



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. NAI E389 OF 2020

BETWEEN

COSMOCARE LIMITED.....APPLICANT

AND

LEEDS ENGINEERING COMPANY LIMITED.....RESPONDENT

(Being an Application for stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi (W. Okwany, J.)

dated and delivered on 12th November, 2020

in

HC Civil Suit No. E333 of 2019)

RULING OF THE COURT

1. **Leeds Engineering Company Limited** (the respondent) filed before the High Court at Nairobi Civil Case No. E333 of 2019 in which it claimed several reliefs as against **Cosmocare Limited** (the applicant). On 25th November, 2019 the respondent obtained a default judgment against the applicant for the sum of Kshs. 23,373,000/= on the basis that the applicant having been served with summons to enter appearance had failed to do so.
2. Aggrieved, the applicant sought to have the default judgment set aside arguing the summons to enter appearance was not served upon it as alleged. Upon hearing of the applicant's application, the learned Judge found that the alleged service of the summons was indeed doubtful, hence setting aside the default judgment and granting the applicant leave to file its defence on condition that it deposits Kshs. 14,000,000/- into a joint interest earning account in its name and that of the respondent's advocates within 30 days, failing which the default judgment would be reinstated leaving the respondent at liberty to execute.
3. Dissatisfied, the applicant filed a Notice of appeal intending to appeal the impugned ruling but in the meantime preferred the instant application, dated 8th December, 2020 which is predicated on, among other grounds, that the intended appeal is arguable and it would be rendered nugatory if stay is not granted as the applicant is apprehensive that the respondent would not be in a position to reimburse the decretal sum in the event that the intended appeal succeeds. The applicant is also apprehensive that if stay is not granted it will be subjected to deposit a sum that is so colossal that the same would financially cripple it hence rendering it insolvent. The application is supported by the affidavit of Elka Motanya, the applicant's Legal Manager, sworn on even date.
4. Echoing the contents of the affidavit in support of the application through submissions dated 18th December 2020, learned counsel for the applicant citing, **Regnoil Kenya Limited v. Winfred Njeri Karanja (2019) eKLR**, urged that the intended appeal is arguable as the applicant intends to challenge the impugned decision on grounds, *inter alia*, that the learned Judge erred by finding that the sum of Kshs. 14,000,000/= was uncontested; by improperly exercising her discretion hence erroneously issuing a conditional stay despite finding in favour of the applicant for reasons that the summons to enter appearance was not served upon it; failing to consider that reinstating the default judgment was erroneous as the same was irregular *ab initio* and would not stand in law.
5. In opposition, the respondent relied on a replying affidavit sworn by its Director, Moses Nyamu Mutahi, on 22nd December, 2020 and submissions dated 22nd December 2020 filed by counsel for the respondent in response to the applicant's submissions. In sum, it opposed the applicant's application on arguments that the intended appeal is not arguable as it doesn't raise *bona fide* issues and that it is frivolous as

it is evident that the applicant had already conceded being indebted to the respondent hence not deserving of stay.

6. On the nugatory aspect, citing **Kaushik Panchamatia & 3 Others v. Prime Bank Limited & Another (2020) eKLR** learned counsel submitted that the applicant had failed to demonstrate that the respondent would be unable to reimburse the decretal sum and/or pay damages in the event the intended appeal was successful.

7. Placing reliance on **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR** he argued that the applicant had not successfully demonstrated that it was deserving of stay of execution of the impugned ruling. He urged that the application be dismissed.

8. We have considered the application along with the rival submissions and the law. The principles applicable in determining an application under **Rule 5(2)(b)** of the Court Rules have now been clearly restated in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) eKLR**. An applicant must satisfy both the twin principles of arguability and the nugatory, aspect by demonstrating that he/she has an arguable appeal and that the intended appeal if successful will be rendered nugatory if the interim orders sought are not granted.

9. It is trite that to demonstrate arguability of the intended appeal, the applicant must show that the intended appeal is not frivolous but raises arguable issues. (See: **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008**). The grounds of appeal as aforementioned, appear on the face of the draft memorandum, the main issue being that the learned Judge erred by issuing a conditional stay which stood to reinstate an irregular default judgment if the applicant failed to satisfy the set conditions.

10. On the second limb, the applicant has to demonstrate that the appeal will be rendered nugatory if the order of stay sought is not granted as the subject matter of the appeal shall be lost, resulting in irreparable loss in the event that the intended appeal succeeds. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227** at page 232.

11. According to the applicant, if stay is not granted, the respondent will proceed with execution and demand the sum of Kshs. 23,373,000/= which is so colossal that the applicant would not be capable of reimbursing the same upon a successful appeal.

12. From the onset, we note that there is no doubt that the learned Judge set aside the default judgment after satisfying herself that summons to enter appearance had not been served. That being the case we are satisfied it is an arguable issue whether the default judgment ought to have been set aside *ex debito justitiae* and whether it is a judgment capable of being restored in the event the conditions set by the learned Judge were not met. Without saying more, we find that the applicant has demonstrated arguability as all that the applicant needs to do is to establish that it has an arguable issue that deserves consideration and determination by this Court on appeal. See: **Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd, Civil Application No. NAI 345 of 2004**).

13. On the nugatory aspect, if the stay orders are not granted and execution proceeds on the basis of a judgment which is later found to be an irregular judgment, then a travesty of justice which may be irreversible will have been committed.

14. We are satisfied that the threshold set for applications under **rule 5(2)(b)** of the Rules of this Court has been met. We allow this application with costs in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR