

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OKWENGU, OMONDI & JOEL NGUGI JJ.A)

CIVIL APPLICATION NO. E191 OF 2023

BETWEEN

RICHARD OTIENO ASUDI.....PETITIONER/APPLICANT

AND

**JASON MWORIA DCIO,
CENTRAL DIVISION, NAIROBI.....1ST RESPONDENT**

**CPL. PETER SAWE, CENTRAL
POLICE STATION, NAIROBI.....2ND RESPONDENT**

**THE DIRECTOR OF
CRIMINAL INVESTIGATION.....3RD RESPONDENT**

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

**NATIONAL POLICE
SERVICE COMMISSION.....5TH RESPONDENT**

MWANANCHI CREDIT LIMITED.....6TH RESPONDENT

*(Being an Application for stay of proceedings and temporary injunction
pending hearing and determination of an appeal from the Ruling of the
High Court (Ougo, J.) delivered on the 31st May, 2023*

in

Bungoma H.C. Petition No E015 of 2022)

RULING OF THE COURT

[1] Richard Otieno Asudi, the applicant herein, is dissatisfied with a Ruling delivered on 31st May, 2023 by the High Court (Ougo, J), in

Bungoma Petition No E015 of 2022 (constitutional petition). In the Ruling, the learned Judge dismissed the applicant's motion in which he was seeking among others, constitutional declaratory orders and a temporary injunction restraining the respondents from interfering with his possession of motor vehicle registration No. KBX 005L Toyota Land Cruiser (herein disputed vehicle).

[2] Consequently, the applicant has filed an appeal in this Court against the High Court Ruling, and has now moved this Court under Section 3A & 3B of the Appellate Jurisdiction Act, Rule 5(2)(b) of the Court of Appeal Rules, 2022, and Section 66 & 75(1) of the Civil Procedure Act, 2010, for orders of stay of proceedings in **Bungoma High Court Petition No E015 of 2022**, and an order of temporary injunction restraining the respondents either by themselves, their agents, servants, assignees, and/or any other person acting on their behalf, from detaining, selling, auctioning, disposing of, advertising for sale, or in any way divesting and/or interfering with the applicant's possession of the disputed vehicle.

[3] The applicant's claim in the High Court was a constitutional petition arising from a controversy over ownership of the disputed vehicle. The applicant contended that he bought the disputed vehicle at a public auction on 12th August, 2022; that the auction was

conducted by Jenks Auctioneer in execution of Warrant of Attachment in ***Bungoma High Court Election Petition No. 2 of 2017***; that he was an innocent purchaser for value without notice; and that contrary to his constitutional right of ownership of property, the disputed vehicle was taken from his premises by **Cpl. Peter Sawe of Central Police Station, Nairobi** (the 2nd respondent), on false allegations that the disputed vehicle had been stolen from **Mwananchi Credit Limited** (6th respondent).

[4] The applicant maintained that the respondents violated his constitutional right to enjoyment of property under Article 40 of the Constitution by taking the disputed vehicle from him. He dismissed the 6th respondent's claim to the disputed vehicle, contending that the judgment debtor in ***Bungoma High Court Election Petition No 2 of 2017***, offered the disputed vehicle as collateral for a loan on 8th June, 2022 long after the disputed vehicle had been proclaimed and placed under the custody of the law. The applicant, therefore, urged the High Court to issue orders of temporary injunction to restrain the respondents from interfering with his possession of the disputed vehicle pending the hearing of the constitutional petition.

[5] In opposing the applicant's claim, the 6th respondent contended that it was the legal owner of the disputed vehicle, as the same was charged to it as collateral for a loan, and that the Auctioneer had no right to sell the disputed vehicle. The 6th respondent explained that it filed ***civil suit CMCC No. 5358 of 2022***, against the Auctioneer; that the applicant was joined in the suit as an interested party; that the court in ***CMCC No. 5358 of 2022*** issued orders for preservation of the disputed vehicle; and that the applicant's motion was an attempt to circumvent this order.

[6] In her Ruling of 31st May 2023, the learned Judge applied the doctrine of avoidance and declined to deal with the issue of ownership of the disputed vehicle as a constitutional dispute as raised by the applicant. This decision was anchored on two factors. First, is the existence of ***CMCC No. 5358 of 2022***, and orders issued by that court for preservation of the disputed vehicle, which showed that there was another mechanism, through which the ownership of the disputed vehicle could be resolved. Second, the applicant had not referred his complaint in regard to denial of access to information, to the Commission on Administrative Justice for review, as required under section 14 of the Access to Information Act. The High Court, thus, dismissed the applicant's motion holding that the applicant had

approached it for constitutional relief prematurely, as he had not exhausted other remedies available to him for resolution of the dispute.

[7] The applicant asserts that he has an arguable appeal against the Ruling of the High Court. He has filed a memorandum of appeal faulting the Ruling on 8 grounds. He has filed an affidavit in support of his motion, contending *inter alia* that the learned Judge failed to appreciate that he (applicant), is not a substantive party in **CMCC No. 5358 of 2022**, and that the issues for determination before the magistrate's court, and the issues raised in the constitutional petition, are substantially different. The applicant explains that the substance of the matter in the magistrate's court is determination of the legality of the sale of the disputed vehicle, while the constitutional petition seeks determination of the legality of the actions of 1st to 5th respondent in forcefully gaining entry into the applicant's residence, detaining the disputed vehicle, and the violation of the applicant's constitutional rights. The applicant urges that if the orders he seeks are not granted, his appeal will be rendered nugatory as the disputed vehicle is wasting away.

[8] The 6th respondent is the only respondent who opposed the applicant's motion. In a replying affidavit sworn by Sylvia Wanjiru

Njoroge (Sylvia), the head of its legal Department, the 6th respondent reiterated the same position it had taken in the High Court. That is, that, the disputed vehicle is also the subject of litigation in **CMCC 5358 of 2022** in which the 6th respondent has sued Jenks Auctioneers; that the 6th respondent's claim is that the Auctioneers illegally attached and sold the disputed motor vehicle; that the disputed vehicle was jointly owned by the 6th respondent and Suleiman Kasuti Murunga, the Judgment debtor in **Election Petition No 2 of 2017**; that the disputed vehicle was, therefore, not available for attachment; that the applicant is a substantive party in **CMCC 5358 of 2022**, wherein his rights and interests over the disputed vehicle, if any, can be competently protected; and that the learned Judge was right in applying the doctrine of avoidance as there was a competent alternative machinery for settling the dispute.

[9] The 6th respondent also filed written submissions in which it urged the Court to dismiss the applicant's assertions that its appeal will be rendered nugatory. It argued that the assertions can neither stand on the ground of preservation of the disputed vehicle, nor stay of the High Court proceedings. Citing **Siepa Securities Sol.sa vs Okiya Omtatah Okoiti & two others**, 2018 eKLR; and **Githunguri vs Jimba Credit Corporation (No 2)** [1988] KLR 838; the 6th respondent

submitted that the order of the High Court which the applicant sought to be stayed, is reversible if the appeal is successful. It faulted the applicant for deliberately failing to inform the Court that the disputed vehicle was being detained at Central Police Station pursuant to preservation orders issued by the magistrate's court in **CMCC 5358 of 2022**, and that the applicant has not appealed against the order, nor has the order been set aside.

[10] In addition, the 6th respondent pointed out that the High Court having invoked the doctrine of avoidance and downed its tools, there are no further proceedings that are going on in the High Court, that can be stayed. This is because if the applicant's appeal succeeds, the proceedings in the High Court will just pick up from where the High Court downed its tools and hence the applicant will not suffer any prejudice. The 6th Respondent therefore urged the Court to dismiss the applicant's motion.

[11] The motion before us is substantially under Rule 5(2)(b) of this Court's Rules. This is because although the applicant has cited Sections 3 and 3A of the Appellate Jurisdiction Act, those sections invoke the inherent powers of the Court where there are no specific provisions of the law empowering the Court to grant the orders sought,

but it is necessary in the circumstances of the case, for the Court to exercise its inherent powers in order for the ends of justice to be met.

(See **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**)

[12] The applicant seeks an order of stay of proceedings and a temporary injunction pending appeal. These orders are available under Rule 5(2)(b) of the Court Rules that states as follows:

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

[13] For an applicant to obtain an order under Rule 5(2)(b) the applicant must satisfy the Court first, that the intended appeal is arguable and not frivolous, and secondly, that, if the order is not granted, the appeal would be rendered nugatory if it eventually succeeds. (See **Emirates Airline Limited vs Stephen Chase Kisaka [2015] eKLR**; and **David Morton Silverstein v Atsango Chesoni [2002] eKLR**).

[14] Furthermore, as was stated by this Court in **National Bank of Kenya Limited vs Leonard G. Kamweti [2015] eKLR**:

***“The object of the provisions of rule 5(2)(b) of this Court’s Rules to, inter alia, stay proceedings, is to preserve the substratum of the appeal so that the appeal is not rendered nugatory should it, once heard, succeed. The dual limbs of arguability of appeal and the nugatory aspect must be shown to co-exist in default of which an order under rule 5(2)(b) of the Court of Appeal rules shall be declined.*”**

[15] From the draft memorandum of appeal, the applicant has raised several issues. For instance, whether the parties in the Constitutional Petition and the parties in the civil suit in the magistrate’s court were the same, or to put it another way whether the applicant and the 1st, 2nd, 3rd, 4th and 5th respondents were parties to ***Nairobi CMCC No. E5358 of 2022***, and whether the issues in ***Nairobi CMCC No. E5358 of 2022*** were the same or different from the issues raised in the High Court constitutional petition. There is also an issue as to whether the learned Judge properly applied the doctrine of avoidance, in rejecting the applicants motion dated 2nd October, 2019.

[16] The issues raised by the applicant are issues that are not frivolous but clearly pertinent issues that are capable of argument for purposes of the appeal. At this stage, the Court is not expected to inquire into the merits of the arguments or determine whether they will succeed or not. It suffices that the applicant has met the requisite threshold as the existence of a single bona fide issue is sufficient. As was stated in

eKLR:

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication”

[17] On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if the orders sought are not granted, and the intended appeal succeeds, in **Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**, this Court stated that:

- “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
- x). Whether or not an appeal will be rendered nugatory depends on whether or not 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.”***

[18] The applicant seeks to have the disputed vehicle released to him pending the hearing and determination of the appeal, as he is concerned that the disputed vehicle has been vandalized and is wasting

away at Central Police Station. The question is whether the intended appeal will be rendered worthless if a temporary injunction is not granted in favour of the applicant in regard to the disputed vehicle and whether the applicant cannot be reasonably compensated by an award of damages.

[19] In the first place, the appeal cannot be rendered worthless because as the applicant pointed out his claim in the constitutional petition is the legality of the actions of the 1st to 5th respondent and the violation of the applicant's constitutional rights of ownership, which issues can be determined without the presence of the disputed vehicle. In addition, the applicant has admitted that the legality of the sale of the disputed vehicle by the auctioneer (from whom he claims to have acquired ownership), is the subject of the civil suit in the magistrate's court.

[20] Besides, the applicant has not denied the 6th respondent's contention that the disputed vehicle is being held at the police station pursuant to orders issued in the magistrate's court, that the disputed vehicle remains in safe custody at Central Police Station. It would be premature and un-procedural for this court to set aside or vary an order of the magistrate's court, in a matter in which the magistrate

court is properly vested with jurisdiction, without the order being properly challenged, through an appeal that must first pass through the High Court. In addition, there is no evidence placed before us to show that the disputed vehicle has any special or invaluable attribute, such that it cannot be replaced by an award of damages if the applicant succeeds in his appeal.

[21] As regards the prayer for stay of proceedings pending the hearing of the appeal, the learned Judge having applied the doctrine of avoidance, dismissed the applicant's motion and downed her tools. There are therefore no proceedings going on that can be stayed. As the 6th respondent correctly submitted, should the applicant's appeal succeed, the proceedings in the High Court will just pick up from where the High Court downed its tools and hence the appeal cannot be rendered nugatory, nor will the applicant suffer any prejudice.

[22] We come to the conclusion that the applicant has failed to establish that the appeal will be rendered nugatory if the orders sought are not granted. As stated in **National Bank of Kenya Limited vs Leonard G. Kamweti** (supra) the applicant had to establish both the twin limbs of arguability and the nugatory aspect, in order to succeed in his motion. Having failed to establish the nugatory aspect, the

applicant has failed to meet the threshold for granting the orders he seeks. Consequently, the application dated 4th August, 2023 fails and is dismissed with costs.

Dated and Delivered at Kisumu this 25th day of January, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR