



**Trattoria Limited v Maina & 3 others (Petition (Application)
E029 of 2022) [2022] KESC 75 (KLR) (Civ) (25 November 2022) (Ruling)**

Neutral citation: [2022] KESC 75 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL
PETITION (APPLICATION) E029 OF 2022
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
NOVEMBER 25, 2022**

BETWEEN

TRATTORIA LIMITED APPLICANT

AND

JOANINAH WANJIKU MAINA 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

(Being an application for stay of execution of the Decree of the High Court (Mativo J.) issued on 21st July 2017 in Petition No. 132 of 2014 and confirmed by the Judgement of the Court of Appeal at Nairobi (Warsame, Omondi & Lesiit JJA) delivered on 22nd July 2022 in Civil Appeal No. 151 of 2018)

RULING

[1] Upon reading the Notice of Motion by the applicant dated September 9, 2022 and filed on September 14, 2022, brought pursuant to article 163 (4) (a) of the Constitution, section 23 (A) of the Supreme Court Act, 2011 as well as Rules 31 and 32 of the Supreme Court Rules, 2020 seeking orders that;

1. Pending the inter-partes hearing and determination of the petition, this Honourable Court be pleased to issue an order staying the execution of the order of *Certiorari* issued on July 21, 2017 by the High Court in Petition No. 132 of 2014 as consolidated with Petition No. 129 of 2014, which quashed the approvals granted by the County Government of Nairobi for installation of



water tanks, smoke extractor, L.P.G gas cylinder and cold storage installed at the fire exit at Town House, Nairobi on L.R No. 209/2362; and

- [2] Upon considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by Gaetano Ruffo on September 9, 2022 wherein he contends that, following the judgment of the Court of Appeal delivered on July 22, 2022 affirming the decision of the High Court granting an order of *Certiorari* quashing the approvals granted by the 2nd respondent for the installation of water tanks, smoke extractor, L.P.G gas cylinders, and cold storage at Town House on Nairobi L.R No. 209/2362, the 1st respondent threatened to institute contempt proceedings against it for alleged failure to comply with the decree of the High Court dated July 5, 2018; and that the 1st respondent also confirmed that it had engaged the 2nd respondent with a view to removing from the said premises, the applicant's L.P.G gas cylinder, water tanks, and smoke extractor; and
- [3] Upon considering the applicant's submissions dated September 12, 2022 and filed on September 14, 2022, wherein it submits that, on August 20, 2022, the 1st respondent's advocates issued a seven days' notice seeking to execute the decree of the High Court together with the Penal Notice within 7 days; and that the said L.P.G cylinder, water tanks, and cold room are essential to the operations of the applicant thereby urging the Court to grant the stay; and that unless the orders sought are granted, the appeal before this Court will be rendered nugatory; and
- [4] Also Noting the 1st respondent's replying affidavit, preliminary objection on jurisdiction and submissions wherein she contends that;
- i. She is the owner of L.R No. 209/236 and that the applicant's 1000 kilograms LPG gas cylinder and cold room are placed at the fire exit and fire assembly points in contravention of the law; and if the stay is granted the building would pose a hazard to its occupants, the environs and members of the public.
 - ii. The court lacks jurisdiction to hear and determine the appeal.
 - iii. The petition of appeal is incompetent, defective and in breach of the *Supreme Court Act* and Rules having been filed after expiry of 30 days from the date of filing the notice of appeal and no extension has been sought.
 - iv. The applicant has not placed any material before the court to justify the issuance of a stay of execution order and that the effect of such an order, if granted, will lead to the undesirable consequences of maintaining the status quo and which would pose a danger to the public thereby urging the court that the appeal will not be rendered nugatory if the orders sought are not granted; and
- [5] Further Noting the 2nd respondent's submissions wherein it submits that: at all material times, the applicant had applied for and obtained all necessary approvals of plans of workplace premises as required under the *Occupational Health Safety Act* and all other relevant laws, therefore, the applicant is compliant with all the laws to the extent that it was issued with the necessary clearances from the 2nd respondent. And that, the application should be allowed as this Court has the authority under section 24(1) of the *Supreme Court Act*, 2011, to issue interlocutory reliefs. Furthermore that, the appeal would be rendered nugatory if the orders sought are not granted as the 1st respondent is keen on executing the judgment of the court outlined in Petition No. 132 of 2014 as consolidated with Petition No. 129 of 2014 with the resultant effect of crippling the applicant's business and its operations unless the stay is granted; and



