



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, MURGOR & SICHALE, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. E421 OF 2020

BETWEEN

INSTITUTION OF ENGINEERS OF KENYA.....APPLICANT

AND

DANIEL MWENDA NTOITI.....1STRESPONDENT

THE ENGINEERS BOARD OF KENYA.....2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of the appeal against the judgement and decree of the High Court of Kenya at Nairobi (Makau, J.) dated 1st October 2020

in

Petition No. 275 OF 2019)

RULING OF THE COURT

By the motion dated 29th October, 2020 brought under **Rule 5(2)(b)** of this **Court’s Rules**, the applicant, **the Institution of Engineers of Kenya** seeks an order of stay of execution of the ruling issued against it by the High Court at Nairobi in **Constitutional Petition No. 275 of 2019** pending the hearing and determination of its appeal against the same.

The application is founded on grounds that; the 1st respondent has moved to execute the decree against the applicant by way of a warrant of attachment of movable property in execution of the decree for money; if the stay orders are not granted, the applicant will suffer substantial loss and damage rendering its intended appeal nugatory.

In a rather lengthy affidavit sworn on 29th October 2020 by **Engineer Nathaniel Wilson Omwolo Matalanga**, the President of the applicant, in support of the Motion, the applicant deposes on various issues some of which are not relevant to this application. The applicant states that the 1st respondent circumvented the rules governing preparation of a decree by failing to submit the decree to the parties to the suit for approval before submitting it to the Deputy Registrar contrary to **Order 21 rule 8** of the **Civil Procedure Rules, 2010**. Further, that the 1st responded proceeded to execute the decree before the amount of costs incurred in the petition could be ascertained by taxation, and without leave of court, contrary to **section 94** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**.

The applicant avers that the 1st respondent sued the applicant and the 2nd respondent for cancelling his corporate membership certificate M. 3511, which was found to have been issued irregularly by the applicant’s former Registration Officer, **Christopher Ongonyo Munubi**. The applicant asserts that the 1st respondent deliberately failed to produce his membership certificate to be subjected to a forensic analysis and authentication.

In a supplementary affidavit dated 2nd November 2020, the applicant further deposes that on instructions from the 1st respondent, **Valley Auctioneers** have issued a proclamation dated 26th October 2020 notifying the applicant that the movable property described in the schedule thereto would be removed and sold by public auction.

The 1st respondent through written submissions dated 11th November 2020 opposes the application arguing that the applicant has not adduced any material evidence in the form of a draft memorandum of appeal for the court to evaluate the likelihood of the intended appeal

succeeding. The 1st respondent further states that in the event the decree is complied with and the appeal succeeds, he will refund the decretal sum.

In an affidavit dated 10th November 2020 sworn by **Ivan Kipkoech Rono**, Counsel for the 1st respondent, it is deposed that there is a pending application before the High Court seeking leave from the court to compel the applicant and the 2nd respondent to comply with the orders of the court in **Constitutional Petition no. 275 of 2019**.

The 2nd respondent also filed a replying affidavit in support of the motion, sworn on 11th November 2020 by **Eng. Nicholas M. Musuni**, the registrar of the 2nd respondent. The 2nd respondent deposes that following the cancellation of the corporate membership certificate issued to the 1st respondent by the applicant on allegation that it had been irregularly obtained, the 2nd respondent as the body mandated to register and regulate engineers deregistered the 1st respondent as a Professional Engineer in Civil Engineering.

We have given due consideration to the application, the affidavits, the contending submissions and the law. It is common ground that a stay of execution lies at the discretion of the Court, to be exercised on a case by case basis, with a view to attaining the ends of justice. The discretion is exercised judiciously and judicially on sound principles, not arbitrarily or whimsically. The principles that govern the matter are notorious: the applicant must satisfy the Court both that he has an arguable appeal, which means one that raises a *bona fide* point worthy of consideration, though it need not necessarily succeed; and that if the stay is not granted the appeal would be rendered nugatory, which is another way of saying useless or of no effect, due to harm having been suffered in the intervening period.

Although the applicant's memorandum of appeal is not on record, it is apparent from the affidavit in support of the application that the issue of whether the 1st respondent's corporate membership certificate, and eventual registration as a professional engineer was legally obtained is a matter that is arguable before this court.

On whether the appeal would be rendered nugatory, we note that **Valley Auctioneers** have issued a proclamation dated 26th October 2020 notifying the applicant that its movable property described in the schedule thereto would be removed and sold by public auction, in execution of the decree.

We are satisfied that both limbs of the application have been met and therefore the application is for granting. The costs shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR