



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MUSINGA, JJ.A)

CIVIL APPLICATION NO. E400 OF 2020

BETWEEN

**BILL KIPSANG ROTICH.....1ST APPLICANT**

**FLORENCE ROTICH.....2ND APPLICANT**

**METRO PETROLEUM LIMITED.....3RD APPLICANT**

AND

**PANKAJ VRAJLAL SOMAIA.....RESPONDENT**

(Being an Application for Stay of Execution of the Ruling and Order of the High Court of Kenya at Nairobi, Milimani Commercial and Tax Division (Fred A. Ochieng, J.) dated 10th November, 2020 pending the determination of an intended Appeal *in H.C.C.C. No. 542 of 2007*)

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RULING OF THE COURT

1. Before the Court is a motion on notice dated 14th December, 2020 brought under **Rule 5(2)(b)** of this Court's Rules seeking stay of execution of the judgment and decree on the final findings and quantum contained in the ruling and order of the High Court at Nairobi (Fred A. Ochieng, J.).
2. **Bill Kipsang Rotich** and **Florence Rotich** (the 1st and 2nd applicant) were the original directors and first shareholders of the 3rd applicant, **Metro Petroleum Limited** each holding one Ordinary Share. Subsequently, the 2nd applicant resigned as a director, and the respondent, **Pankaj Vrajlal Somaia**, took over as a Director and co-signatory of the 3rd respondent's bank accounts at Imperial Bank and at Giro Bank Limited in which the 3rd applicant maintained its accounts. However, sometime later a dispute arose prompting the respondent to file a suit before the High Court claiming that among other things, he had been fraudulently and illegally removed as director, and the 2nd respondent re-assigned as such through a forged, hence illegal, null and void, resolution; that the 1st and 2nd applicants had filed falsified returns at the company registry; and that the 1st and 2nd applicants opened other company bank accounts through which they diverted the proceeds of the 3rd applicant and misappropriated the said proceeds.
3. The respondent urged the Court to find that his alleged resignation and purported appointment of the 2nd applicant was illegal hence invalid, that the 1st and 2nd applicants' actions as directors was unlawful, and that the applicants had misappropriated the 3rd applicant's proceeds. He prayed *inter alia* that the applicants be stopped from operating bank accounts for the 3rd applicant, at any bank where the respondent was not a joint signatory with the 1st applicant; that the 3rd applicant's accounts be taken, to establish if the 1st and 2nd applicants had misappropriated any funds from the Company; that if such misappropriation is evident, the 1st and 2nd applicant be compelled to refund the said money; and that the applicant was entitled to compensation and exemplary and punitive damages against the applicants.
4. The applicants denied all the respondent's claims and sought the dismissal of the suit.
5. After hearing the protracted suit in which receipts and invoices were requested for and never supplied, the learned Judge eventually applied his own formula to arrive at the quantum of damages amounting to Kshs. 93,000,000/= which he awarded the respondent herein with interest at Court rates.
6. The applicants being aggrieved by that aspect of the judgment filed a Notice of Appeal dated 19th November, 2020. Subsequently, they lodged the notice of motion now before this Court for stay of execution of the orders pertaining to the quantum as liability is not denied.

7. The application was supported by the grounds stated in the motion and an affidavit sworn by the 1st applicant. The gravamen of the applicant's motion is that the judgement is *per in curium* as the learned Judge applied the wrong formula to calculate the Company's profit. In his calculation, the learned Judge relied on a deed of settlement signed between the 3rd applicant and Kenya Revenue Authority (KRA) produced in evidence before him, in which it was stated that the principal tax liability was Kshs. 62,000,000, to establish that the 3rd applicant had accumulated profits to the tune of Kshs. 186,000,000 hence what was owed to the respondent was Kshs. 93,000,000 as he was entitled to 50% of the profits.

8. According to the applicant, that was a grave misdirection on the part of the learned Judge and on that point alone, the principle on arguability has been demonstrated. On the nugatory aspect, the applicant contends that if stay is not granted, the intended appeal shall be rendered nugatory as the sum is huge and the applicant may not be in a position to refund the same in the event the appeal succeeds and further that if the applicant is condemned to pay the said amount, it will be financially crippled. The Court was urged to rely on its decision in **Oraro and Rachier Advocates v. Co-operative Bank of Kenya Limited (2000) eKLR** to balance the interests of both parties.

9. The respondent opposed the application vide his replying affidavit dated 10th February, 2021. Urging the Court to dismiss the application and reiterating the contents of the replying affidavit, counsel submitted that the applicant's intended appeal did not raise arguable issues. Further that the decretal award was capable of being refunded in the event that the intended appeal is successful. Further, that on a balance of inconvenience, the respondent would be more prejudiced if stay is granted as he will be denied enjoying the fruits of a judgment entered in his favour after prosecuting the matter for 13 years now.

10. We have considered the application along with the rival submissions and the relevant law. It is trite that the test of whether an application seeking orders under **Rule 5(2)(b)** of this Court's Rules succeeds is two-fold, i.e., the applicant must demonstrate that: the appeal or intended appeal upon which the application is anchored, is arguable; and that should the Court fail to grant the orders sought, the appeal will be rendered nugatory. (See:

**Ishmael Kagunyi Thande v. HFCK, Civil Application No. Nai 157 of 2006 (Unreported)**).

11. On the question of arguability, bearing in mind that even a single arguable ground suffices to demonstrate arguability, we find the question as to whether the learned Judge had applied the correct formula to arrive at the amount awarded arguable. On the nugatory aspect, no doubt the amount in question is substantial. We note, however, that liability is not denied and the bone of contention is the quantum. At the end of the day, the applicant is entitled to some amount regardless of whether the appeal succeeds or not. We are also alive to the fact that the respondent has waited for this judgment for many years. It is in our view only fair that the Court strikes a balance so that even as the respondent waits for determination of the appeal, he gets to enjoy part of the award.

12. Faced with a similar situation in **Peter Gathecha Gachiri v. AG and 4 Others, Civil Application No. Nai 24 of 2014 (unreported)** this Court expressed itself as follows:-

**“Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b).**

**The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410.”**

(Emphasis supplied)

Applying the above principles and in view of the circumstances of this case as discussed earlier, we are inclined to give a conditional stay of execution pending the hearing and determination of the appeal.

13. We grant stay of execution of the orders as prayed pending the hearing and determination of the intended appeal on condition that the applicant pays Ksh. Ten million (Ksh. 10,000,000/=) to the respondent, and secondly, that the applicant gives a Bank guarantee for Ksh. Twenty million (Ksh 20,000,000/=) within 30 days from the date hereof, failing which the conditional stay will automatically lapse, leaving the applicant at liberty to execute. Costs of the application will be in the appeal.

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

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**