[6] Also Noting the 3rd and 4th respondents’ response to the applicant’s application where they aver that the dispute between the applicant and the respondent is a civil dispute arising out of a tenant-landlord relationship, and they, therefore, do not wish to interfere in it and would instead prefer to leave it to court to make a determination on the application: and

[7] Having considered the application, responses, and submissions before us, we now opine as follows:

- i. In many instances, this court has addressed itself on the question whether its jurisdiction has been properly invoked under article 163(4)(a) of the Constitution. In that regard, we stated thus in Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another SC Petition No 3 of 2012; [2012], eKLR :

“This Article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court...

The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum.”

- ii. Also, we emphasized in Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others SC Petition No. 10 of 2013 [2014] eKLR and Gatirau Peter Munya v Dickson Mwenda & 2 others SC Application No. 5 of 2014 [2014] eKLR that an appeal lies to this court under article 163(4)(a) if the issues placed before it revolved around the interpretation and application of the Constitution and that the interpretation or application of the Constitution had formed the basis for the determinations at the superior courts below this court and the same issue had therefore progressed through the normal appellate mechanism to reach this court.
- iii. We note in the above context that, the applicant’s case before the superior courts did not involve the interpretation and application of the Constitution. The gravamen of the applicant’s case before the said courts involved a tenant-landlord dispute concerning the approvals by the 2nd respondent to allow the applicant to store the L.P.G cylinder, water tanks, and cold room in what the 1st respondent alleged to be fire exits and fire assembly points. A perusal of the Judgment of the Court of Appeal would indeed show that at no point did it venture to address any constitutional question and the Judgment of the High Court, while involving some provisions of the Constitution, cannot be of benefit to the applicant as those issues are not presently before us.
- iv. In the circumstances, the applicant has not properly invoked this court’s jurisdiction under article 163 (4) (a) of the Constitution and following the principle enunciated in Lawrence Nduttu supra we must find that we lack jurisdiction to entertain its plea.
- v. The principles for grant of orders of stay was settled in Gatirau Peter Munya v. Dickson Mwenda & 2 others SC Appl. No. 5 of 2014 [2017] eKLR. In that case we held that in such applications, an applicant must satisfy this court that the appeal is arguable and not frivolous; that the appeal would be rendered nugatory if the stay orders are not granted and that it would be in the public interest to do so.



vi. In *Kenya Hotel Properties Limited v Attorney General & 5 others* SC Application No 27 of 2020 [2020] eKLR, we furthermore observed:

“Arguability of an appeal would entail this court looking at the record and the Petition of Appeal and determine, without finality but at a *prima facie* level, whether the appeal has substance and/or is not made of straw. It also entails interrogating its foundation and confirming that it is not built on quicksand.”

vii. In *Haki Na Sheria Initiative v Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR) (Civ) (3 December 2021) (Ruling) we added thus:

“On the nugatory aspect, the concern is whether 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.”

viii. From the foregoing, it is our considered opinion that the application does not meet the criteria set for grant of orders of stay as enunciated in *Gatirau Peter Munya* (*supra*) because we lack the jurisdiction to entertain both the appeal and the application before us. Accordingly, we are not persuaded to grant the orders of stay because the appeal itself is founded on quick sand.

ix. In addition, section 18 of the *Supreme Court Act*, 2011 grants this court the jurisdiction to make an order for summary dismissal of a petition where it is apparent on the face of it that it is wholly defective. Having found that this court lacks jurisdiction to entertain the appeal under article 163 (4) (a) of the *Constitution*, we find that the appeal lacks legal foundation. Consequently, we find that the Notice of Motion dated September 9, 2022 is not merited and is hereby dismissed for want of jurisdiction and the petition of appeal is also struck out for want of jurisdiction.

[8] Having found the application unmeritorious, we order as follows:

- a. The Notice of Motion dated September 9, 2022 is hereby dismissed.
- b. The petition of appeal dated September 5, 2022 is hereby struck out for want of jurisdiction.
- c. The applicant shall bear the costs of this application.

[9] It is so ordered.

DATED and DELIVERED AT NAIROBI this 25th Day of November, 2022

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P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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S. C WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT



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I. LENAOLA

JUSICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA

