



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI E388 OF 2020

BETWEEN

MAYFAIR INSURANCE COMPANY LIMITED.....APPLICANT

AND

GLOBE DEVELOPERS LIMITED..... RESPONDENT

(Being an application for stay of execution pending the filing and determination of an intended appeal to be lodged at the Court of Appeal against the ruling of the High Court at Nairobi (Majanja, J.) dated 13th

November, 2020

in

HCCC NO. E186 OF 2020

RULING OF THE COURT

[1] On 13th November, 2020 the High Court delivered a ruling in which it determined two motions. In the first motion, the High Court dismissed an application lodged by the applicant **Mayfair Insurance Company Limited**, for striking out of a plaint that had been filed by the respondent **Globe Developers Limited**; and in the second motion, the High Court granted an application that had been filed by the respondent, and entered summary judgment against the applicant for Kshs.143,430,355.00 being an amount due to the respondent in regard to a performance bond that had been issued for the due performance of a contract. [2] The applicant who is aggrieved by the ruling, has lodged a notice of appeal and has filed a motion under **Rule 5(2)(b)** of the **Court of Appeal Rules** seeking, *inter alia*, an order for stay of execution of the judgment of the High Court pending the hearing and determination of his intended appeal.

[3] The applicant contends that its intended appeal raises, *inter alia*, an arguable issue as to whether it was discharged from the performance bond, in light of the admitted variation of the works that was to be carried out under the contract.

[4] The applicant urges the Court that its intended appeal may be rendered nugatory as the respondent has already initiated the process of executing the judgment, by filing a bill of costs, and the applicant fears that if an order of stay of execution is not issued, it may be forced to pay to the respondent the colossal sum of Kshs.143,430,335.00 which amount the respondent may be unable to repay back in the event that the appeal is successful, as the respondent is in financial distress.

[5] In response to the applicant's motion, the respondent has relied on a replying affidavit sworn by its director, **Abdul Kasmani**, who deposes that the applicant executed a performance bond in favour of the respondent for the sum of Kshs.143,430,355.00 for the due performance of a building contract within the contractual period, but the contractor failed to perform his contractual obligations and the sums in the performance bond became due.

[6] The respondent argues that the intended appeal does not raise any triable issue as the applicant had failed to satisfy the Court that the variations to the contract were over and above the variations that were allowed. The respondent maintains that it is more than capable of paying the decretal amounts as it is currently undertaking a development project worth over Kshs.1.4 billion.

[7] Due to the Covid-19 Pandemic, hearing of the motion proceeded by way of written submissions which were duly filed by the parties.

[8] In its submissions, the applicant identified three pertinent issues that it contend arises in the intended appeal. These are: whether a party can be held liable under a conditional performance bond after an event of default discharging the party from its obligations has occurred; whether summary judgment can be entered against a party despite the presence of triable issues; and whether a performance bond issued by an insurance company is subject to the doctrine of utmost good faith. The applicant submits that the respondent is in financial stress as its construction has stalled for years.

[9] For the respondent, it is argued that the issues raised by the applicants are not triable issues, and that the intended appeal being a monetary decree will not be rendered nugatory if a stay of execution is not granted. The respondent claims that it is in a sound financial position, currently undertaking a project worth over one billion.

[10] We have considered this application, the contending affidavits and the submissions filed by the parties. The application before us being one under Rule 5(2)(b), the principles applicable are clear. First, the applicant must satisfy the Court that he has an arguable appeal, and secondly, that if the order of stay of execution is not granted, its intended appeal will be rendered nugatory. (See **Stanley Kang’ethe Kinyanjui vs Tony Keter & 5 Others** [2013] eKLR).

[11] An arguable appeal does not necessarily mean one which must succeed, but one which is not frivolous. (See **Damji Pragji Mandavia vs Sara Lee Households & Body care (K) Ltd., Civil Application No. NAI 345 of 2004**). It is clear that there is an issue as to whether the respondent has been discharged from the performance bond through the variation of the contract. This is an arguable issue that will have to be determined during the hearing of the appeal.

[12] As regards the nugatory aspect, it is not denied that the process of execution of the judgment of the High Court is in progress as a bill of costs has been filed for taxation. Although the decree is a monetary decree, the amount is a colossal amount which if paid, may paralyze the operations of the applicant and this may indeed affect the applicant’s ability to pursue its appeal. As was stated in **Reliance Bank Limited vs Norlake Investments Limited** [2002] 1 EA 227:

“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.”

[13] In the circumstances, we find it appropriate to allow the application for stay of execution pending appeal on condition that the applicant shall provide security in the form of a bank guarantee for the amount of Kshs.143,430,355 within 30 days from the date hereof failing which the order of stay of execution shall lapse. Costs of the application shall be in the appeal.

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