



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 71 OF 2018 (UR 54 OF 2018)

BETWEEN

RIZIKI ENTERPRISES LIMITED..... APPLICANT

AND

SAFARI KADENGE KATHUPA.....RESPONDENT

(Being an application for stay/conservatory orders/injunctive orders pending the hearing and determination of an intended

appeal from the decision of the High Court of Kenya at Malindi (W. Korir, J.) delivered on 19th April 2018 in

Miscellaneous Civil Application No. 38 of 2017)

RULING OF THE COURT

1. In its application before us dated 14th June 2018, the applicant, Riziki Enterprises Limited, seeks an order for stay of execution of the ruling delivered by the High Court at Malindi (*W. Korir, J.*) on the 19th April 2018 pending the hearing and determination of its intended appeal. In the said ruling, the court dismissed the applicant's application for leave to appeal out of time against a judgment of the Chief Magistrates' Court in Malindi awarding the respondent general and special damages. The applicant's prayer to stay execution of that judgment was also rejected by the Judge.
2. The grounds of the application as amplified in the supporting affidavit sworn by Maurice Kilonzo advocate are that, aggrieved by the ruling of the High Court, the applicant filed a notice of appeal dated 7th May 2018; that the intended appeal is arguable and has high chances of success as demonstrated in the draft memorandum of appeal; that should the judgment of the Magistrates' Court be executed in the meanwhile, the intended appeal will be rendered nugatory.
3. In his replying affidavit in opposition to the application, Safari Kadenge Kathupa set out the background to the matter and deposed that he is entitled to enjoy the fruits of the judgement; that the notice of appeal dated 7th May 2018 on which the applicant's present application is pegged was filed out of time contrary to Rule 75(2) of the Court of Appeal Rules; that the intended appeal is frivolous; that should the Court be inclined to allow the applicant's application, it should require the applicant to deposit the entire decretal amount plus costs (Kshs.620,948.30) in a joint account in the names of the advocates for the parties.
4. We have considered the application and the written submissions filed by counsel for both parties and the authorities cited. To begin with, the impugned ruling dismissed, with costs, the applicant's application for leave to appeal out of time and for stay of execution. The only part of that order capable of execution is in relation to the award of costs. It is otherwise a negative order and not capable of stay. See *Western College of Arts and Applied Sciences vs. Oranga & Others (1976-80) 1 KLR.*
5. Furthermore, it is incumbent upon the applicant to demonstrate that the intended appeal is arguable and that if the orders sought are declined, and the appeal ultimately succeeds, the same will be rendered nugatory. See *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012.* Although, based on the draft memorandum of appeal, we do not consider the intended appeal to be frivolous, the applicant has not in our view demonstrated how, by declining its request, the appeal will be rendered nugatory should the appeal ultimately succeed.
6. There is also the issue raised by respondent that the impugned ruling was delivered on 19th April 2018 and that the notice of appeal was

filed outside the 14 days prescribed under Rule 75(2) of the Court of Appeal Rules which raises the question of the competence of that notice.

7. All in all, as the applicant has not fulfilled one of the two necessary requirements aforesaid, the application fails and is hereby dismissed with costs to the respondent.

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

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR