IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: MUSINGA (P), MUMBI NGUGI, & TUIYOTT,

JJ.A.) CIVIL APPLICATION NO. E527 0F 2025

BETWEEN

ORBIT PRODUCTS AFRICA LIMITED.....APPLICANT

AND

SPOT TRADING IMPORT EXPORT SRL.....RESPONDENT

*(Being an application for stay of execution pending appeal of the Ruling and Order of the High Court of Kenya at Nairobi (**Mulwa, J.**) delivered on 14th August 2025*

in

HCCOMMSU E720 of 2024)

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RULING OF THE COURT

1. Before this Court is an application dated 29th August 2025 which is premised on the provisions of **rules 5(2)(b)** of the Rules of this Court as well as **Section 3A and 3B** of the **Appellate Jurisdiction Act**. The applicant seeks stay of execution of the ruling and order of the High Court at Nairobi, Commercial and Tax Division (**Mulwa, J.**) delivered on 14th August 2025 in Milimani **HCCOMMSU E720 of 2024**

together with all

consequential orders pending hearing and determination of the intended appeal.

2. The crux of the matter before the trial court and which ultimately gave rise to this application was whether the applicant could avoid or vary a consent judgment and secure leave to settle an admitted debt by instalments, or whether the respondent was entitled to immediate judgment and execution.

3. In summary, the dispute arose from a contract for the supply of goods in which the applicant expressly admitted owing USD 377,544 but sought the court's indulgence to settle the amount in 24 monthly instalments, citing financial hardship. The respondent opposed the request, maintaining that the admission entitled it to immediate judgment with interest. The parties had entered into two separate consents, one recorded in December 2024 requiring the applicant to provide a bank guarantee, and another in February 2025 acknowledging the debt and setting out specific issues for determination. The applicant contended that the later consent effectively superseded the earlier one.

4. In the impugned ruling delivered on 14th August 2025, the trial court held that the applicant's own affidavit constituted a clear unconditional admission of debt under **Order 13 rule 2** of the **Civil Procedure Rules,** thereby justifying judgment on admission. The court further found that the December 2024 consent remained binding as no valid legal grounds such as fraud or mistake had been shown to warrant its variation. The applicant's history of default and lack of credible proof of financial incapacity also defeated its plea to pay by instalments.

5. In the end, the trial court entered judgment for the respondent in the sum of USD 377,544, together with interest at court rates from February 2023 until payment in full. It declined the request to set aside the consent order dated 19th December 2024, as well as the applicant's plea to pay the decretal sum by instalments. The respondent was further awarded costs of both applications.

6. The applicant was dissatisfied with the decision of the High Court and intends to lodge an appeal before this Court as evinced by the Notice of Appeal dated 21st August 2025.

7. In its application that is supported by an affidavit sworn by **Alice Muigai**, the applicant's Legal Manager, the applicant contends that its intended appeal raises arguable points of law with high chances of success. In the draft memorandum of appeal ,which is annexed to the affidavit in support, the applicant contends, *inter alia,* that the learned judge erred by misdirecting himself on the matters before him and on the applicable law, in particular by taking into account irrelevant matters and determining an application that was not properly before him, thereby granting reliefs to the respondent founded on a motion dated 6 February 2025 which had already been compromised and withdrawn by consent; making a ruling that was ultra vires the consent of the parties dated 11th February 2025 and without jurisdiction; finding that the appellant had not satisfied the threshold for setting aside the consent order of 19th December 2024 and in the process failed to consider relevant factors and relied on irrelevant ones; failing to exercise judicial discretion properly in dismissing the appellant's application dated 31st January 2025; awarding interest on the principal sum without legal or factual basis despite the issue

being contested in the applicant's defence and thus requiring trial; and entering judgment against the appellant for USD 377,544 together with interest and costs in a manner that was plainly wrong, beyond jurisdiction, and resulted in a miscarriage of justice.

8. On the nugatory aspect, the applicant argues that unless a stay of execution is granted, the intended appeal will be rendered futile and of no practical effect. It is contended that the impugned ruling ordered the immediate payment of USD 377,544, a substantial sum equivalent to approximately KES

48.7 million, which the applicant asserts would impose severe financial strain on its operations. The applicant further maintains that once execution is undertaken, the resulting payment to the respondent, a foreign entity with no known assets or presence within the jurisdiction, would make recovery impossible in the event of a successful appeal. It asserts that enforcement would not only cripple its business operations but also cause irreversible financial loss, as the funds would likely be remitted outside the jurisdiction beyond the court's reach. The applicant further contends

that a stay is necessary to

preserve the subject matter of the appeal and to prevent the appeal process from being reduced to a mere academic exercise. It therefore urges this Court to intervene in order to safeguard its right of appeal and ensure that the appellate process remains meaningful and effective.

9. The application is opposed through a replying affidavit sworn by **Valentine Ataka**, the respondent's advocate on record. The respondent asserts from the out set that the impugned ruling does not constitute a positive executable order capable of being stayed as the applicant's notice of motion dated 31st January 2025 was dismissed by the trial court. Therefore, in the absence of any consequential or executable orders arising from the said ruling, there is nothing to stay and as such, the reliefs sought by the applicant are legally untenable, and besides, the Court has no jurisdiction to grant the same.

10. The respondent further avers that the applicant has failed to demonstrate any arguable ground of appeal. It reiterates that the trial court entered judgment on admission and based on a consent between the parties. It maintains that the appeal is frivolous and merely seeks to reopen matters

that were

conclusively settled by consent and through a judgment on admission. The respondent further contends that the application does not meet the nugatory test, as the applicant has neither shown that it will suffer substantial loss nor that execution would render the appeal futile. It points out that the applicant, being a limited liability company operating in Kenya, has not proved that payment of the decretal sum would cripple its operations or that recovery of the money would be impossible if the appeal were to succeed. The respondent adds that the plea of financial hardship is unsupported and inconsistent with the applicant's conduct, particularly its repeated failure to honour previous court-sanctioned obligations and its persistent delays. Emphasizing that litigation must come to an end, the respondent argues that granting a stay would unjustly deny it the fruits of its judgment and therefore urges the Court to dismiss the application with costs.

11. At the hearing of this application, learned counsel, **Mr. Litoro,** appeared for the applicant, while **Mr. Ataka,** learned counsel, represented the respondent. Both counsel made brief oral highlights of their respective client's written

submissions.

12. We have considered the application, the affidavits, the rival submissions and the law. It is trite law that in applications of this nature an applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.**

13. As regards arguability of the intended appeal, the applicant has, in our view, raised genuine and bona fide questions as to whether the learned judge erred in granting judgment on admission in a matter that had already been compromised by consent and in addressing an application that had been withdrawn. These issues touch on the proper exercise of judicial discretion which warrant consideration on appeal. We are mindful that an arguable appeal is not one that must necessarily succeed but one that raises at least one serious issue deserving of this Court's attention. On that basis, therefore, we are satisfied that the intended appeal is arguable.

14. Turning to the nugatory aspect, it is trite law that whether or not an intended appeal shall be rendered nugatory depends

on

whether the applicant can be adequately compensated by way of damages should the appeal ultimately succeed. In determining this limb, the Court must consider the nature of the decree and the likelihood of recovery in the event of reversal. In the circumstances herein, the decree is purely monetary and arises from a debt that the applicant has unequivocally admitted as due and owing. It therefore follows that satisfaction of such a decree cannot, without more, amount to irreparable loss. The general principle is that payment of a decretal sum, and more so one that is admitted, cannot render an appeal nugatory.

15. In addition, the applicant's assertion that execution would cripple its operations is, with due respect, devoid of any evidential foundation. Allegations of financial hardship must be supported by credible and cogent evidence, such as audited accounts, bank statements, or cash flow projections. None was tendered before this Court. In the absence of such evidence, and considering that the decretal sum arises from an admitted liability, we are not satisfied that the nugatory limb has been satisfied.

16. Since the applicant has only satisfied one limb of the twin principles under ***rule 5 (2) (b)*** of this **Court's Rules**, this application must fail. We hereby dismiss the application and award costs thereof to the respondent.

Dated and delivered at Nairobi this 19th day of December, 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.