



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: ASIKE-MAKHANDIA, SICHALE & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. 50 OF 2020

BETWEEN

STEPHENS KITHI NGOMBO T/A STEVE KITHI & CO. ADVOCATES.....1ST APPLICANT

PROPKEN (MAURITIUS) LIMITED.....2ND APPLICANT

AND

CHINA WU YI (KENYA) COMPANY LIMITED.....RESPONDENT

(Being an application for stay of execution of the Ruling and Order and all consequential orders thereto pending the hearing and determination of an intended appeal arising from Commercial and Admiralty Division of the High Court of Kenya at Mombasa (Justice P. J. Otieno) delivered on the 2nd June, 2020

in

Mombasa High Court Admiralty & Commercial Case No. 89 of 2019

RULING THE COURT

Upon considering the application before us which is by way of a notice of motion dated 1st July, 2020 by the applicant, and noting that it is principally predicated upon the provisions of **Rule 5(2)(b)** of this Court Rules among other statutory enactments cited, the applicant principally seeks an order of stay of execution of the ruling and order delivered on 2nd June 2020 by **P. J. Otieno, J.** and all consequential orders thereto until the intended appeal is heard and determined. There are other prayers in the motion which we doubt we have jurisdiction to entertain at this stage. We shall therefore confine our ruling to the prayer for stay of only.

Upon reading the supporting affidavit sworn on 1st July, 2020 by **Stephens Kithi Ngombo** (the 1st applicant) on his own behalf and on behalf of the 2nd applicant, and the grounds in support of the application which allude to the fact that the appeal is arguable and has high chances of success; that in the supporting affidavit they have attached a copy of a draft memorandum of appeal that discloses several grounds that they intend to pursue and demonstrate that the impugned ruling and the injunction granted was irregular; that unless the order of stay of execution is granted, the appeal will be rendered nugatory since the respondent being a foreign company, may dispose of the assets it has in a bid to avoid the satisfaction of the decree which is in the sum in excess Kshs. 1 billion thus rendering the appeal nugatory.

Upon further reading the grounds of opposition filed by the respondent on 2nd October, 2020 in opposition to the application as well as the notice of preliminary objection, in which the respondent reiterates that we have no jurisdiction to entertain this application; that the injunction order sought to be stayed lapsed on 29th July 2020 and was not renewed or extended; that an application to set aside the *ex parte*

judgment has been filed and is awaiting determination by the trial court, hence the intended appeal is premature; and that the draft memorandum of appeal does not disclose any reasonable prospect of success as the *ex parte* injunction challenged has already lapsed.

Cognizant of the guiding principles that the jurisdiction of this Court under Rule 5(2)(b) is discretionary, but is exercised judicially and with reason not whimsically; that for the applicants to succeed, it is trite that they must show that they have an arguable appeal hence it is not frivolous and also demonstrate that the appeal, if successful, would be rendered nugatory in the absence of an order of stay; that in the case of **Stanley Kang’ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR**, this Court stated inter alia:

“That in dealing with Rule 5(2)(b), the Court exercised original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

Noting further that in determining whether the appeal is arguable or not, it should be appreciated that an arguable appeal does not necessarily mean that the appeal or intended appeal must be one that ought to succeed, but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court. In **Dennis Mogambi Mang’are vs Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** this Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

Having considered the instant application, the supporting affidavit, written submissions of the applicants and grounds of opposition as well as the notice of preliminary objection filed by the respondent, we are satisfied that the intended appeal may not be arguable as the injunction order sought to be stayed has lapsed and has not been renewed. The applicant has and did not counter this assertion by the respondent. We therefore take it that it must be true. Accordingly, we shall be acting in vain if we were to issue an order of stay in respect of a matter which has lapsed. Similarly the intended appeal will not be rendered nugatory given these circumstances.

The applicants having failed to satisfy the twin limbs as required by **Rule 5(2)(b)** of this Court’s rules, the application must fail and is accordingly dismissed with no order as to costs.

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

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR