



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & WARSAME, J.J.A.)

CIVIL APPLICATION NO. NAI 289 OF 2017

BETWEEN

ATTORNEY GENERAL1ST APPLICANT

MR. SAITOTI TOROME,

PRINCIPAL SECRETARY, MINISTRY OF DEFENC.....2ND APPLICANT

AND

EUNICE MAKORI and HELLEN MAKONE (Administrators and

Personal Representatives of the Estate of the late JOHNSON ONDUKO

MAKORI).....RESPONDENTS

(An application for stay of execution pending an intended appeal against the judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 23rd November, 2017

in

H.C. Misc. Application No. 74 of 2016)

RULING OF THE COURT

1. The motion on notice before this Court dated 13th September, 2017 is brought under **Articles 25, 47 and 50** of the Constitution of Kenya, **Section 3, 3A and 3B** of the Appellate Jurisdiction Act, the Contempt of Court Act, the Judicature Act and **Rule 5(2)(b)** of the Court of Appeal Rules. The applicant is seeking orders for stay of execution pending an intended appeal against the decision of the High Court at Nairobi (Sergon, J.) dated 23rd November, 2017 in Nairobi Civil Miscellaneous Application No. 74 of 2016. The decision in question is nonetheless not included in the record of Appeal before us.

2. Undoubtedly, this Court has unfettered discretion under **Rule 5(2) (b)** to grant an order of stay. The principles guiding the exercise of such discretion are well settled. Firstly, an applicant has to demonstrate that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. (See: **Multimedia University & Another v. Professor Gitile N. Naituli (2014) eKLR**).

3. These principles construe that an applicant must bring to the Court’s attention the subject matter of the intended appeal which he/she wishes to preserve through orders for stay and the grounds upon which he/she intends to challenge the impugned decision. Therefore, having noted that the impugned decision is not on record, it is apparent that this alone stands against the applicant’s motion as there is no basis for this Court to exercise its discretion.

4. We also note that there is communication dated 1st March, 2021 received by the Court to the effect that the instant application was never

served on the respondent and that a similar application, **Civil Application No. 130 of 2020 - The Attorney General –vs- Eunice Makori & Another** seeking similar orders of stay of execution, was heard and dismissed by the Court on 20th November, 2020. We have confirmed that the said application was dismissed principally for the reason that the applicant had failed to demonstrate the first prerequisite on arguability of the appeal.

5. From the foregoing, clearly this application is doomed to fail. We find the application tantamount to gross abuse of the Court process and dismiss it accordingly. We make no order on costs as the application was not served on the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR