



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: ASIKE-MAKHANDIA, SICHALE, & J. MOHAMMED, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 52 OF 2020**

**BETWEEN**

**NIC BANK LIMITED.....1<sup>ST</sup> APPELLANT/APPLICANT**

**AUCKLAND AGENCIES.....2<sup>ND</sup> APPELLANT/APPLICANT**

**NDUTUMI AGENCIES.....3<sup>RD</sup> APPELLANT/APPLICANT**

**AND**

**MOMBASA WATER PRODUCTS LIMITED.....RESPONDENT**

(Being an application for stay pending appeal from the Judgment of the High Court of Kenya

**(P. J. O. Otieno, J.) dated 13th April 2020 in H.C.C.C No. 149 of 2019)**

**RULING OF THE COURT**

**Background**

1. Before us is a Notice of Motion dated 24th July, 2020 in which **NIC Bank Limited, Auckland Agencies & Ndutumi Agencies** (the applicants) seek an order for stay of execution pending appeal of the judgment of the High Court (**P. J. O. Otieno, J.**) dated 13th April, 2020 and delivered on 23rd April, 2020. The application is brought under **Rule 5(2) (b)** of the Court of Appeal Rules (this Court's Rules). **Mombasa Water Products Limited** is the respondent herein.

2. It was the applicant's case that it has an arguable appeal with a high probability of success and that the applicants' appeal will be rendered nugatory if the orders sought are not granted as some of the orders are irreversible once complied with. It was the applicants' further contention that if the decretal sum is paid out to the respondent before the hearing and determination of the appeal, the 1st applicant will not be able to recover the same from the respondent who has no capacity to refund the decretal sum.

3. In a replying affidavit sworn by **Joseph Mbugua Gichanga**, the director of the respondent, it was deponed: that the respondent obtained judgment in its favour from the Chief Magistrate's Court for the sum of Kshs. 9,112,000/- on 27th June, 2019; that the applicants were aggrieved and they appealed to the High Court, which appeal was dismissed with costs while the respondent's cross appeal was allowed; that this is a second appeal and the applicants can only appeal on issues of law but the annexed memorandum of appeal raises factual issues hence the intended appeal has no chances of success; that the decree in question is monetary and the success of the appeal will therefore not render it nugatory; and that the respondent is financially capable of paying the decretal sum plus interest in the event that the appeal succeeds.

**Submissions by Counsel**

4. The application was heard by way of written submissions. The applicants submitted that they have an arguable appeal with a high probability of success and that their draft memorandum of appeal raises arguable grounds *inter alia*: that the learned Judge erred in finding that the 1st applicant's recourse in the event of default in repayment of the hire purchase facility lay with a third party, **Ocean Freight (E.A) Ltd** and not in repossession of motor vehicles registration numbers **KBY 469R and KBY 410R** (the Motor Vehicles) purchased under the Hire Purchase Agreements between the 1st applicant and the respondent which granted the 1st applicant the right to sell the Motor Vehicles in the event of default. Further, that the learned Judge erred in finding that the respondent had led evidence in support of the special damages sought in the amended plaint, yet no such evidence had been led and the Hire Purchase Agreements expressly provided that the 1st

applicant would not be liable for any loss of use of the Motor Vehicles arising from default in the repayment of the Hire Purchase facility.

5. On the nugatory aspect, it was the applicants' contention that some of the orders issued by the learned Judge are not reversible such as: the order directing the 1st applicant to pay the respondent Kshs. 14,177,200/-; the order to release to the respondent the original logbooks in relation to the Motor Vehicles; and the order to expunge the respondent's name from the Credit Reference Bureau, once complied with are not reversible. It was counsel's further contention that should the logbooks be released to the respondent before the intended appeal is heard and determined, the respondent may dispose of the said Motor Vehicles thereby defeating the substratum of the appeal and rendering the same nugatory. Further, that if the decretal sum is paid out to the respondent before the hearing of the appeal, the 1st applicant will not be in a position to recover the same from the respondent who has no capacity to refund the amounts paid in the event that the appeal is successful. The applicants further submitted that no prejudice will be occasioned to the respondent should the orders sought be granted as the respondent has since transferred Kshs. 9,478,252/- of the decretal amount from its account without the applicants' knowledge. The applicants submitted that they are willing and ready to provide a bank guarantee in respect of the balance of the decretal sum of Kshs 4,698,948/- as security for the performance of the Decree.

6. The respondent opposed the application and contended that the applicants have not demonstrated that they have an arguable appeal since the issues they intend to appeal against are issues of fact and not law given that their appeal is a second appeal; that the memorandum of appeal as framed is frivolous with no chances of success; that the applicants have failed to tender any evidence that the appeal will be rendered nugatory as they have admitted that the execution process will not render the appeal nugatory since the respondent has already been paid a portion of the decretal sum without the appeal being rendered nugatory; that since this is a money decree, courts would not ordinarily grant stay of execution orders unless it is demonstrated that the respondent is a man of straw and not capable of paying the decretal amount when the appeal is determined. Counsel relied on **Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji & Ano. [2015] eKLR** in support of its proposition. Counsel further contended that the applicants have not tendered any evidence to show that the respondent is a man of straw; and that to the contrary, the respondent has adduced title documents and two valuation reports which have not been rebutted and is therefore capable of repaying the decretal sum in the event that the intended appeal succeeds.

### **Determination**

7. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under **Rule 5(2)(b)** of this **Court's Rules** is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

8. The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled as was observed by this Court in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR** where the Court delineated the jurisdiction of this Court in such an application as follows:

**“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”**

9. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

10. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicants in order to warrant ventilation before this Court. See **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR (Civil Application No. Nai. 31 of 2012)** where this Court described an arguable appeal in the following terms:

**“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.**

**viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”**

12. We have carefully considered the grounds set out in the motion. In our view it is arguable *inter alia* whether a Hire Purchase Agreement between two parties with clear terms on enforcement can be enforced against a third party in the event of default. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the appeal is arguable.

12. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra)** this

Court stated that:

**“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.**

**x). 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.**

13. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicants are apprehensive that should the logbooks be released, the respondent will dispose of the Motor Vehicles thereby rendering the appeal nugatory. The respondent has argued that this is a monetary decree and it is financially capable of refunding the decretal amount should the appeal succeed and the appeal will therefore not be rendered nugatory. In **Housing Finance Company of Kenya Limited v Sharok Kher Mohamed Ali Hirji & Ano.** (supra) cited by the respondent, this

Court stated as follows:

**“with time it became necessary to put certain riders to the legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.**

14. By parity of reasoning, it is clear that the applicants will lose the security they have over the respondent if they release the logbooks to the respondent. The respondent on the other hand has already executed part of the decree and should stay not be granted, it will proceed with execution hence there is imminent risk of execution. In **Reliance Bank Ltd v Norlake Investments Ltd [2002] E.A. 227**, this Court stated:

**“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”**

(Emphasis supplied).

15. In the circumstances of the instant application, we are persuaded that the applicants have demonstrated an arguable appeal which will be rendered nugatory, absent stay.

16. In the circumstances the applicants have satisfied both limbs of the requirements under **Rule 5(2)(b)** of this Court’s Rules. The upshot is that the Notice of Motion dated 24th July, 2020 is allowed. Costs shall abide by the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY, 2021**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**