



Kassam Hauliers Limited v Ngaruiya (Suing as the Administrator of the Estate of Samuel Mbugua Mungai (Deceased)) (Civil Appeal (Application) E384 of 2020) [2024] KECA 1635 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1635 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E384 OF 2020
S OLE KANTAI, PM GACHOKA & DK MUSINGA, JJA
NOVEMBER 8, 2024**

BETWEEN

KASSAM HAULIERS LIMITED APPLICANT

AND

JULIA WAMBUI NGARUIYA RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL MBUGUA MUNGAI (DECEASED)

(Being an application for stay of execution of the Judgment of the High Court of Kenya at Machakos (Odunga, J.) delivered on 6th February 2020 in Civil Suit No. 9 of 2019)

RULING

1. The applicant's notice of motion dated 18th February 2022 seeks stay of execution of the High Court judgment (Odunga, J.) (as he then was), delivered on 6th February 2020, pending hearing and determination of this appeal.
2. In the impugned judgment, the trial court awarded the respondent a sum of Kshs.46,400,000 for loss of dependency following a fatal accident that involved Samuel Mbugua Mungai (deceased) and the appellant's motor vehicle registration number KBW-868R ZE 5489.
3. The appellant was aggrieved by that decision and filed an appeal to this Court.
4. The applicant states that the respondent has so far caused attachment and sale of its five (5) motor vehicles in execution of the impugned judgment; that the respondent is a person of unknown means and if the entire decretal amount is paid to the respondent before the appeal is heard and determined, the appeal if successful, shall be rendered nugatory as the respondent will be unable to refund the decretal sum.



5. The applicant contends that its appeal is arguable in that the learned judge erred in law in awarding the sum of Kshs.46,400,000 for loss of dependency and contends, inter alia, that the learned judge misdirected himself in finding that the deceased's income was Kshs.200,000 per month; and in failing to properly consider other relevant facts of the case as set out in its memorandum of appeal.
6. Opposing the application, the respondent argues that the award of Kshs.46,400,000 was commensurate to the loss occasioned on her late husband's estate; that the appellant had been granted stay of execution on condition that it deposits half of the decretal amount in court but it failed to do so and as a result the execution ensued; that the applicant has so far filed three applications for stay of execution without ever complying with the conditional stay as aforesaid; that the applicant has resorted to transferring its motor vehicles to third parties to defeat the execution of the decree; that the appeal is not arguable because judgment on liability was entered by consent at 90:10 and that the award of damages was also properly done. For the aforesaid reasons, the respondent urged us to dismiss this application.
7. During the hearing of the application, Ms Ngoizi appeared for the applicant, while Mr. Makumi appeared for the respondent. Counsel made brief oral submissions, which we have taken into consideration.
8. The principles that guide this Court in an application of this nature are well settled. An applicant must demonstrate existence of an arguable appeal, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. For an applicant to succeed, one must satisfy the twin principles. See Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR. An applicant need not demonstrate a multiplicity of arguable grounds of appeal, even one suffices. An arguable appeal is not one that will necessarily succeed, it is one that should be argued fully.
9. Having perused the memorandum of appeal that raises six grounds, we are persuaded that the appeal is arguable. We need not say more lest we embarrass the bench that shall hear and determine the appeal.
10. Turning to the second limb, it is not in dispute that the applicant was granted a conditional order of stay of execution but has failed to comply with the condition. That prompted the respondent to apply for execution of the decree, and there has been partial execution. The applicant has so far made three unsuccessful applications for stay of execution of the trial court's judgment.
11. The order that was made by the trial court directing the applicant to deposit half of the decretal amount in court is, in our view, quite reasonable and has never been varied. We would ourselves have been inclined to make such an order, considering that before the trial court's judgment on liability was agreed by consent at 90% against the applicant and 10% against the respondent.
12. Whereas the decretal amount is substantial, this Court must balance the competing interests of the parties herein. An applicant who has failed to comply with a reasonable conditional order of stay of execution imposed by a trial court will hardly expect this Court to grant an unconditional order of stay. We therefore dismiss this application with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

D.K. MUSINGA, (P.)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

