



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, OKWENGU & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. E393 OF 2020

BETWEEN

FARM AFRICA MILLYS INVESTMENTS LIMITED.....APPLICANT

AND

TATA AFRICA HOLDINGS (K) LIMITED.....RESPONDENT

(Being an application for stay of execution pending an intended appeal from the Judgment and Decree of the High Court sitting at Narok (Bwononga, J.) dated 7th May 2020

in

NAROK HCCC No. 15 of 2018)

RULING OF THE COURT

[1] On 7th May 2020, the High Court entered judgment in favour of the respondent against the applicant for US\$ 203,614.00 together with interest at 18% per annum. By a notice of motion dated 26th June, 2020, the applicant moved the High Court for two orders - extension of time to file a notice of appeal against the judgment of 7th May, 2020, and an order for stay of execution of that judgment, pending appeal.

[2] On 4th December, 2020, the learned Judge of the High Court granted the applicant's motion and issued an order for extension of time to file the notice of appeal, and an order for stay of execution of the judgment of 7th May, 2020, on condition that the applicant pays US\$ 80,000 to the respondent and also provides a bank guarantee for Kshs. 30,000,000 within 30 days.

[3] The applicant is aggrieved by the conditions imposed by the High Court, maintaining that they are onerous and effectively amount to a denial of the orders of stay of execution. By a notice of motion dated 10th December, 2020, the applicant has now moved this Court for an order of stay of execution of the High Court judgment, pending the hearing of its appeal.

[4] In response to the applicant's motion, the respondent filed a replying affidavit sworn by one **Edwin Too**, an accountant in the respondent company, who deposes on the advice of his counsel, that the High Court properly exercised its discretion in imposing the conditions for stay of execution; that the applicant is an international company dealing in the importation and sale of tractors and motor vehicles, and is therefore able to pay the amount ordered. It is also deposed in the affidavit that the applicant admitted owing the respondent a sum of US\$ 81,000, and that although the applicant is alleging fraud, there were no allegations of fraud pleaded, and none can be introduced at this stage.

[5] Due to the Covid-19 pandemic, hearing of the applicant's motion proceeded by way of written submissions without the presence of the parties or their advocates.

[6] In its submissions, the applicant has argued that the Court has jurisdiction to hear its application, notwithstanding the orders that were made by the High Court. In this regard the applicant relied on **Patrick Kalava Kulamba & another vs Philip Kamosu & Roda Ndanu Philip [2016] eKLR**; and **Halai & another vs Thornton & Turpin (1963) Ltd. [1990] eKLR**.

[7] The applicant maintained that its intended appeal is not frivolous but raises arguable issues and has substantial chances of success. It urges that the intended appeal would be rendered nugatory if the orders sought are not granted, as the amount of US\$ 80,000 which it is required to pay is a colossal sum whose immediate payment would constitute substantial loss.

[8] In addition, depositing a sum of Kshs. 30,000,000 would lead to the applicant being denied access to that money till the appeal is determined, and this would deny it opportunity to trade with the money. The case of **Bernard Mwangi Mbogo vs Republic [2008] eKLR** was cited. The applicant therefore urged the Court to grant the orders of stay without any onerous conditions.

[9] For the respondent, it was submitted that the applicant had not satisfied the requirements for granting an order for stay of execution under Rule 5(2)(b) of the Court's Rules, as it has failed to annex the draft memorandum of appeal to show that the intended appeal is arguable.

[10] The respondent argued that the suit in the lower court was for a liquidated sum of US\$ 203,614 being the unpaid balance of goods supplied to the applicant at their own request, and that in making the orders, subject of the intended appeal, the learned Judge took into account that the applicant had admitted owing the respondent a sum of US\$ 80,000. The respondent urged that the decree being a monetary decree, the Court must balance the interest of the applicant against that of the respondent, particularly since part of the decree is admitted. The Court was therefore urged to dismiss the motion.

[11] We have carefully considered the motion before us, the contending affidavits and the written submissions. The first issue that has been raised is the issue of jurisdiction, as the applicant is applying for an order for stay of execution, having obtained similar orders from the High Court.

[12] Under Rule 5(2)(b) of the Court's Rules, this Court has jurisdiction where a notice of appeal has been lodged in accordance with Rule 75 of the Court Rules, to order a stay of execution or an injunction pending appeal, on such terms as the Court may think just. The issue of the jurisdiction of the Court in a 5(2)(b) application was addressed by a five-judge bench in **Equity Bank Limited vs West Link MBO Limited [2013] eKLR** where **Githinji, JA** stated:

“It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 C.P. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction(Githunguri Versus Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838).”

[13] This means that the applicant is before us invoking our original jurisdiction, and we are not fettered by the orders that were made by the High Court, nor are we sitting on appeal against that order, such as to consider the propriety of the orders made by the High Court. In other words, we have to consider and determine the application before us purely on merit, given the circumstances before us.

[14] Under Rule 5(2)(b) the principles that this Court is enjoined to apply is, first, whether the jurisdiction of this Court has been properly invoked through the initiation of an appellate process, if so, whether the intended appeal is arguable and whether absent an order of stay of execution, the intended appeal will be rendered nugatory. (See **Ishmael Kagunyi Thande vs Housing Finance Company Limited in Civil Appeal No. 156 of 2006**).

[15] In this case, the applicant lodged a notice of appeal on 10th December, 2020 after being granted extension of time by the High Court on 4th December, 2020. The notice of appeal is sufficient to initiate the appellate process, and therefore the jurisdiction of this Court has been properly invoked. It is clear from the judgment of the court which was annexed to the applicant's motion that the judgment was for US\$ 203,614 together with interest at 18% from 7th September, 2015, till payment in full. The applicant has indicated in its motion several grounds that it intends to raise in its appeal. Whereas no memorandum of appeal has been exhibited, the grounds indicated in the applicant's motion at paragraph 9 are sufficient to demonstrate that the intended appeal is not frivolous, but is arguable.

[16] As regards whether the intended appeal would be rendered nugatory if the orders sought are not granted, the decree is a monetary decree. In **Kenya Hotel Properties Limited vs. Willeden Properties Limited, Civil Application No. 322 of 2006 (UR 178/2006)**, this Court stated as follows:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree, so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”

[17] We also take note of what this Court stated in **Reliance Bank Limited vs Norlake Investments Limited [2002] 1 EA 227** that:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

[18] In this case, the respondent is a limited liability company, and although the applicant has not laid anything before us to show that the respondent would have any difficulties repaying the decretal sum should that become necessary, we take cognizance of the amount and the fact that payment of such a colossal amount may have irreversible consequences on the applicant's business, and this may make it impossible for the applicant to pursue its appeal.

[19] In the circumstances, we deem it appropriate that we grant an order of stay of execution on condition that the applicant provides a bank guarantee for the sum of Kshs. 30,000,000 within 30 days from the date hereof, failing which the order of stay shall lapse Costs of the motion shall be in the appeal. Orders accordingly.

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

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR