



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI E255 OF 2020

BETWEEN

S.S. SEHMI GENERAL BUILDING & CIVIL CONTRACTORS LIMITED..APPLICANT

AND

C.J. SECURITIES LIMITED RESPONDENT

(Being an application for stay of execution of the Judgment and decree pending lodging, hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (F. Tuiyot, J.) dated 11th December, 2019 in **H.C.C.C. No. 611 of 2010**)

RULING OF THE COURT

We are asked in the Motion on Notice brought under **rule 5(2) (b)** of the **rules of this Court** and under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** to stay execution of the Judgment and decree of the High Court (**Tuiyot, J.** given on 11th December, 2019) pending lodging, hearing and final determination of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of **Savanjit Singh Sehmi** the applicant says amongst other things that the intended appeal is arguable because the Judge erred in law by making the finding that there existed a valid contract between the applicant and the respondent; that the Judge erred by making a finding that a letter dated 17th March, 2009 formed the basis of the contract between the parties; that the Judge erred by finding that the case had been proved on a balance of probabilities; that the sum due to the respondent had been paid in full. It is said that if execution issues "...and owing to the economic crisis posed by COVID-19 pandemic, the same will cause it serious and irreparable economic hardship." Further, that, upon application, the applicant had been granted a conditional stay of execution by the High Court; that the applicant, a contractor, is out of business hence unable to comply with conditional stay granted and that the appeal would be rendered nugatory "... and substantial loss will be suffered by the Applicant if the execution is not stayed pending the lodging, hearing, and determination of the intended Appeal."

There is a replying affidavit of **Christo Desa**, the **Managing Director** of the respondent, who deposes *inter alia* that their case at the High Court was for payment by the applicant to the respondent of a sum of **Ksh.3,546,000** being **40%** of a balance of an agreed total value of a project; that Judgment had been entered accordingly after a hearing; that the Judge had considered relevant matters on the application for stay pending appeal; that the respondent has been prejudiced for 10 years when it was not paid its money by the applicant; that the scales of justice should sway both ways.

We have perused written submissions filed by both sides and Applicant's Digest of Authorities.

The principles that apply in an application of this nature to this Court are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal is arguable which is the same as saying that it is not frivolous. Secondly, the applicant must prove that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR**.

The dispute between the parties here involved payment of a sum of Ksh.3,546,000 being what the respondent called 40% of the balance on an agreed total value of a project. The parties testified before the Judge and the Judge found for the respondent and entered judgment for that amount. Thereafter the applicant, in an application for stay pending appeal was ordered to pay ½ that amount to the respondent and provide a bank guarantee for the other ½ within 45 days of the date of the ruling.

One of the grounds to be argued in the intended appeal is whether, on the evidence, the respondent proved its case to the required standard. It is proposed to be argued that the Judge misunderstood the purport of a letter dated 17th March, 2009. These are arguable points and it has been held by this Court that an arguable point is not one that must succeed, and an applicant need not argue a multiplicity of points as one arguable point is sufficient to satisfy the first principle on which we exercise our discretion in applications under **rule 5(2) (b)** of the **rules of**

this Court.

What about the nugatory aspect which an applicant must also satisfy to succeed?

The Judge, on the application for stay pending appeal considered the material before him and he exercised his discretion by allowing the application but he imposed a condition where the applicant was ordered to pay ½ of the decretal sum and provide a bank guarantee for the other ½ within 45 days of the date of the ruling. We note that the dispute between the parties involved a sum of money. A money decree issued and the applicant was given favourable orders in the application for stay of execution pending appeal. Apart from citing some difficulties arising from working in an environment affected by the COVID-19 pandemic the applicant has not alleged that the respondent would be unable to pay back the money decree if the intended appeal succeeded. In those circumstances the applicant has failed to demonstrate that the intended appeal would be rendered nugatory in the absence of stay. In the premises the Motion fails and is dismissed with costs to the respondent.

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

P.O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR