IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI JJ.A.)

CIVIL APPLICATION NO. E368 OF 2020

BETWEEN

DR. JANARDAN D. PATEL ..... APPLICANT

AND

BINDI SHAH .....RESPONDENT

(Being an Application seeking for stay of Execution of the Judgment and Decree of the High Court of Kenya at Nairobi (L. Njuguna J.) dated 4th March,2019 in ***Nairobi HCCC No. 492 of 2003)***

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RULING OF THE COURT

Before this court is a Notice of Motion application dated 27th November, 2020 brought under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, **Rules 5(2) (b), 41** and **47** of the **Court of Appeal Rules 2010**, **Rules 3** and **11** of the **Court of Appeal Practice Directions for Civil Appeals and Applications 2015**, and **Article 159(2)(a)** of the **Constitution of Kenya 2010**, substantively seeking orders that pending the full and final determination of the intended appeal this Court be pleased to grant stay of execution against the whole of the judgment and decree of the High Court at Nairobi Civil Division in Civil Suit No. 492 of 2003 delivered by **L. Njuguna, J**. on 4th March 2019, together with an attendant order that costs of this Application be awarded to the Applicant.

The application is supported by the affidavit of the applicant **Dr. Janardan D. Patel** dated 27th November 2020. It has been opposed by a replying affidavit of **Virinder Goswami** the Advocate on record for the respondent, deposed on 18th December 2020. The application was canvassed through rival pleadings, written submissions and legal authorities orally highlighted by learned counsel for the respective parties. Learned counsel **Mr. Kisigwa** appeared for the applicant while learned counsel, **A. B. Shah** holding brief for **Goswani** appeared for the respondent.

The background to the application albeit in a summary form is that on 4th March, 2019 the High Court Civil Division at Nairobi (**L. Njuguna, J.)** delivered a Judgment dated 4th March, 2019, in favour of **Bindi Shah** (the respondent) against the applicant vide which the learned Judge awarded the respondent Kshs.21,535,459.00 as compensation for medical negligence attributed to the applicant.

Aggrieved, the applicant filed a notice of appeal against the whole Judgment dated 8th March, 2019 and subsequently on 15th April, 2019 filed a Notice of Motion application before the trial court seeking an order for stay of execution of the judgment, whose merit determination resulted in the trial court's ruling of 20th February, 2020, granting a conditional order of stay of execution pending the hearing and determination of the appeal on condition firstly that the applicant do deposit a total sum of Kshs.5,000,000/=in a joint interest earning account in the names of the advocates on record for the respective parties. Second, to deposit in court as security for the balance of the decretal sum a title deed/certificate of lease in his name together with a valuation report within sixty (60) days of the date of ruling, in default the stay of execution order would lapse.

The applicant partially complied with the orders of 20th February, 2020 by depositing Kshs.2,500,000.00 in a joint interest earning account provided in the joint names of advocates for the respective parties in satisfaction of the first prerequisite. For the second, a title deed registered in the name of Nanak Hospital Management Services for a property valued at Kshs.97,000,000.00 was deposited which according to the respondent was not in compliance with the second prerequisite. The respondent commenced execution proceedings prompting the applicant to file an application for review and variation of the terms of the conditional stay. The same was opposed by the respondent through grounds of opposition stating *inter alia* that the application was *res judicata*. Second, that the applicant is in breach of item 2 of the conditional stay by providing a title deed registered in the name of a company instead of his name as ordered by the Court. And prayed for the application for variation to be dismissed.

Upon merit hearing of the application for review and variation, the trial court declined that request holding *inter alia* first that reviewing its orders of 20th February, 2020 to allow the applicant to deposit a title deed that was not in his personal names would be prejudicial to the respondent as the title was meant to secure the balance of the decretal sum and on that account held that the applicant had not produced credible evidence to warrant review of the Court's ruling of 20th February, 2020. There was also inordinate delay in filing the application for review. Lastly, that the applicant had failed to provide sufficient security to ensure due performance of the decree and on that account dismissed the application for review.

Aggrieved, the applicant filed the application under consideration. He contends that, he has satisfied the twin principles for granting relief under **Rule 5(2)(b)** of the Court's **Rules**. He relies on the draft memorandum of appeal annexed to the supporting affidavit to assert that he has an arguable appeal. In summary he intends to fault the trial court for the failure to: properly evaluate, appreciate the record and find that he was erroneously individually sued and found individually negligent for surgery he carried out well, professionally and with a team of other surgeons in Nairobi Hospital; appreciate that medical reports relied upon by the respondent in support of her case were contradictory and should therefore have not been relied upon in support of her case; to appreciate that the reports were prepared 7 years later after the surgery and could not therefore refer to the respondent's medical condition as at March, 2001 when the surgery was carried out; consider applicant's evidence, submissions and legal authorities tendered before court in opposition to the respondent's claim; appreciate that he followed the correct protocols and procedures when carrying out surgery on the respondent as explained by him in his testimony to Court; appreciate that on the evidence on the record the respondent recovered fully after surgery; appreciate that the respondent failed to heed applicant's advice upon discharge from hospital not to have pregnancies during the recovery period or alternatively undergo child birth by way of caesarian section as opposed to normal delivery in case she conceived during the time of recovery, which advise she ignored and instead went on to have two pregnancies by way of normal delivery which caused her complication to recur resulting in her erroneously suing the applicant for carrying out the surgery in an alleged negligent manner, all of which the applicant contends are all arguable.

Turning to proof of the second prerequisite, the applicant contends that the respondent by her own admission in her testimony conceded that she has no known source of income and employment. If the decretal sum is paid out to her without restrictions on how it should be applied pending appeal, there is a very high likelihood that the money will not be recoverable should the appeal ultimately succeed. Second, he has complied with the conditionalities set by the trial court for stay, first by depositing kshs. 2,500,000.00 in the escrow account, and a title deed of a property owned by a company in which he holds 50% shareholding. He also furnished a company resolution authorizing him to use the company title deed as security in satisfaction of the conditionalities set by the trial court for the conditional stay of execution and he has also gone further and deposited kshs.2,500,000.00 with his advocate for onward transmission to the escrow account in the joint names of advocates for the respective parties herein to make up the total amount of kshs.5,000,000.00 thereby complying with item 1 of the conditional order for stay.

To buttress the above submissions, the applicant relies on the following authorities namely, **Nairobi Women's Hospital vs. Purity Kemunto [2018] eKLR;** and **Regnoil Kenya Limited vs. Winfred Njeri Karanja [2019] eKLR** both on principles that guide the Court in the exercise of its mandate under **Rule 5(2)(b**) of the Court's **Rules**.

In rebuttal, the respondent in her written submissions has raised preliminary objections to the application as laid firstly, that the application as laid explicitly states in its heading that it seeks stay of execution pending hearing and determination from the ruling and order of **L. Njuguna, J.** dated 29th October, 2020 and delivered on 29th October, 2020 against which ruling no notice of appeal has been filed. Secondly, the applicant's application under consideration is a nonstarter as the notice of appeal on which it is anchored dated 8th March, 2015, was served on her advocates on 2nd April, 2015 outside the timeline stipulated in the rules requiring such service to be effected within seven (7) days of such lodging and without leave and therefore stands vitiated. Third, the letter bespeaking proceedings was neither copied nor served on her. The time for lodging of an appeal without leave of Court expired on 14th May, 2019. Granting relief sought will not therefore serve any useful interests of justice. Fourth, the application under consideration does not lie as the applicant exhausted his right to seek stay of execution of the intended impugned judgment pending appeal before the trial court.

On the merits, the respondent argues that the appeal is not arguable because: applicant's contention that he has had a clean record of professional service for fifty-two (52) years is negated by the fact that in **HCCC No. 4942 of 1990 B. K. vs. J. D. Patel & Another** he was found guilty of professional negligence; it is not true as contended by the applicant that he warned the respondent of the consequences of undergoing the surgery as the record is explicit that no such warning was ever given. Neither was there any demonstration made to show that consent was obtained from the respondent to undergo the said surgery as none was tendered in evidence. Contrary to his assertion that he performed the surgery on the respondent with a team of surgeons, his own testimony on record is explicit that he performed the surgery alone. It is not also correct as contended by the applicant that the respondent raised no complaint about the surgery until close to seven years later as it is on record that the surgery was conducted on 27th March, 2001 and by July, 2001 the respondent was back at the applicant's clinic raising complaints over the surgery she underwent at the applicant's clinic.

Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited in the heading of the application. Before we delve into the merits of the application, we find it prudent to deal with the preliminary issues raised by the respondent in their submission highlighted above which in our view go to the root of the application and should therefore be disposed of first.

Starting with preliminary issue number one, we agree with the respondent's contention that the heading of the application tends to create an impression that what is sought to be stayed is the ruling declining review. It is however our view that this misdescription in the heading is inconsequential to our core mandate herein namely, to determine whether the substratum of the application which is the prayer for stay of execution is sustainable or not and give reasons either way. All that we make of the respondent's objection in the manner laid on this issue is that it is one that deals with want of form curable under the inherent power of the Court enshrined in **Rule 1(2)** of the Court's **Rules** and the non-technicality principle enshrined in **Article 159(2)(d)** of the **Constitution of Kenya, 2010**. It is accordingly declared inconsequential and ignored.

On preliminary objection number two, it is common ground that the notice of appeal dated 8th March, 2019 was filed on 14th March, 2019, served on the respondent on 2nd April, 2019 outside the 7 days stipulated by **Rule 77(1)** of this Court's **Rules** which is couched in mandatory terms and provides in part as follows:

> **"An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal**." [Emphasis supplied].

We have given due consideration to the above objection. It is our considered view that objection of this nature would fall for consideration in an application for striking out or deeming a notice of appeal as withdrawn under either **Rules 83** or **84** of the Court's **Rules** which we are not seized with. In our view as long as the notice of appeal is not struck out it cannot be ignored. It forms sufficient anchor for the application under consideration especially when it is on record that we have not moved *suo motu* to fault the said notice, but at the invitation of the respondent at large. We therefore decline to accede to that invitation.

On preliminary objection number three, it is common ground that objection of lack of service of a letter bespeaking proceedings and its consequences on the time lines set in **Rule 82(1)** for filing a record of appeal also falls for consideration in an application for vitiating either a notice of appeal or a record of appeal which is not the case before us.

On the fourth preliminary issue as to whether the applicant has exhausted his right to the relief sought of stay of execution and has no further recourse to this Court for the same relief, **Rule 41** of this Court's Rules provides as follows:

> **"The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court."**

Our take on the construction of the above rule is that it donates jurisdiction to an aggrieved party to seek relief from this Court in instances where similar relief has been declined by the trial court.

In light of the conclusion reached above in response to the preliminary issues raised by the respondent against the application under consideration, we are satisfied that we are properly seized of the application and shall proceed to interrogate its merit.

Turning back to our core business herein, it is our finding that **Rules 41** and **47** are merely procedural and require no interrogation. It is also sufficient for us to state that **sections 3A** and **3B** of the **Appellate Jurisdiction Act** enshrines the overriding objective principle of the Court donating greater latitude to the Court in the discharge of its mandate under the said **Act** and which principle we bear in mind as we proceed to interrogate the merits of the application.

The substantive rule of access for the relief sought is **Rule 5(2)(b)** of the **Court of Appeal Rules** which provides as follows:

> **"(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just."**

The principles that guide the court's exercise of its jurisdiction under the above rule and which we fully adopt are as succinctly crystallized in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**. We have applied the above threshold to the rival position herein and proceed to render ourselves as hereunder.

On the arguability of the intended appeal, the applicant has annexed to the application a memorandum of appeal raising fourteen (14) grounds of appeal already summarized above which in our view are all arguable notwithstanding that they may not ultimately succeed. In law an arguable ground of appeal need not be one that will ultimately succeed but one that is not frivolous. One that will invite a response from the opposite party and warrant interrogation by this Court. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

In our view, all the grounds highlighted above will not only invite a response from the respondent but also warrant interrogation by this Court. We are therefore satisfied that the applicant has satisfied the first prerequisite under the said **Rule**.

Turning to the nugatory test, the position in law and which we fully adopt is as was restated in the **Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others** (supra) as follows:

> **"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved." [emphasis added]**

The applicant alleges that the respondent has no source of income or known employment from which she can raise funds to refund the decretal sum should the appeal succeed. This assertion shifted the burden of proof onto the respondent to demonstrate how the decretal sum if paid out to her would be refunded should the appeal ultimately succeed. Lack of response to the above issue by the respondent either in her replying affidavit or the written submissions leads us to the only logical and plausible conclusion that the applicant's fears and or apprehensions are well founded considering that the decretal amount awarded is to the tune of kshs. 21,535,459.00, bound to rise bearing in mind the interest component. There is therefore need for us to apply the principle of equality of arms and balance the interest of the respondent as the decree holder entitled to enjoy the fruits of judgment entered in her favour, and those of the applicant who may encounter hardship recovering the amount from the respondent either in whole or part should the appeal ultimately succeed after the respondent has applied the decretal sum as deemed fit.

In the result, we find the applicant has satisfied both limbs for granting relief under **Rule 5(2)(b)** of the Court's **Rules**. The application

therefore succeeds on terms that are just in the interests of justice to both parties. We therefore proceed to make orders as follows:

1) The order made by the trial Court requiring the applicant to deposit kshs. 5,000,000.00 in an escrow interest earning account in the joint names of advocates for the respective parties herein as partial security for due performance of the decree is affirmed. The balance of the money held by applicant's advocates to be paid into an escrow account within thirty (30) days of the delivery of the ruling.

2) The condition for depositing of a title deed in the applicant's name as security for the balance of the decretal sum is varied to read that applicant does deposit the title deed in the name of Nanak Hospital Management Services on condition that he deposits a fresh resolution by the Board of Directors of Nanak Hospital Management Services of no objection to the title deed being used as security and second an undertaking that Nanak Hospital Management Services will not divest themselves of the said title pending hearing and determination of the appeal also within thirty (30) days of the delivery of the ruling.

3) In default of any of items 1 and 2 above, the stay order granted herein shall lapse.

4) Costs of the application to abide the outcome of the intended appeal.

DATED** and **DELIVERED** at **NAIROBI** this **23rd day of April, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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