



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & KIAGE, J.J.A.)

CIVIL APPLICATION NO. NAI. E68 OF 2020

BETWEEN

JIGNESH DESAI.....APPLICANT

AND

CENTRAL BANK OF KENYA.....1<sup>ST</sup>RESPONDENT

ALEX REBIRO NGUGI (ALIAS ABA MPESHA T/A MPESHA

ENTERPRISES .....2<sup>ND</sup> RESPONDENT

JOHMAT DISTRIBUTERS LIMITED.....3<sup>RD</sup> RESPONDENT

(Being an application for stay of execution pending the Appeal against the *judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated 18th December, 2019 in HCCC No. 204 of 2004*)

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**RULING OF THE COURT**

In a suit it filed at the High Court, the 1st respondent **Central Bank of Kenya (CBK)** averred that the applicant, **Jignesh Desai**, acting as the agent and servant of Giro Commercial Bank Limited (Bank) in his capacity as the Branch Manager, assisted the 2nd and 3rd respondents, **Mpesha Enterprises** and **Johmat Distributers Limited**, respectively, to open Central Depository System accounts in breach of its **Prudential Regulations and Guidelines** under its eponymous statute.

Those respondents, it was argued, with the assistance of the applicant, proceeded to defraud CBK of proceeds of sale of treasury bonds totaling to Kshs. 205,000,000. The proceeds of the fraudulent sale were transferred to various accounts and persons. CBK claimed that amount from the Bank as its constructive trustee having knowingly through its agents and servants assisted with the fraud or, in the alternative, a claim against the applicant, 2nd and 3rd respondent and another jointly and severally for the same amount plus interest thereon.

Odunga, J. delivered the judgment on 18th December 2019 and held that the applicant and the 2nd respondent were liable for the loss suffered by CBK. In consequence, judgment was entered jointly and severally against the applicant and the 2nd respondent in the sum of Kshs. 205,000,000 plus interest at bank rates.

Aggrieved by that decision, the applicant lodged a notice of appeal and has now filed the motion dated 6th March 2020, seeking the following order in the main;

**2. THAT the honourable court be pleased to stay the judgment/decree by hon. Justice G.V Odunga on 18th December 2019 in H.C.C.C No. 204 of 2004 pending the hearing and determination of the intended appeal.**

It was contended that the applicant has an arguable appeal in that the learned Judge erred by; failing to take into account USD 420,000 and USD 57,850 seized by CBK from the applicant and one Mr. Ashok B. Patel, respectively, being proceeds from the fraud; taking into account an inquiry statement from CBK as evidence yet the same was unlawfully procured through threats, intimidation and coercion; and, erroneously, without explanation discharging the Bank of its culpability in the fraud.

On the nugatory aspect, the applicant argued that factoring in interest, the decretal sum totals to about Kshs. 727,750,000, which is quite colossal and would cause him untold hardship and damage thereby render the appeal nugatory, if it was to succeed.

The respondents opposed the motion through a replying affidavit sworn by **Kennedy Kaunda Abuga**, CBK's general counsel. He swore that the application is unmeritorious and an abuse of the Court process. The grounds raised are not arguable and are merely a delaying tactic to prevent CBK from enjoying the fruits of the judgment. The applicant has failed to satisfy the conditions for stay.

He urged us to dismiss the application with costs.

Counsel for the parties filed written submissions and authorities, which we have fully considered.

For an applicant to succeed in a **Rule 5(2)(b)** application, he must satisfy the Court that first, he has an arguable appeal and second, that the appeal will be rendered nugatory if its substratum is not preserved. On the issue of arguability, the appeal need not be one that must necessarily succeed but rather one that raises at least one point that demands an answer from the respondent, and is worthy of judicial consideration or interrogation on appeal. The applicant must satisfy both limbs. See **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR**.

In light of these principles, we find that although the appeal maybe arguable, we are not convinced that the same shall be rendered nugatory if the stay order is not granted. The applicant has failed to satisfactorily establish that the harm, apprehended if any, shall be irreparable if the appeal succeeds, given the circumstances of this case. Moreover, the 1st respondent as the banker for the Government is well-capable of compensating the 1st respondent for any such loss, should the appeal succeed.

For these reasons, this application is devoid of merit and is hereby dismissed in its entirety.

Costs will abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021**

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**