



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJA.)

CIVIL APPLICATION NO. 249 OF 2018 (UR 199/2018)

BETWEEN

KIRIINYA MUKIIRA .....APPELLANT/APPLICANT

AND

MIDDLE EAST BANK KENYA LIMITED .....RESPONDENT

*(Being an Application for stay of Execution and further proceedings pending the hearing and determination of an intended*

*Appeal from the Ruling of the High Court of Kenya, Milimani Commercial Courts Nairobi, (Mary N. Kasango, J.)*

*Dated 13th June, 2018*

in

**HIGH COURT CIVIL SUIT NO 134 OF 2014)**

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**RULING OF THE COURT**

We are asked in the Motion brought under **Rule 5(2) (b)** of the **Court of Appeal Rules** to stay the ruling and order made on 13th June, 2018 in **Milimani HCCC No. 134 of 2014** dismissing the plaintiff’s/applicant’s suit pending the lodging, hearing and determination of the applicant’s intended appeal and that we order stay of any further proceedings pending the hearing and determination of the intended appeal.

In grounds in support of the motion and in a supporting affidavit of the applicant, **Kiriinya Mukiira**, it is stated that the applicant has an arguable appeal with a high probability of success because, in the applicant’s view, the Judge erred in fact and in law in relying on circumstantial evidence, conjecture and surmise by failing to appreciate submissions by the “Defendant”; that the Judge erred by issuing an unfair order; that the intended appeal will be rendered nugatory if orders of stay are not granted because, in the applicant’s view, there is imminent danger and risk of execution; that damages would not be an adequate remedy and the appeal has high chances of success.

There was no affidavit in reply when we considered the motion on 23rd March, 2021 virtually without hearing counsel in person in view of the COVID 19 pandemic.

From the record of the Motion we discern from the ruling of **Kasango, J.** delivered on 13th June, 2018 (*subject of the intended appeal*) that the applicant filed suit at High Court against the respondent, **Middle East Bank Limited**. Contemporaneous with the suit was a motion seeking interlocutory orders for the respondent to pay to the applicant certain money held in the applicant’s account with the respondent. That application was withdrawn.

It was common ground in the matter at the High Court that the applicant had not filed Summons to Enter Appearance with the Plaintiff. The court found that filing Summons to Enter Appearance with the Plaintiff was a mandatory requirement and in the end the suit was struck out.

We are asked to stay those orders pending institution and determination of an intended appeal.

The principles that apply in an application for stay of execution pending appeal are now well known. For an applicant to succeed he must,

firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – see the case of **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**.

As we have seen the applicant’s suit was struck out for non compliance with what the High Court found to be a mandatory requirement where Summons to Enter Appearance must accompany the Plaintiff.

This Court held in the case of **County Secretary of Kajjido & 47 Others v Salaries & Remuneration Commission & Another [2021] eKLR** that it was settled law that the issue as to whether a negative order is capable of being stayed is paramount in determining the success or otherwise of an application under **Rule 5(2) (b)** of this Court’s Rules.

In the case of **Western College of Arts and Applied Science v Oranga & Others [1976 - 80] 1 KLR 63** it was held by this Court:

*“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”*

In the Motion before us the applicant’s suit was struck out. Although we exercise original jurisdiction in applications brought under Rule 5(2) (b) where exercise of discretion is only subject to law we cannot see what can be stayed where the applicant’s suit was struck out. That suit does not exist; there is nothing that can be stayed.

We need not consider the nugatory aspect, the applicant having failed to satisfy the first principle on arguability of the intended appeal. The Motion dated 22nd August, 2018 fails and is dismissed with no order on costs.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE 2021.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

*Signed*

**DEPUTY REGISTRAR**