



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, SICHALE & J. MOHAMMED, JJ.A)**

**CIVIL APPLICATION NO. E354 OF 2020**

**BETWEEN**

**JOHN NGUGI.....APPLICANT**

**AND**

**DAYTONS VALUERS LIMITED.....RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of the intended appeal against the ruling of the High Court of Kenya at Nairobi (Kasango, J.) dated 7th October, 2020*

*in*

***HCCC No. E032 of 2019)***

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**RULING OF THE COURT**

**Background**

1. The application before the Court has been brought under **Rule 5(2)(b)** of the **Court of Appeal Rules (this Court's Rules)**. **John Ngugi** (the applicant) seeks the following orders:

1) THAT the execution of the Judgment and/or orders of the superior court in HCCC No. 032 of 2019 dated and delivered on 7th October, 2020 and all consequential orders flowing therefrom be stayed pending the hearing and determination of the applicant's intended appeal.

2) That the costs of this application be awarded to the applicant in any event.

2. A brief background of the application is that **Daytons Valuers Limited** (the respondent) instituted a suit in the High Court in HCC Milimani Civil Case No. E32 of 2019 against the applicant, who was its former employee. The applicant had worked for the respondent for a period of six (6) years as a Valuer cum Property Manager. The respondent's claim against the applicant was for general and punitive damages which the respondent pleaded it suffered following the applicant's negligence and/or fraud in carrying out a valuation of a property. On 12th March, 2020, the learned Judge (**Kasango, J.**) entered judgment in favour of the respondent for Kshs 4 million in general damages; Kshs 1 million as punitive damages; interest on general and punitive damages at Court rates until payment in full; and costs of the suit.

3. Aggrieved by that decision, the applicant filed a motion in the High Court dated 28th May 2020, urging the Court to review or set aside the impugned judgment. This motion was based on the ground that the applicant's former counsel failed to adequately represent him and did not give him updates on the matter. The learned judge delivered a ruling on 7th October, 2020 dismissing the application.

4. Dissatisfied by that decision, the applicant's counsel filed the instant application supported by an affidavit sworn by the applicant. The applicant contends that his intended appeal raises arguable grounds and that the learned Judge erred by: visiting the mistakes of counsel upon his client; failing to appreciate that the applicant was denied his right to be heard; and failing to consider the evidence placed before the Court. It was counsel's further contention that unless the orders of stay are granted, the intended appeal will be rendered nugatory.

5. In opposition, the respondent through filed a replying affidavit sworn by **Justus Munene Munyi (Mr. Munyi)**, a Director of the respondent. **Mr. Munyi** contended that the instant application is a waste of judicial time as it seeks to stay a negative order; and that the

ruling sought to be appealed against was delivered on 7th October, 2020, yet the applicant's notice of appeal was filed on 4th November, 2020. It was the respondent's contention that the notice of appeal was filed out of time and was therefore invalid; that in the absence of a valid notice of appeal, there is no valid appeal against which the intended appeal could be anchored; that the applicant has not demonstrated that he has an arguable appeal; and that the appeal will not be rendered nugatory. Counsel urged us to dismiss the application with costs.

**Determination**

5. We have considered the application, the affidavits, the rival submissions, the authorities cited and the law. In an application of this nature, the applicant is required to demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought, the intended appeal, if successful, will be rendered nugatory.

6. As stated by the Court in *Ishmael Kagunyi Thande vs. Housing Finance Company of Kenya Limited, Civil Application No. 157 of 2006 [2007]eKLR*:

*“The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”*

See: *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR*.

7. On arguability of the intended appeal, we bear in mind that an arguable appeal is not one that must necessarily succeed. It suffices that the issue whether in the circumstances of the case, the applicant was denied his right to be heard is a *bona fide* arguable ground. Taking caution not to delve into the issue and make conclusions that may prejudice the hearing of the intended appeal, we find that the intended appeal is arguable.

8. On the nugatory aspect, as this Court held in *Reliance Bank Limited v Norlake Investments Ltd [2002] 1EA 227*, the factors which render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated as follows:

*“To refuse to grant an order of stay to the applicant would be out of proportion on any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined.”*

9. In the instant application, we note that the impugned decree is a money decree. There is no assertion that the respondent is incapable of refunding the decretal amount in the event that the intended appeal succeeds. In the circumstances, the applicant's appeal will not be rendered nugatory if he pays the decretal amount and his intended appeal succeeds.

10. From the circumstances of the application, the applicant has satisfied only one limb of the requirements under **Rule 5(2)(b)** of this **Court's Rules**. As the applicant is required to satisfy both the limbs of arguability and the nugatory aspect in regard to the requirements, the Notice of Motion dated 30th October, 2020 is hereby dismissed with costs.

**Dated and delivered at Nairobi on this 23<sup>rd</sup> day of April, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**