



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPLICATION NO. 133 OF 2019**

**BETWEEN**

**ANN WANJIKU NDUATI.....APPLICANT**

**AND**

**FREDRICK OOGO OYUOYA.....RESPONDENT**

***(Being an application for stay of execution of ruling pending the hearing and***

***determination of an intended appeal from the ruling and order of the***

***High Court of Kenya at Nairobi (Njuguna, J.)***

***delivered on 21<sup>st</sup> February 2019***

***in***

***High Court Misc. Civil Application No. 103 of 2018)***

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**RULING OF THE COURT**

1. In a ruling delivered on 21<sup>st</sup> February 2019, the High Court at Nairobi (*Njuguna, J.*) dismissed the applicant's application dated 1<sup>st</sup> February 2018 by which the applicant sought orders of stay of execution of a judgment and decree of the Chief Magistrate's Court in CMCC No. 5392 of 2010 pending the hearing and determination of an intended appeal from that judgment. In the same application, the applicant also sought leave of the High Court to appeal the judgment of Chief Magistrate's Court out of time. Both prayers having been rejected, the applicant was aggrieved and lodged a notice of appeal on 4<sup>th</sup> March 2019.

2. On 26<sup>th</sup> April 2019, the applicant presented the application now before us under Rule 5(2)(b) of the Rules of this Court seeking: an order to "stay the judgment" (read ruling) delivered on 21<sup>st</sup> February 2019; and an order of "temporary injunction restraining the respondent from executing the decree in the Chief Magistrates 5392 of 2010...pending the hearing and determination" of the intended appeal.

3. Urging the application before us, *Ms. Kogai*, learned counsel for the applicant referred us to the application and supporting affidavit and submitted that the intended appeal from the ruling of 21<sup>st</sup> February 2019 is arguable; that in dismissing the applicant's application dated 1<sup>st</sup> February 2018, the learned Judge proceeded on the wrong basis that a defence had not been filed when in fact the same had been filed; that the Judge wrongly concluded that allowing the application would be prejudicial to the respondent; that the Judge failed to consider that the judgment of the Chief Magistrate's court was wrongly entered against the applicant; that the applicant was never served with summons to enter appearance or notice of entry of judgment; that the judgment of the Chief Magistrate's court holding the applicant liable in damages for injuries sustained in a road traffic accident is based on wrong factual premise that she was the owner of a vehicle that was involved in the accident, when in fact the vehicle belonged to another person.

4. Counsel submitted further that unless we grant the orders sought, the intended appeal will be rendered nugatory; and that the judgment of the Chief Magistrate's court has already been executed and no account has been rendered of the amount recovered from that execution.

5. Appreciating that there was nothing arising from the impugned ruling of 21<sup>st</sup> February 2019 capable of being stayed, counsel urged us to grant prayer 4 of the application and grant a temporary injunction to restrain execution of the judgment of the subordinate court.

6. Opposing the application, **Ms. Mureithi**, learned counsel for the respondent submitted that there is no appeal, least of all an arguable appeal on the basis of which the present application can be entertained; that the question whether the applicant was served with summons to enter appearance and notice of entry of judgment were canvassed before the trial court which found that the judgment entered against the applicant was regular; that despite having been served with summons to enter appearance, the applicant did nothing to defend the suit but belatedly complained about service. According to counsel, the applicant has been indolent and is not deserving of assistance. Furthermore, the intended appeal will not be rendered nugatory, it was submitted.

7. We have considered the application and submissions by counsel. To succeed, the applicant should demonstrate that the intended appeal is arguable; and that if the application is declined and the appeal subsequently succeeds, it would have been a futile exercise. As stated by the Court in ***Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006***:

***“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***

8. As to whether the intended appeal is arguable, we are mindful that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court or one that is deserving of the Court’s consideration. [See ***Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR***; and ***Kenya Commercial Bank Ltd vs. Hon. Nicholas Ombija, Civil Application No. Nai. 153 of 2009***].

9. Bearing those principles in mind, counsel for the applicant readily appreciated that to the extent that the ruling of 21<sup>st</sup> February 2019 merely dismissed the applicant’s application, there is nothing arising from it that is capable of being stayed. The prayers to stay the ruling are therefore misplaced and cannot be granted. (See the case of ***National Cereals and Produce Board vs. Errad Supplies & General Contractors Limited, Nairobi Civil Application No. Nai 48 of 2012***).

10. The remaining prayer 4 of the application seeking a temporary injunction to restrain execution of the judgment of the subordinate court, which counsel for the applicant ultimately urged us to grant poses a jurisdictional challenge. As counsel for the respondent submitted, there is no appeal challenging that judgment. The notice of appeal on which the present application rests is in respect of the ruling that declined leave to appeal the judgment of the subordinate court out of time in addition to declining to stay execution of that judgment.

11. It seems to us that the notice of appeal challenging the ruling does not give the Court a basis to halt execution of the earlier judgment of the Magistrate’s court in respect of which there is no appeal. In ***Nguruman Ltd vs. Shompole Group Ranch & another [2014] eKLR*** a five judge bench of this Court was unanimous that a notice of appeal lodged in relation to a later decision cannot be the basis of stopping execution of an earlier decision. That decision followed an earlier decision of the Court in the case of ***Nairobi City Council vs. Resley (2002) EA 494*** where it was stated:

***“There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision.”***

And later in the same decision:

***“It is trite law that without a notice of appeal against particular orders we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr. Oduol’s argument to the effect that the notice of appeal against the ruling of 11<sup>th</sup> April, 2002, entitles him to apply for a stay of execution of orders made on 11th March, 2002.***

***27. In this matter, the notice of appeal relates to the decision of the High Court given on 2nd December, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on 2nd December, 2009. No appeal has been preferred against that Judgment. In the case of John N. Liboyi versus the Board of Governors of St. John College Civil Application No. Nai 13 of 2009 (UR 92/2009) to which we were referred, this court held:***

***“The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the Jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough from the wording of the Rule”***

12. Guided by those principles, we do not have a basis for restraining the respondent from executing the decree of the Chief Magistrate’s court given on 21<sup>st</sup> November 2012 in respect of which there is no appeal. We must therefore down our tools.

13. The application therefore fails and is accordingly dismissed with costs to the respondent. For the avoidance of doubt, the applicant is of course at liberty to pursue her appeal against the ruling of 21<sup>st</sup> February 2019.

Orders accordingly.

***Dated and delivered at Nairobi this 25<sup>th</sup> day of October, 2019.***

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**