



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 22 OF 2010**

**BETWEEN**

**1. JUMA MUCHEMI**

**2. MARY WANJIKU JUMA MUCHEMI .....APPLICANTS**

**AND**

**JUDE RAGOT T/A RAGOT & COMPANY ADVOCATES .....RESPONDENT**

*(Being an application for stay of execution pending hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Kisumu (J.R. Karanja, J.) dated 7<sup>th</sup> August, 2009*

in

H.C.Misc. C. C. No. 244 of 2002)

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**RULING OF THE COURT**

This application by notice of motion is brought under **rule 5(2)(b)** of the Court of Appeal Rules in which the applicants **Juma Muchemi** and **Mary Wanjiku Juma Muchemi** seek the following prayers:

**“1. ...**

**2. That the Honourable court be pleased to order stay of execution of the order of the superior court given on 7<sup>th</sup> August, 2009 in the superior court’s Miscellaneous Civil Cause No. 244 of 2002 at Kisumu pending the hearing and determination of the applicants’ intended appeal.**

**4. That the applicants be at liberty to apply for further orders and/or directions as this Honourable Court may deem fit and just to grant.**

**5. That costs be provided for.”**

The same was based on the grounds set out on the face of the application as follows:

**“(a) That the superior court in the aforementioned order directed that the applicants be personally held liable for the decretal debt incurred by WEST KENYA WHOLESALERS LTD.**

**(b) That the decretal amount with costs exceed Kshs.2,500,000/= and further will accrue.**

**(c) That the applicants intend to appeal from the said order, which intended appeal raise arguable points of law and facts and which intended appeal has a high chance or probability of success.**

**(d) That the respondent has taken out execution proceedings against the applicants at Kisumu.**

**(e) That the applicants are apprehensive that unless this Court grants the orders sought herein, the respondent shall proceed to execute the said orders against the applicants and the intended appeal if successful will be rendered nugatory.**

**(f) That the applicants are sickly senior citizens who have just returned from medication in India and any execution shall subject them to untold suffering irreparable loss and embarrassment.**

**(g) That it is in the interest of justice and fairness that this Court do grant the applicants the orders sought herein.”**

The application was also supported by an affidavit deposed to by Mary Wanjiku Juma Muchemi, the 2<sup>nd</sup> applicant. In the affidavit the deponent avers about **Civil Suit No. 80 of 1999** which involved a dispute between National Bank of Kenya and West Kenya Wholesalers Limited in which the applicants were sole directors and shareholders. In course of business the latter had obtained banking facilities from the former which was the core of the dispute. It was further deposed that arising from this dispute a consent order was recorded in the year 2003 fixing the respondent’s fees at Kshs.2.5 million in circumstances unknown to the applicants; that the company came to know of the consent order and instructed the firm of **Messrs Kasamani & Company Advocates** to set aside that order but he could not carry out the instructions as he had been barred from practising. However, while the application was pending determination the respondent filed an application seeking to lift the veil of incorporation of the company. The applicants then filed a reply to that application. It appears the application was heard and determined by the superior court at Kisumu (*Karanja, J.*) wherein the veil of incorporation of West Kenya Wholesalers Limited was lifted and the applicants required to honour the liabilities of the company. The applicants are aggrieved by the order of the superior court and intend to appeal against it, notice whereof has already been filed. Meanwhile the respondent took out notice to show cause proceedings but did not serve the applicants with the same but instead dropped a copy at the office of their advocates and on 1<sup>st</sup> February, 2010 obtained a court order allowing him to execute for his said fees. Arising from these proceedings, the respondent had already attached and collected Kshs.300,000/= which was deposited in Court pursuant to the order in the proceedings. The deponent avers further that if the order of stay is not granted the applicants will suffer irreparable loss and damage due to the old age of the 1<sup>st</sup> applicant who is not in employment while the deponent is a housewife and that Kshs.2.5 million is a colossal sum of money which the applicants cannot pay in view of the competing medical needs and other daily subsistence; that the applicants will be subjected to untold suffering, embarrassment and inconvenience. That on the other hand the respondent, a leading lawyer in Kisumu will suffer no hardship if an order of stay is granted.

The respondent filed a replying affidavit to oppose the application. He deposed that he had been instructed by the 1<sup>st</sup> applicant to represent West Kenya Wholesalers Limited in **High Court Civil Case No. 80 of 1999** and that the decree which he sought to execute was generated from a consent order recorded by the parties on 21<sup>st</sup> May, 2003 which order and the resultant decree had not been set aside. According to the replying affidavit the notice taken out by the advocates for the respondent required the applicants to show cause why their properties should not be attached and sold to satisfy the decree and that the applicants’ lawyer was properly served with the notice and they appeared in court in response thereto on 1<sup>st</sup> February, 2010 when the order was made. As a result of that order the applicants had already made part payments of the decree apart from Kshs.350,000/= which was deposited by them

as part of the security against the decree.

According to the deponent the ruling intended to be appealed against was well reasoned hence unassailable and that the intended appeal is frivolous and the respondent is able to refund the sum sought in the decree in event that the appeal succeeds.

The application was heard by this Court on 15<sup>th</sup> May, 2010 when **Mr. Ojiambo**, learned counsel for the applicants and **Mr. Ragot**, learned counsel for his firm submitted on the application on the basis of the supporting or replying affidavits. Counsel for the applicants submitted that as directors of West Kenya Wholesalers Limited, they were separate entities from the company and not one and the same thing, and that when they made proposals to sell their personal property in order to pay the company debt this was simply an act of good faith. Counsel stated further that no good reason was given by the superior court for lifting the veil of incorporation. In his view this demonstrates an arguable appeal with good chances of success.

On the nugatory aspect, counsel stated that refusal of the application by this Court as sought will open the applicants to a risk of more debt claims which will cause them prejudice and that since the applicant's land had already been pledged as security, the respondent will not suffer any prejudice if the order of stay is granted.

Mr. Ragot for the firm stated in reply that there had been exchange of letters between the company and the respondent over this claim all of which were signed by the 1<sup>st</sup> applicant on behalf of the company. He stated that apart from the respondent there was no other creditor of the applicant in court. According to counsel the admission of the 1<sup>st</sup> applicant that he has been settling huge medical bills shows ability to pay the debt owed to the respondent.

The applicants herein are questioning their position viz a viz West Kenya Wholesalers Limited and whether their positions as director and/or shareholders of the company constitute them as the company. They are also not sure if a valid reason was given by the superior court for lifting the veil of incorporation. These issues are reflected in the draft memorandum of appeal which has been annexed to this application.

Having considered what has been urged before us we are of the view that they constitute arguable issues which require investigation in the cause of hearing of the intended appeal. The court has repeatedly pointed out that an arguable appeal does not in any way connote an appeal that will or must succeed.

The applicants also express the fear that refusal to grant the order of stay sought herein is likely to open them to the risk of more debtors coming up with claims against them and that Kshs.2.5 million is a colossal amount of money. Much as the present application is between the two parties herein, this fear by the applicants, as business people, cannot be wished away.

In our view the applicants have satisfied the two principles which are necessary before an application of this nature can be granted and we find this a proper case where a stay order should be granted – see ***CFC Financial Services Limited v Juja Road Fancy Store Limited, Civil Application No. Nai. 328 of 2009 (UR 226/2009)***. In the circumstances we grant the applicants the order of stay sought in prayer 2 of the Notice of Motion dated 12<sup>th</sup> February, 2010 on condition that they provide security in form of a bank's guarantee, or land whose value is in excess of Kshs.2.5 million within 30 days of this order, failing which the application will stand dismissed. Costs of the application will be paid to the respondent in any event.

***Dated and delivered at Nairobi this 2<sup>nd</sup> day of July, 2010***

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**