



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & SICHALE J.J.A) NYERI

CIVIL APPLICATION NO. 50 OF 2020

BETWEEN

MAYFAIR INSURANCE COMPANY LIMITED..1ST APPLICANT

TEEVEE INSURANCE BROKERS LIMITED.....2ND APPLICANT

AND

NAKURU POLYPLAST LIMITED.....1ST RESPONDENT

BANK OF BARODA KENYA LIMITED.....2ND RESPONDENT

RELIANCE METALS LIMITED.....3RD RESPONDENT

NAKURU PRESS SHOP LIMITED.....4TH RESPONDENT

(Being an Application for Stay of Execution of the judgment of the High Court of Kenya at Nakuru (Rachel Ng'etich, J.) dated 14th May 2020 pending the lodging, hearing and determination of an intended Appeal *in H.C.C. No. 41 of 2017*)

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**RULING OF THE COURT**

1. The genesis of this application is that Nakuru Polyplast Limited (the 1st respondent) entered into an insurance contract dated 1st October, 2015 with the 1st applicant under a policy to cover its property as itemized in the insurance policy for a period of one year running from 1st October, 2015 to 30th September, 2016 for an aggregate sum of Kshs. 64,850,000.
2. On 31st January, 2016 the 1st respondent's property was destroyed by fire prompting the 1st respondent to lodge a claim of Kshs. 68,500,000 against the 1st applicant pursuant to the aforementioned insurance policy. However, on suspicions of arson, the 1st applicant sent the 1st respondent a letter dated 17th August, 2016 denying liability on the basis that damages through arson did not attach upon the insurance policy.
3. Aggrieved, the 1st respondent instituted a suit before the High Court at Nakuru claiming a sum of Kshs. 68,500,000 as compensation and special damages of Kshs. 2,049,434 plus costs of the suit and interest.
4. Ultimately, by a judgment dated 14th May, 2020, the learned Judge (Rachel Ng'etich, J.) entered judgment in favour of the 1st respondent against the applicants in the terms below:

