



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appli 209 of 2009 (UR 143/2009)**

SAMUEL KAMAU MACHARIA ..... 1<sup>ST</sup> APPLICANT

PURITY GATHONI MACHARIA ..... 2<sup>ND</sup> APPLICANT

AND

OCEANFREIGHT TRANSPORT CO. LTD ..... RESPONDENT

*(An application for stay of proceedings in Bankruptcy Notices No. 3 and 4 of 2008 pending*

*the lodging, hearing and determination of an intended appeal from the Ruling*

*and Order of the High Court of Kenya at Nairobi, (Kimaru, J) dated 27<sup>th</sup> May, 2009*

in

**Bankruptcy Notices Nos. 3 and 4 of 2008 (Consolidated)**

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**RULING OF THE COURT**

This is an extremely old case with a checkered history. It all started in 1991 when the respondent filed an action in the superior court seeking refund of Kshs.500,000/= from the appellants, in respect of a property transaction that did not materialize. The suit is Nairobi ***HCCC No. 3958 of 1991 – Oceanfreight Transport Co. Ltd vs Purity Gathoni Githae and S. K. Macharia***. The respondent obtained judgment in that suit for the principal sum of Kshs.500,000/= plus interest thereon at 19% p.a. compounded monthly from 6<sup>th</sup> December, 1986 until payment in full. That judgment debt, which still remains unpaid, now stands at a staggering sum in excess of Kshs.30 million. No appeal was ever filed against that judgment. Over the years the judgment creditor has attempted to execute the judgment without much success.

On 1<sup>st</sup> July, 2008 the respondent issued bankruptcy notices to the applicants, pursuant to Rule 99 of the Bankruptcy Rules, demanding payment of Kshs.29,334,170/= together with interest thereon at the rate of 19% p.a. as per the aforesaid judgment.

The applicants, in response to the bankruptcy notices, filed affidavits pursuant to Rule 101 of the Bankruptcy Rules seeking the setting aside of those notices. Essentially, the applicants' case was that they had a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt and for which they could not have set up in the action in which the judgment or order was obtained. They relied on **Rule 100 (2)** of the **Bankruptcy Rules**, which states:

***“There shall be also endorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the registrar.”***

In a ruling delivered by the superior court (Kimaru, J) on 27<sup>th</sup> May, 2009, the court rejected the argument that the applicants had a valid counter-claim, set-off or cross demand that entitled them to set aside the bankruptcy notices and upheld the said notices.

In a well reasoned ruling, the superior court said, in part:

***“In my humble view, for a debtor to be successful in his application to set aside a bankruptcy notice in bankruptcy proceedings, he must first establish that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt. Further, such counter-claim, set-off or cross demand must be of a nature which would not have been raised by the debtor in the proceedings that resulted in the judgment that is sought to be enforced by institution of bankruptcy proceedings against such debtor. Such counter-claim, set-off or cross demand must be of a nature that a court of law, can, when applying its mind on the facts of the case, reach a determination that such a counter-claim, set-off or cross demand is valid as to disentitle the creditor from instituting bankruptcy proceedings against the debtor.”***

It is against that ruling that an appeal is intended, and for now the applicants seek a stay of further proceedings with respect to the bankruptcy notices.

In his able submissions before this Court, Mr. Gibson Kamau Kuria, learned senior counsel for the applicants argued that the issue before the Court was a novel one, never having been decided before, and revolving around the question: ‘what is the burden of proof required of a person who says he has a valid counter-claim against the judgment creditor?’ Dr Kuria relied on the English case of ***Re A Debtor (No. 991 of 1962) ex parte The Debtor vs Tossoun [1963] 1 AER 85*** in which Lord Denning said in part:

***“I do not think that it is right to define by any particular formula what is the degree of proof in support of the cross-demand that is to be required because that must depend in every case entirely on the particular facts and circumstances. The registrar has to be satisfied that he has a cross-demand which exceeds the judgment debt. I agree that means a genuine triable cross-demand. The one thing on the evidence before him that the registrar could not properly do when the matter was before him was to say: “I am not satisfied that there is here a cross-demand” and dismiss the application. It seems to me he could either have allowed it or allowed evidence generally to be filed in reply.”***

Dr. Kuria submitted that the superior court erred in not admitting the applicants’ counter-claim and in imposing a much higher burden of proof, and he relied on another English case of ***The Debtor vs Wiseburg (1957) 2 AER 551***.

With regard to whether this appeal will be rendered nugatory unless the orders sought are granted, Dr. Kuria submitted that the Receiving Orders, if issued, would seal the fate of the applicants.

Mr Riunga Raiji, learned counsel for the respondent, also ably argued before us that there was indeed a valid judgment against the applicants, against which there has been no appeal preferred, and that the applicants are simply frustrating recovery of the judgment-debt. He relied on the cases of ***Uniconsult Kenya Ltd vs Anastasia Wangechi Mbau, Court of Appeal Civil Application No. Nai. 105 of 2009 (unreported)***, ***Re A Debtor 1934, All E. R 688 and Re G. E. B, A Debtor 1903, 2 KB 341***.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

Dr. Kuria’s argument that there is a novel issue before court regarding the standard of proof required in asserting a counter-claim under Rule 100 (2) of the Bankruptcy Rules has some merit and needs to be tested in the intended appeal when the same is filed and argued before a full bench of this Court. We are, therefore, satisfied that the appeal is arguable. An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. The appeal is based on technical legal grounds. It would not be appropriate to say more on that for doing so would not only be pre-emptory but also might cause embarrassment to the judges who will ultimately deal with the appeal. Suffice to say at this stage that we are prepared to accept that it is arguable.

On the second point of whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that the same will **not** be rendered nugatory. We recognize the argument put forward by the applicants that there is threat of Receivership Orders being made against them which would effectively seal their fate. But we are also conscious of the case put forward by the respondent that the judgment debt which now stands at a staggering sum in excess of Kshs.30 million continues to rise, and must indeed be paid. We also note, once again, that no appeal was ever preferred against

that judgment. We are also of the view that should the applicants eventually succeed, they will be able to seek refund of the judgment sum. Having considered the interests of both the parties, we have come to the conclusion that the intended appeal herein will **not** be rendered nugatory should the orders sought are not granted.

In view of the fact that the applicants have not satisfied the second limb of the principles for grant of stay of execution and/or further proceedings, we dismiss this application with costs to the respondent.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of October, 2009.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**