application or take steps in those proceedings to challenge the illegitimate process; and that the applicant intends to argue that under the *Mental Health Act*, the competence to determine whether the applicant has dementia or a mental disorder is vested in medical practitioners and not the court.
7. On the question whether the appeal will be rendered nugatory absent stay, counsel submitted that unless the orders sought are granted, the applicant's intended appeal will be rendered nugatory; that the High Court ordered the applicant to attend court for the purposes of carrying out the intended examination; that in the event that the applicant does not attend Court for the said examination, he faces automatic arrest and committal to jail; and that if the orders of stay sought are not granted, the applicant will be forced to engage in proceedings that demonstrably violate his Constitutional right. Counsel urged that the application be allowed.
8. Messers Muma & Kanjama Advocates, counsel for the respondents submitted that the intended appeal is not arguable; that the issue of the need to obey court orders cannot be over emphasized; that the applicant was presented in Court on 11th June, 2021 and the instant application has therefore been overtaken by events; and that the examination and presentation of the applicant will take place at his residence.
9. On the question whether the intended appeal will be rendered nugatory, counsel submitted that the applicant has failed to demonstrate this point since the impugned order has been overtaken by events. Counsel urged that the applicant has therefore failed to satisfy the conditions for granting an order of stay of execution pending appeal. Counsel urged that the application be dismissed with costs to the respondents.

Determination

10. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
11. 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 (Civil Application Nai. 258 of 1999) 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...”

12. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction.
13. 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. See *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)* where 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.”
14. 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 proceedings commenced under the *Mental Health Act* are civil in nature and are not criminal or quasi-criminal in nature as would necessitate the issuance of warrants of arrest to compel the attendance of a party. 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.
15. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. In *Stanley Kang’ethe Kinyanjui v Tony Keter & 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.
16. 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. We find that in the circumstances of the instant application, the impugned order has been overtaken by events as the applicant was presented to court on 11th June, 2021 and on 17th June, 2021 the court ordered that the applicant be presented before it on 23rd June, 2021 at the applicant’s resident. The issue of an arrest was not indicated on 17th June, 2021 when the High Court made its order. The intended appeal will



therefore not be rendered nugatory as the High Court varied its order for locus in quo. The 2nd limb of Rule 5(2)(b) of this Court's Rules has therefore not been established.

17. As the applicant has to establish both the arguability and nugatory aspect, the applicant has therefore failed to establish the twin limbs for consideration in an application under Rule 5(2)(b) of this Court's Rules.
18. The upshot is that the application dated 9th June, 2020 is without merit and the same is hereby dismissed. Costs shall abide by the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

