



**County Secretary, Nairobi City County & another v Tom Ojienda & Associates
(Civil Application E052 of 2024) [2024] KECA 767 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KECA 767 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E052 OF 2024
PO KIAGE, P NYAMWEYA & PM GACHOKA, JJA
JULY 5, 2024**

BETWEEN

**COUNTY SECRETARY, NAIROBI CITY COUNTY 1ST APPLICANT
CHIEF OFFICER FINANCE, COUNTY TREASURER, NAIROBI CITY
COUNTY 2ND APPLICANT**

AND

TOM OJIENDA & ASSOCIATES RESPONDENT

(An application for stay of proceedings pending the hearing and determination of the intended appeal against the Ruling of the High Court of Kenya at Nairobi (Chigiti J.) delivered on 20th December 2023 in Judicial Review Application No. 123 of 2017)

RULING

1. The County Secretary and the Chief Officer Finance/ County Treasurer of Nairobi City County are the applicants in a Notice of Motion application dated 7th February 2024 lodged in this Court, in which they seek an order for temporary stay of proceedings in Nairobi HCJR 123 of 2017, pending the hearing and determination of the intended appeal against a ruling delivered therein on 20th December 2023. This prayer is supported by an affidavit sworn on even date by Patrick Analo Akivaga, the Acting County Secretary of Nairobi City County who is the 1st applicant herein.
2. We shall briefly set out the context of the application, as gleaned from the pleadings. Prof Tom Ojienda, the respondent herein, filed an application dated 5th May 2021 in the High Court seeking to cite the then County Secretary of Nairobi City County, one Cyrus (Jairus) Musumba, and the Chief Officer, Finance, one Halakhe Waqo, for contempt. The High Court delivered a ruling on 10th March 2022 and cited the two officers for contempt and summons were subsequently issued to the officers to show cause why they should not be committed to civil jail. The applicants allege that they became aware of the



- alleged contempt on 19th March 2023 when Dr. Jairus Musumba asked the 1st applicant to accompany him to court, and that on 7th November 2023, the court gave a date for mitigation ahead of sentencing.
3. On 11th December 2023, the applicants filed an application in the High Court in HCJR/123/2017-Prof. Tom Ojienda vs The County Secretary, Nairobi City County and Another, seeking to pay the respondent the outstanding decretal sum of Kshs 133,202,739.72 in three instalments as follows: Kshs 15,000,000 on or before 22nd November 2023; Kshs 35,000,000 on or before 31st March 2024; and Kshs 83,303,739.72 within the next three financial years. The applicants explained that the application was necessitated by the budgetary constraints faced by the Nairobi City County Government, the substantial decretal sum whose payment in lump sum would affect and compromise the delivery of basic and essential services provided by the County Government, and the deactivation before the commencement of the 2023/2024 financial year of the Integrated Financial Management Information System (IFMIS), the platform designated by the National Treasury for financial management of government funds.
 4. The applicants are accordingly aggrieved by the dismissal of their application in a ruling delivered by the High Court at Nairobi (Chigiti J.) on 20th December, 2023, and state that as a consequence the matter shall be proceeding to sentencing of both applicants on account of contempt of court orders. Further, that the applicants are not the officers who were initially cited for contempt on 10th March 2023 as they came into office to replace the individuals who had actually been cited for contempt, namely Mr. Cyrus Musumba and Mr. Hallakhe Waqo. The Applicants stated that the initial sum of Kshs 20,000,000 had been paid to the Respondent partially to settle the decretal amount pursuant to a consent entered into and recorded in Court. They stated that the Court urged them to negotiate with a view to arriving at a further settlement and pursuant to this direction there was an offer to pay Kshs 15,000,000.
 5. The applicants aver that they are merely accounting officers of the Nairobi City County and could only exercise authority, control and mandate to a certain extent. Further, that they risked being punished in their personal capacities for official issues that had spun out of their control and mandate. Additionally, there was no evidence of service on them of the order or judgment the respondent was seeking to enforce, and that they had acted in good faith in spite of the alleged contemptuous acts being attributed to the previous office holders. The applicants are apprehensive that should the orders sought not be granted, they are likely to be incarcerated for monies owed out by a public entity without any lawful justification. The applicants annexed the impugned ruling dated 20th December 2023; their Notice of Appeal dated 21st December 2023 and lodged on 27th December 2023; and their draft Memorandum of Appeal dated 25th January 2024.
 6. The respondent filed a replying affidavit sworn on 8th April 2024 in which he deposed that the trial Judge cogently laid down the reason for dismissal in the ruling dated 20th December 2023, being that the application was brought in bad faith as illustrated by the conduct of the applicants. The respondent further averred in this regard that the applicants, through their advocates on record, entered into a consent with the respondent leading to a partial payment of Kshs 20,000,000 and an outstanding debt of Kshs 133,202,739; on 19th May 2023, the 1st applicant testified that the decretal sum would be settled pursuant to the passing of the budget; and through submissions dated 22nd May 2023, sought an extension of up to August 2023 to settle the decretal sum. Accordingly, the High Court issued orders dated 21st July 2023 directing;
 - a. That the Respondent (being the Applicant) shall cause payment of the sum of Kshs 133,202,739.72 on or before 30th August 2023,



- b. That in the event the Kshs 133,202, 739.72 is not paid on or before 30th August 2023, then the Court shall proceed to sentence the contemnor, and
 - c. That the matter will be mentioned on 4th October 2023 to report compliance or for purpose of sentencing.
7. However, when the matter was mentioned on the 4th October 2023, the applicants “had not paid a cent” towards settlement of the decretal sum, and instead filed a replying affidavit dated 1st November 2023 stating that their budget was slashed and they could not pay the respondent, and further made promises to both the trial court and the respondent to make a payment of Kshs 15,000,000 by 8th December 2023, which was not done.
8. The respondent further deposed that there were no conceivable grounds of appeal with regard to the ruling of 20th December 2023 that would satisfy the threshold for granting a stay of proceedings under Rule 5 (2) (b) of the Court of Appeal Rules, and that the draft Memorandum of Appeal attached to the application was flawed, on account that it contained grounds of appeal challenging the conviction of the applicants for contempt, which was beyond the scope of the ruling of 20th December 2023, which only dismissed the application dated 11th December 2023 seeking instalment orders. The respondent asserted that the applicants were found in contempt through the judgment dated 10th March 2022, where A. Ndungu J. cited them for contempt for failing to pay the decretal sum as itemized in the Certificate of Order dated 25th October 2019. Therefore, this Court lacked jurisdiction to entertain any ground of appeal premised on the validity or otherwise of the contempt conviction since there was no Notice of Appeal indicating that the applicants intended to appeal the judgment dated 10th March 2022.
9. It was the respondent’s position that the applicants had not demonstrated any cogent grounds of appeal that would satisfy the threshold for an arguable appeal to warrant a stay of proceedings. Further, the substratum of the matter at hand, the payment of the decretal sum, was undisputed. All the other issues were merely auxiliary, raised to delay his enjoyment of the fruits of his labour. The respondent argued that the onus was upon the applicants to demonstrate how the sentence of the contemnors would render the intended appeal against the ruling of 20th December 2023 nugatory, as the said ruling did not relate to the conviction of the applicants for contempt of court but merely dismissed the applicants’ application dated 11th December 2023. As such the sentencing of the contemnor would not render the intended appeal nugatory since the intended appeal did not question the finding of guilt nor the legality of the sentencing process.
10. We heard the application on this Court’s virtual platform on 9th April 2024. Learned counsel, Mr. Duncan Okatch holding brief for learned counsel Mr. Mugoye, appeared for the applicants and highlighted written submissions dated 4th April 2024. Learned Senior Counsel Prof. Tom Ojienda appeared together with learned counsel Ms. Veralucy Awuor for the respondent, and similarly highlighted written submissions dated 8th April 2024. This Court has discretion under Rule 5 (2)(b) of the *Court of Appeal Rules* 2022 to grant and order of stay of further proceedings pending appeal, and the applicable principles are well settled. Firstly, an applicant has to satisfy that he or she had an arguable appeal. Secondly, an applicant in addition has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang’etbe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
11. Mr. Okatch, while reiterating the averments made in the application, submitted that an arguable appeal must not necessarily succeed but ought to be argued fully before the Court, and made reference to the case of *Kenya Commercial Bank Limited vs Nicholas Ombija* [2009] eKLR. It was counsel’s



- position that a cursory glance at the application and the draft Memorandum of Appeal showed that the applicants had an arguable appeal, and reiterated that an order for sentencing once made and the sentence served was irreversible. Therefore, that the applicants' appeal would be overtaken by events and if successful, would purely be an academic pyrrhic victory.
12. Prof Ojienda SC on his part submitted that firstly, the Court did not have jurisdiction as the applicants did not seek leave to appeal the decision of 20th December 2023, since the basis of their application in the High Court was execution proceedings arising from a taxation ruling. Additionally, the Notice of Appeal dated 20th December 2023, was invalid since the applicants were yet to obtain leave to appeal against the said decision. As such this Court did not have jurisdiction to hear and determine this matter, which position was buttressed in the decisions in *Kamau Kinga & Company Advocates vs Grace Wanjiku Kabiaru* [2017] eKLR and *Peter Nyaga Muvake vs Joseph Mutunga* [2015] eKLR.
 13. Secondly, the draft Memorandum of Appeal and the grounds in support of the application purport to refer to the ruling of the High Court made on 10th March 2022, and that this Court did not have jurisdiction over the said ruling as no Notice of Appeal was filed against it, as held in the case of *Margaret Kwamboka Ogeka & 3 Others vs Permanent Secretary, Ministry of Health & 3 Others* [2014] eKLR, and *Safaricom Ltd vs Ocean View Beach Hotel Ltd* Civil Application No. 327 of 2009. Related to this submission was Senior Counsel's assertion that the applicants had no arguable appeal against the ruling dated 20th December 2023 since they had failed to show any sufficient reason for the issuance of the orders sought in the High Court, and cited a lack of a budget for legal fees whilst the courts have held severally that the satisfaction of judgmental decrees does not lie in budgetary allocation. In addition, the applicants having continuously exhibited bad faith, and the Senior Counsel reiterated the instances the applicants had proposed modes of payment of the decretal sum but which they did not comply with.
 14. Thirdly, the ruling dated 20th December 2023 dismissed the Applicants' application dated 11th December 2023 amounting to a negative order which could not be the subject of a stay order therefore the current application was wholly misplaced. Reliance was placed on the holding by this Court in the case of *Kaushik Panchamatia & 3 Others vs Prime Bank Limited & Another* [2020] eKLR that a negative order is incapable of being stayed because there is nothing to stay. Senior Counsel submitted that the applicants were trying to stay the Court's proceedings pursuant to the ruling of 20th December 2023, yet there were no proceedings flowing from the said ruling that declined to accept their proposed mode of payment, and the only proceedings that were pending were the sentencing proceedings that flowed from the contempt ruling of 10th March 2022.
 15. Lastly, the applicants had not exhibited how the failure to grant this application would render the appeal nugatory, as they were yet to make any further payment in the partial settlement of the outstanding decretal sum per their proposal that the outstanding sums would be paid within the next three financial years, and the appeal would not have been heard and determined before the lapse of their proposed additional three years. Furthermore, there was no nexus between the intended appeal against the ruling dated 20th December 2023 which declined payment through instalments, and the sentencing as a consequence of the contempt ruling of 10th March 2022. In conclusion, Senior Counsel submitted that it was against public interest to allow the application which simply sought to validate continuous disobedience of court orders.
 16. A preliminary issue has been raised by Prof. Ojienda SC on the lack of jurisdiction of this Court for want of leave to appeal from the ruling of 20th December 2023. Mr. Okatch, however, pointed out in reply that the leave to appeal was granted after the delivery of the ruling and referred us to the order which was on the record. We are, therefore, satisfied that this application is properly before us. On the



substantive aspects of the application, we need to point out at the outset that an arguable appeal is not one that must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, it is sufficient if an appeal raises only one triable issue.

17. We have perused the draft Memorandum of Appeal annexed by the applicants, and we feel that it is necessary to reproduce the said grounds verbatim, in order to determine if any triable issue is raised in relation to the ruling delivered on 20th December 2023 declining the proposal to pay the decretal sum in instalments. The applicants have raised eight grounds of appeal as follows:
 1. The Learned Judge erred in fact and in law by dismissing the Appellants' application dated 11th December 2023;
 2. The Learned Judge erred in law and in fact by holding that the Applicants are in contempt of the Court orders issued on 10th March 2022 when they were not even in officer as employees of the Nairobi City County Government;
 3. The Learned Judge erred in law and fact by disregarding applicable known principles on the law of contempt
 4. The Learned Judge erred in law and in fact by holding that the Applicant have taken no single step whatsoever to satisfy the decretal sum and are consequently not deserving of the Court's mercy.
 5. The Learned Judge erred in law and in fact by relying on a lot of material stated from the bar and documents presented by the decree holders without establishing the truthfulness of the information contained on those documents.
 6. The Honourable Judge erred in law and in fact in failing to consider that some of the issues the Appellants were out of their control and in the hands of third parties like the Controller of Budget.
 7. The Learned Judge erred in law and in fact in failing to be guided by law and procedure in determining the matter at hand and issuing his ruling of the 20th December 2023 and therefore arriving at a wrong conclusion.
 8. The Honourable Judge erred in law and in fact in relying on extraneous matters in dismissing the Applicant's application.
18. It is notable that a number of grounds relate to the contempt proceedings which were not the subject of the impugned ruling. However, given the low threshold for arguability, we are prepared to accept that there may be a triable issue raised as regards whether the trial Judge took into account relevant factors when exercising his discretion to dismiss the applicant's proposal for payment of the decretal sum in instalments. We, however, do not find that the appeal will be rendered nugatory if a stay of proceedings is not granted for two reasons. Firstly, the order by the trial court was a negative order dismissing a proposal on payments by instalments. Since the impugned ruling did not order any party to do anything or to refrain from doing anything, the orders made therein are incapable of being stayed. and a stay order cannot therefore lie. In this regard see the decisions of this Court to this effect in *Registered Trustees, Kenya Railways Staff Retirements Benefits Scheme vs Milimo, Muthomi & Co. Advocates* [2022] eKLR and *Jennifer Akinyi Osodo vs Boniface Okumu Osodo & 3 Others* [2021] eKLR.
19. Secondly, even though the trial Judge after delivery of the ruling ordered that consequent to the ruling the sentencing proceeds, the contempt and sentence proceedings were not the subject of the



application by the applicants nor of the ruling appealed against. The sentencing proceedings cannot therefore be the subject of a stay in this application.

20. We therefore find that the applicants have not met the threshold for a grant of stay of proceedings, and the Notice of Motion application dated 7th February 2024 is accordingly dismissed with costs to the respondent.

21. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2024

P. O. KIAGE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

M. GACHOKA C. IArb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