***“1. Judgment is entered for plaintiff against the 1st defendant for kshs.64,850,000.***

***2. I decline to issue any restraining orders against the interested party.***

***3. Costs to be paid by the 1st defendant to the plaintiff.***

***4. Plaintiff to pay costs of this suit to the interested party.”***

5. Dissatisfied, the applicants filed a notice of appeal against the whole judgment on 28th February, 2020 and also filed the instant application under **Rule 5(2)(b)** of this Court's rules seeking stay of execution of the judgment and decree of the trial court pending the hearing and determination of the intended appeal against the impugned judgment.
6. On the grounds on the face of the application, the applicants only state that the intended appeal is arguable and that the appeal will be rendered nugatory if the order sought is not granted. The application is supported by the affidavit of one Emma Mwangi, the 1st applicant's Legal manager – Claims, sworn on 9th June, 2020.
7. Citing this Court's decision in **Stanley Kangethe Kinyanjui v. Tony Ketter & Others, Civil Application No. 31 of 2012** counsel for the applicants echoing the contents of the supporting affidavit, submitted that the applicants intended appeal is arguable. Reproducing the grounds on the face of the intended memorandum of appeal, he submitted that the applicants intend to challenge the trial court's judgment on grounds *inter alia* that the learned Judge erred in fact and law: by disregarding the 1st applicant's evidence with regard to the 1st respondent's business status as at the time of the fire incident; by failing to consider the terms of the insurance policy between the 1st applicant and the 1st respondent in relation to forfeiture of benefits; by failing to find that the 1st respondent was responsible for connivance in relation to the fire incident; by disregarding the 1st applicant's expert-witness evidence on the cause of the fire; in failing to consider the residual value of items recovered from the 1st respondent's premises after the fire and failing to consider the quantum of insured loss and damage from the fire incident.
8. He maintained that applicants' grounds of intended appeal are more than arguable and the appeal has considerable chances of success.
9. Placing reliance on among other cases the **Stanley Kangethe Kinyanjui v. Tony Ketter & Others** case (*supra*) counsel submitted that 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 and if it is not reversible whether damages will reasonably compensate the party aggrieved.
10. Counsel urged that the decretal sum of Kshs. 64,850,000 is colossal by any standards and that the 1st respondent's business which is in distress lacked the financial capacity to reimburse the same in the event that the intended appeal succeeds. Further, that the 1st respondent had not expressed its willingness and/or ability to repay the decretal amount in the event the appeal was successful.
11. Citing, *inter alia*, **Kenya Hotel Properties Limited v. Willesden Investments Limited, Civil Application No. 322 of 2006**, counsel submitted that the balance of convenience tilted in favour of the applicants as the decree is a money decree which would cause untold suffering if stay was denied. He maintained that the applicants were ready and willing to provide security for the decretal sum in the form of a banker's guarantee for the due performance of any order that this Court may issue, pending hearing and determination of the intended appeal.
12. In conclusion, he urged that the applicant was deserving of an order for stay of execution as they had satisfied both limbs of arguability and the nugatory aspect as required.
13. The 1st, 3rd and 4th respondents opposed the application vide a replying affidavit sworn by counsel, one Koome Gitau, on 18th July, 2020. Reiterating its contents, counsel submitted that the application was untenable and lacked merit for reasons, *inter alia*, that the application as filed contained averments by the present counsel for the applicant, Mr. Evans Monari and Ms. Emma Mwangi who never participated in the proceedings before the trial court. Therefore, their averments amounted to hearsay evidence which is inadmissible for all purposes. He urged that the said affidavits should be struck out which in turn would leave the notice of motion unsupported thus proving any efforts to get orders for stay futile.
14. Learned counsel maintained that contrary to the provisions of **Rule 5(2) (b)** of this Court's Rules, the notice of appeal as filed was incompetent as it had been filed in the wrong court and or received by the wrong court. Further, that the same was fatally defective as it lacks the signature of the Deputy Registrar. He urged that as such the applicants had not properly invoked this Court's jurisdiction in entertaining the instant application.
15. Citing the now celebrated case of **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others** (*supra*), counsel argued that the applicant had not demonstrated a prima facie case to warrant the issuance of the orders sought. He maintained that the applicants' intended memorandum of appeal did not raise any arguable ground as the issues raised had been properly and conclusively determined by the trial court.
16. On the nugatory aspect, counsel submitted that the applicants had not demonstrated how the intended appeal would be rendered nugatory. Further, that the applicants have also not adduced evidence to prove the 1st respondent's alleged financial distress hence such claims are mere allegations which do not suffice to tilt the scales in the applicants' favour.
17. He urged the Court to dismiss the application maintaining that if the Court would deem it fit to grant orders for stay in favour of the applicants, the applicants are willing to secure the decretal sum by depositing the same in Court or in a joint interest earning account in the names of the advocates for the parties pending the hearing and determination of the intended appeal.
18. We have carefully considered the application and submissions by learned counsel. On the question as to whether the notice of appeal in this matter is competent or not, it is evident that a copy of the notice of appeal was duly filed and stamped in the Environment and Land Court. The same was forwarded to this court as required. It is not our place at this point to interrogate whether the notice of appeal was filed in the proper superior court's registry or not and how the said notice of appeal found its way to the Court of appeal registry. The nitty gritty as to whether the said notice of appeal was signed by the registrar of the court or not may avail a ground for argument in an application to strike out the notice of appeal, but not in an application under Rule 5 (2) b of the Court of Appeal rules as is the one before us. We are satisfied that the application is properly before us.

19. Having considered the application, the rival affidavits and the applicable law, we are satisfied that given that an arguable appeal is not necessarily one that will succeed, the applicants' intended appeal is not frivolous. See **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others**, Civil Application No. 124 of 2008. We are persuaded that the limb on arguability has been demonstrated.

20. On the nugatory aspect, the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. See **Reliance Bank Ltd v Norlake Investments Ltd** [2002] 1 EA 227 at page 232. 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. In this case, we appreciate that the amount involved is substantial. We also appreciate that if paid out to the respondents, in the event the intended appeal succeeds, it would be arduous to recover it, more so in view of the applicants' assertion that the respondent has closed down its operations.

21. Having all the above in mind, we are satisfied that the nugatory aspect has also been demonstrated. Bearing in mind the circumstances surrounding this matter, we allow the application and grant stay of execution of the judgment and orders appealed against on condition that the applicants deposit 50% of the decretal amount in an interest earning joint account in the names of counsel for both parties within 45 days from the date hereof pending hearing and determination of the intended appeal, failing which the stay orders will stand discharged leaving the respondent at liberty to execute for the entire decretal amount plus interest and costs.

**Dated and delivered at Nairobi this 19th day of February, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a truecopy of the original.

Signed

**DEPUTY REGISTRAR**