



IN THE COURT OF APPEAL

AT KISUMU

(CORAM:ASIKE-MAKHANDIA, GATEMBU & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. 27 OF 2021

BETWEEN

YOBESH TINEGA.....APPLICANT

AND

GETRUDE W. NYANGE & PETER O. OMAYO (*Suing as the legal representatives*

of the Estate of Francis N.Omayo(deceased)RESPONDENT

(Being an application for stay of execution of the ruling/order of the High Court in Nyamira (E. Maina, J) dated 1st March 2021

in

NYAMIRA HCC. APPLN. NO. E002 OF 2020)

RULING OF THE COURT

The background to this instant motion is that the applicant had moved to Nyamira High Court through a Miscellaneous Civil Application No. E002 seeking stay of execution of the judgment and decree issued on 29th September 2020 in Nyamira Chief Magistrate's Court Civil Case No. 128 of 2017 and leave to file an appeal against the said judgment and decree out of time. The grounds in support of the motion and an affidavit sworn by **Yobesh Tinega** largely point to the fact that the decretal sum of ksh 7,303,492.8/= that was awarded to the respondents was a substantial amount and the respondents were men of straw who may not be able to refund, should the same be paid to them and the intended appeal succeeds. The respondents' counsel opposed the application by deposing that it was an afterthought since the applicant had defaulted in paying the decretal sum within 30 days as directed by the trial magistrate when granting temporary stay. As a consequence they had instructed **Messrs Hegeons auctioneers** to proclaim the applicant's moveable property to recover the decretal sum.

The application was canvassed through written submissions and the High Court delivered its ruling on the 1st March 2021 in which it granted leave to the applicant to appeal out of time and conditional stay of execution of the decree pending the hearing and determination of the appeal. The conditional stay of execution was on condition that the applicant deposits the entire decretal sum either in court or in an interest earning account in the joint names of the advocates acting for the parties within 14 days of the ruling; which conditions he did not seek review of. Aggrieved by the decision, the applicant filed the instant undated motion pursuant to rule 5(2)(b) of this court's rules in which he has asked us to grant stay of execution of the judgment and decree entered against him on 29th September 2020 and the period of 14 days granted for compliance with the order be stayed pending hearing and determination of the intended appeal.

The grounds in support of the motion as well as the supporting affidavit sworn by the applicant make the point that stay was granted on condition that the decretal sum be deposited in an interest earning account within 14 days which was set to lapse on the 15th March 2021, that thereafter he would be exposed to execution which had already commenced; that the statutory limit for the Directline Assurance Company Ltd was ksh.3,000,000/= and he would have to pay the balance; that his intended appeal was arguable and if execution was allowed to proceed it would be rendered nugatory; that the motion was filed without undue delay; that it was in the interest of justice that the orders be granted; that if execution was allowed to proceed he would suffer irreparable loss and damage and that his motor-vehicle registration KBN 964 J which was his only source of income and allowing it to be attached would deprive him of his livelihood.

In opposing the motion, the respondents filed a replying affidavit dated 18th March 2021 deposing that the estate of **Francis Omayo** (deceased) sought compensation upon his demise following a fatal road traffic accident that involved the applicant's aforesaid motor vehicle,

that judgment was subsequently entered in their favor for a sum of ksh. 7,889,299/= which the applicant has failed to satisfy to date. Further that the applicant was only denying them the fruits of the judgment and that in the High Court he had offered a bank guarantee of ksh. 30 million yet in this motion he was only offering Ksh. 3 million. They prayed that the application be dismissed with costs in the circumstances.

In its written submissions, the applicant maintained that he deserved a grant of stay for the reason that execution had commenced vide warrants of attachment and sale dated 11th November 2020, and if allowed to proceed, his assets would be attached which would occasion him great loss. We were urged to be guided by the principles in ***Butt v. Rent Restriction Tribunal [1982]KLR***, where the court held that discretion should be exercised in such a manner that it should not stifle the appellate process. Lastly we were urged to find that the statutory limit for his Directline Insurance Company which had insured his vehicle was ksh.3,000,000/= and that even if the insurer was to pay, the applicant would still be indebted and therefore liable to pay the balance which he was unable. We were urged to grant stay, which in its absence would render the intended appeal nugatory. No submissions on behalf of the respondents were filed.

The court has considered the application, the rival affidavit, the submissions filed and the authorities cited. The motion is premised on rule 5(2)(b) of this court's rules. The purpose of this rule is to preserve the substratum of the appeal. The principles that apply to applications of this nature are well known. First the applicant has to demonstrate that the appeal or intended appeal as the case may be, is arguable and secondly, that absence stay, the same shall be rendered nugatory. These principles were restated and amplified by this Court in the decision of ***Multimedia University & Anor v. Professor Gitile N.Natuli [2004]*** wherein it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR ...”

Thus the applicant has to establish that his appeal is one which is not frivolous but one which raises a bona fide issue deserving determination by a court and a single issue would still suffice. See ***Silverstein v. Chesoni [2002]1KLR 867***.

We have perused the draft memorandum of appeal annexed to the application which grounds revolve around the learned judge imposing punitive conditions for stay; failure by the learned judge to consider the proposal by the insurer to provide a bank guarantee as security and that the decretal sum was too colossal for the applicant to raise being a man of straw. From these grounds what the applicant is essentially questioning is the exercise of discretion by the High Court. It is trite that an appellate court will rarely upset or set aside a discretion exercised by the court below. We are not persuaded that the intended appeal is arguable .

It is also apparent that the applicant soon after the judgment was entered in favour of the respondents sought and obtained a stay of execution for 30 days the terms of which he failed to comply with. The applicant thereafter moved to the High Court again seeking stay of execution which had actually commenced. He was successful and was granted stay on condition that he deposits the entire decretal sum. Again the applicant has failed to meet the terms. He is now before us seeking the same stay when he is already actually enjoying stay. We do not think that the applicant is acting in good faith in pursuing this application. We think he is forum shopping which is not permissible.

On the nugatory aspect, whether or not the appeal will be rendered nugatory depends on whether what is being stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party. See ***Reliance Bank(in liquidation) v. Norlake Investment Ltd (2002) 1EA 227***. The applicant claims that his insurer had a statutory limit of Ksh. 3,000,000/=. In other words the insurer can only satisfy the decretal sum to the tune of the aforesaid sum. The balance will have to be met by the applicant personally. To our mind this is an issue entirely between the applicant and his insurance company. It has nothing to do with the respondents. We do not see therefore how those issues can render the appeal nugatory. This is not one such case.

We are thus satisfied that the applicant has not met the threshold for grant of the orders sought. The motion is accordingly dismissed with costs to the applicant.

Dated and delivered at Nairobi this 4th day of June, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR