



**Coast Development Authority v Endebess Development Co. Ltd (Civil Application E053 of 2021) [2021] KECA 315 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 315 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E053 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
DECEMBER 17, 2021**

**BETWEEN**

**COAST DEVELOPMENT AUTHORITY ..... APPLICANT**

**AND**

**ENDEBESS DEVELOPMENT CO. LTD ..... RESPONDENT**

*(An application brought under Rule 5 (2) (b) of the Court of Appeal Rules, 2010 for stay of execution of the Judgment of the High Court (Justice D. O. Chepkwony) delivered on 9th June 2020) in (Mombasa High Court Civil Suit 11 of 2017)*

**RULING**

1. The Notice of Motion before this Court is dated 12<sup>th</sup> July 2021, and is brought by the Applicant herein under Rule 5(2)(b) of the Court of Appeal Rules. The Applicant seeks a stay of execution of the judgment delivered on 9<sup>th</sup> June 2020 in Mombasa High Court Case No. 11 of 2017 together with all other consequential orders pending the hearing of this appeal. The trial Court in the said judgment entered judgment against the Applicant to pay the Respondent the sum of Kshs 62,000,000/=, being the agreed purchase price for assorted block cutting machines, interest of 10% from 14<sup>th</sup> April 2013 until payment in full, together with costs.
2. The application is supported by affidavits sworn on 12<sup>th</sup> July 2021 and 3<sup>rd</sup> September 2021 by Dr. Mohammed Keinan Hassan, the Applicant's Managing Director. The Applicant also annexed a copies of the impugned judgment and decree, a Notice of Appeal against the said judgement dated 15<sup>th</sup> June 2020 and lodged in the Court on 16<sup>th</sup> June 2020, and its memorandum of appeal dated 8<sup>th</sup> October 2020 lodged in Civil Appeal No. E003 of 2020. Having lodged the Notice of Appeal within 14 days of the judgment pursuant to Rule 75 of the *Court of Appeal Rules* this court is properly seized of the application, as prescribed by Rule (2)(b) and held in *Halai & Another vs Thornton & Turpin (1963) Ltd. (1990) KLR 365*.



3. The Applicant detailed the proceedings that it had undertaken since delivery of the impugned judgment, including a stay application filed and heard by the trial Court. Further, that the Respondent had commenced execution proceedings in the trial Court through garnishee proceedings in which interim orders nisi were granted.
4. The Applicant's case is that it is a public body, and if ordered to release the decretal sum it may be forced to suspend its services, and the Respondent may not be in a position to refund the said sum if the appeal is successful, as its financial position remains unknown., They conclude that the application was brought without unreasonable delay as the Applicant had first attempted to seek reprieve from the trial Court and Court of Appeal.
5. The Respondent did not file a response to the application, and instead argued the application by way of written submissions.
6. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR* .
7. The Applicant referred the Court to its memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The Applicant has in its grounds faulted the trial Court for failing to consider its defence; dismissing the Preliminary Objection it raised that the suit being time barred; failing to take into account that the Appellant's procurement and tendering processes were flouted; failing to take into account well established principles relating to law of contract, and on the purchase and execution of documents by the Appellants. Garane & Somone Advocates for the Applicant filed submissions dated 3<sup>rd</sup> September 2021, in which the above arguments were reiterated, and reference was made to the case of *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Holdings & 2 others, Civil Application No. 124 of 2008* for the position that an arguable appeal is not one which must necessarily succeed.
8. MJD Associates Advocates for the Respondents filed submissions dated 13<sup>th</sup> September 2021, wherein they cited various judicial authorities to demonstrate that the various grounds of appeal raised by the Applicant are not arguable, and submitted that the appeal is not arguable as the Applicant failed to plead the issue of limitation in its pleadings and lead evidence on limitation during the hearing; and prove that the Managing Director lacked authority to sign the sale agreement between the parties which, was reduced to a formal agreement after the Appellant had unequivocally accepted the Respondent's offer to purchase the subject machines. Furthermore, that the Applicant, being a corporate entity, was assumed to have complied that the internal rules before execution of the subject sale agreement.
9. We have examined the memorandum of appeal, and note that the Applicant has raised multiple grounds of appeal set out herein above, which have also been responded to with equal fervour by the Respondent. We are cognisant of the fact that in the first limb of an arguable appeal, the Applicant need only demonstrate one arguable ground, and further that an arguable appeal is not necessarily one that will succeed. The Applicant has raised concerns on the procuring and contracting processes in the subject agreement, and we find that it has an arguable appeal capable of consideration and which ought to be argued fully, and its therefore not frivolous. We cannot also consider the merits of the arguments raised by the Respondent on the said grounds at this stage for the same reasons, and the proper time shall be during the hearing of the appeal. The first limb has therefore been demonstrated by the Applicant.



10. On the appeal being rendered nugatory, the Applicant averred that if they are ordered to release the decretal sum, this being a substantial figure, its operations may be suspended and the Respondent may not be in a position to refund the sum of money. The decision in *Shah vs Munge & Partners v National Social Security [2018] eKLR* was cited for the position held that an appeal would be rendered nugatory if refusal to grant an order of stay to the Applicant would cause such hardship as would be out of proportion to any suffering the Respondent might undergo while waiting for the Applicant's appeal to be heard and determined. Also cited in support of the submission, were various cases, including Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [supra], *Butt vs Rent Restriction Tribunal [1979] eKLR*, and *Attorney General vs Equip Agencies [2002] eKLR*.
11. The Respondents submitted that on 9<sup>th</sup> June 2021 after delivery of the judgment, the trial Court granted the Applicant stay of execution for 60 days. The Respondent further asserted that upon application, the trial Court by a ruling on 27<sup>th</sup> January 2021, granted the Applicant a further stay of execution pending appeal, but on condition that it provides a bank guarantee for the whole judgment sum within 60 days to secure the decretal sum. However, that the Applicant neglected to comply and moved to this Court after the Respondent commenced execution, and that it is therefore estopped from arguing that it would be unable to recover the judgment sum. Reliance was placed on the cases of *UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR*, and *RFS vs JDS (2013) eKLR* for this position.
12. On the nugatory aspect, it was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd [2002] 1 E.A. 227*, that "the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." Likewise it was held in Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
13. It is evident that the Applicant had the opportunity of securing the decretal sum and chose not to comply with the trial Court's orders in this regard. Although we are mindful that this court exercises original and discretionary jurisdiction under Rule 5(2)(b), and that exercise does not constitute an appeal from the trial judge's discretion as held in *Ruben & 9 Others vs Nderitu & Another (1989) KLR 459*, it would be inequitable in the circumstances and arising from the conduct of the Applicant, to exercise our discretion in its favour. In addition, the Applicant still has the opportunity to comply with the orders of the trial Court as it has not pleaded that the said orders were varied or set aside. We therefore find for this reason that its appeal will not be rendered nugatory.
14. Lastly, an applicant needs to demonstrate both arguability and the nugatory aspect in an application under Rule 5(2)(b) of the Court of Appeal Rules, and proving only one limb will not suffice. Having failed to demonstrate the nugatory aspect, the application herein fails, and is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 2021.**

**S. GATEMBU KAIRU (FCI Arb)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**



**J. LESIIT**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

