



IN THE COURT OF APPEAL

NAIROBI

(CORAM: KARANJA, OKWENGU & MUSINGA, JJ. A.)

CIVIL APPLICATION NO. E397 OF 2020

BETWEEN

MITS ELECTRICAL COMPANY LIMITED.....1ST APPLICANT

SATYA BHAMA GANDHI.....2ND APPLICANT

PRIEYA DARSHANI GANDHI (NOW DECEASED

THROUGH THE ADMINISTRATOR).....3RD APPLICANT

AND

UBA KENYA LIMITED.....RESPONDENT

(Being an application for stay of execution of the Judgment of

the High Court (Majanja, J.) delivered on 3rd February 2020 *in H.C.*

Civil Case No. 171 of 2014 Consolidated with H.C. Civil Case No. 20 of 2016.)

RULING OF THE COURT

1. The applicant's application dated 10th December 2020 brought under **rules 5(2)(b)** and **42** of this **Court's Rules** seeks to stay execution of a judgment entered by the High Court (**Majanja, J.**) on 3rd February 2020 in favour of the respondent in the sum of **US Dollars 427,400.65** together with interest at 9.5% per annum from 6th February 2014 until payment in full.
2. The background to the application is that the respondent filed a suit in the High Court against the applicants seeking to recover a sum of US Dollars 610,764.06 together with interest at 19.5% per annum from 1st January 2016 plus costs. The respondent had granted banking facilities to the applicants to facilitate importation of passenger elevators and escalators. The applicants had also filed a separate suit against the respondent claiming that the Bank delayed in issuing the said facilities and as a result they had suffered loss amounting to KShs.15,000,000. The learned judge dismissed the applicants' claim but granted an adjusted amount of the respondent's claim as stated above.
3. Being aggrieved by the aforesaid decision, the applicants filed a notice of appeal, evincing their intention to challenge the High Court judgment. In their application before this Court, which was disposed of by way of written submissions, the applicants stated that they have an arguable appeal and the same shall be rendered nugatory unless the orders sought are granted.
4. Regarding arguability of the intended appeal, the applicants advanced two grounds, to wit, the learned judge erred in law and fact in entering judgment for the respondent on a wrong disputed amount of US Dollars 427,600.68; and secondly, in dismissing their claim without considering their evidence and submissions.
5. On the nugatory aspect, the applicants stated that the 1st applicant is the sole distributor of The Mitsubishi brand elevator spares and related products in East Africa, solvent and capable of paying its debts, but the respondent intends to file a petition for its winding up on account of the judgment sum, as had filed one earlier, which was dismissed. Unless the orders sought are granted, the respondent is likely to commence winding up proceedings, which will be detrimental and prejudicial to its business interests as it will not be able to get any new

business.

6. In response, the respondent stated that the intended appeal is not arguable, and the applicants had not demonstrated that the same shall be rendered nugatory unless the orders sought are granted. Of the two grounds of the intended appeal, the first one, that is, whether the applicants owed the respondent US Dollars 427,400.68 was framed by the parties by consent, and the trial judge rightly found in favour of the respondent.

7. Regarding the ground that the trial judge dismissed the applicants' suit without considering their evidence and submissions, the respondent submitted that the applicants had not particularized what evidence or submissions were not considered.

8. On the nugatory aspect, the respondent stated that the apprehension that it will petition to wind up the 1st applicant is premature and unfounded as no evidence had been presented to that effect. On the above arguments we were urged to dismiss the application and bring to an end that dates back to the year 2014.

9. The principles that guide this Court in its consideration of *rule 5(2(b))* applications are well known. An applicant must satisfy the Court that the appeal or intended appeal is arguable, and that absent the order sought, the appeal if successful will be rendered nugatory. An arguable appeal is not one that must succeed, it is one that is not frivolous and merits a full consideration by the Court. See ***Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008.*** Even one arguable ground is sufficient.

Having perused the affidavits filed by both parties, the impugned judgment and the draft memorandum of appeal, we think the intended appeal is arguable. We need not say more on the issue at this juncture.

10. As for the second requirement, we note that the judgment sum inclusive of interest is quite substantial. As stated in ***Hashmukhlal Virchand Shah & 2 Others v Investment & Mortgages Bank Limited [2014] eKLR***, the word "nugatory" must be given its full meaning, namely that the appeal will not be rendered worthless, futile, invalid or even trifling. If the orders sought are not granted, the respondent will definitely proceed to execute the judgment before the intended appeal is heard and that may render them totally inoperative.

11. In ***Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited [2000] eKLR***, the Court in granting stay of execution, observed that if the applicants were required to pay the full decretal amount, they might find themselves in a very tight situation, whereas if the respondent's bank was kept out of the claimed sum pending hearing and determination of the appeal, it would not be gravely affected.

12. Balancing the interests of both parties, the orders that commend themselves to us, and which we hereby make, are to grant a conditional stay of execution of the impugned judgment on the following terms:

- (a) Pending hearing and determination of the intended appeal, the applicants to deposit a sum of US Dollars 200,000.000 in an interest earning account in the joint names of the advocates for the parties.
- (b) In the event of any default on the part of the applicants the order of stay of execution shall lapse and the respondent shall be at liberty to execute the decree.
- (c) The intended appeal to be filed and served within thirty (30) days from the date hereof.
- (d) The applicants shall bear the costs of this application.

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