IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 193 OF 2019

BETWEEN

KENYA ORGANIZATION FOR ENVIRONMENTAL EDUCATION.....APPELLANT/APPLICANT

AND

DANISH ORGANIZATION FOR SUSTAINABLE ENERGY..... RESPONDENT

NON-GOVERNMENTAL ORIGINATIONS BOARD .....INTERESTED PARTY

(Being an application for stay of execution of the judgment and decree of the High Court at Nairobi (Nzioka, J.) dated 21st November, 2017 **in H.C.C.C. No. 465 of 2011)**

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RULING OF THE COURT

In a plaint filed at the High Court of Kenya at Nairobi the respondent, **Danish Organization for Sustainable Energy**, prayed for various orders against the applicant, **Kenya Organization for Environmental Education**. The prayers included: a declaration that all assets, equipment and funds in respect of a project called **UtSS** and another project called **SECODE2** were held by the applicant in trust for the respondent; orders of permanent injunction; that there be delivery of certain assets to the respondent by the applicant; a refund of monies by the applicant to the respondent and delivery of true accounts of activities carried out by the applicant on behalf of the respondent.

The suit was heard by **Nzioka, J.,** who in a judgment delivered on 21st November, 2017 ordered the applicant to release certain assets to an organization called Umande Trust Registered Trustees; that the Non-Governmental Coordination (NGO) Board investigate (within 30 days) the utilization of sums disbursed and file an appropriate report detailing out any identified irregularities and the appropriate action to be taken, if need be; each party to meet their own costs and liberty was given to the parties to move the Court. The Deputy Registrar of that court was to follow up the issue of the report with the NGO Board and file the same with the Court as soon as it was availed.

The applicant was dissatisfied with those orders and lodged a Notice of

Appeal on 30th November, 2017 challenging:

> **"… the whole of the said judgment save for the part declaring that the assets in issue in the suit cannot be returned to the Plaintiff and the order on costs of the suit."**

The applicant has taken a Motion before us brought under **rules 5(2) (b) and 42** of the **rules of this Court** where it is prayed in the main that we stay further proceedings in **HCCC No. 465 of 2011 Danish Organization for Sustainable Energy v Kenya Organization for Environmental Education** pending the hearing and determination of the Motion and of an intended appeal. In grounds in support of the Motion and the supporting affidavit of **Dorcas Beryl Otieno** who says that she is the Executive Director of the applicant, it is stated *inter alia* that the trial court granted an injunction against the applicant …… **"yet called for more evidence to enable it make an order for release of assets to an entity which was not a party to the suit …"** and directed the Interested Party (NGO Coordination Board) to investigate the applicant and file an appropriate report to court when the Interested Party was not a co-plaintiff in the suit. It is further stated that granting an injunction against the applicant when the respondent's suit against it did not succeed went against the fundamental principle of privity of litigation between parties in a personal dispute; that it was wrong for the trial court to call for evidence post-judgment as this did not afford fair trial rights to the applicant contrary to law. Further, that the applicant is not only aggrieved by the judgment delivered on 21st

November, 2017 but also by a ruling delivered on 22nd July, 2018 (this ruling is not in the record of the Motion).

The application is opposed through a replying affidavit of **Lars Jacobsen**, who is the **Head of the International Department** of the respondent. He depones amongst other things that the applicant has not met the threshold for grant of orders of stay of execution pending appeal, the trial judge having found that assets in issue in the dispute did not belong either to the applicant or the respondent; that in the premises the judge reached a correct finding that the assets be held by Umande Trust Registered Trustees; that the trial court had jurisdiction to make further orders after the judgment; that the applicant does not suffer any loss if the judgment is implemented as the contract between the applicant and respondent has been terminated; that:

> **"… The Respondent filed an affidavit on 20th December, 2017 identifying Umande Trust to take over completion of the projects, and the Respondent (sic) did not oppose the said affidavit, having previously had engagements with Umande Trust and cannot possibly now be aggrieved by such identification …."**

Mr. Kiunga Kingirwa, learned counsel for the applicant, in submissions before us when the Motion came up for hearing on 24th October, 2019 thought that the intended appeal was arguable because, in his view, the trial court became *functus officio* after judgment and could not take further evidence. Further, that it was arguable in the intended appeal whether the trial court could order release of assets to a party that was not a party in the suit.

On what would be negated in the intended appeal if orders of stay were not granted, counsel submitted that an application had been filed for contempt of court and officials of the applicant could be ordered jailed.

In opposing the Motion learned counsel for the respondent **Mr. Chege Njoroge** conceded that the intended appeal was arguable as assets were ordered released to a party which was not a party to the suit. On whether officials of the applicant could be found in contempt of court for not obeying orders of the court, it was counsel's view that the application for contempt of court was not part of the judgment to be appealed. It was counsel's further submission that the NGO Coordination Board had led evidence before the trial judge that assets could not be retained by the applicant but should be released to Umande Trust to implement projects previously implemented by the applicant; that some of the assets were perishable and could in the event of the intended appeal succeeding be returned to the applicant.

Miss Karari, for the Interested Party, supported the motion submitting that Umande Trust was not a registered NGO.

The principles that govern applications for stay of execution pending appeal are now well settled. For an applicant to be entitled to favourable orders he must demonstrate that the appeal, or intended appeal, as the case may be is arguable, which is the same as saying that such an appeal is not frivolous. If the applicant succeeds in that aspect he must also show that, absent stay, the appeal, or intended appeal would be rendered nugatory. Those principles are well captured and summarized by this Court in the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR as** follows:

> **"*i)* In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court.**
>
> **ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**
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> **iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.**
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> **iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.**
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> **v. An applicant must satisfy the court on both of the twin principles.**
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> **vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.**
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> **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.**
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> **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.**
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> **ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.**
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> **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.**
>
> **xi.. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim."**

We have considered the record of the Motion, the affidavits and the submissions made before us. We have also perused the draft Memorandum of Appeal where seven (7) grounds are taken. The applicant intends to argue in the intended appeal that the judge erred in

calling for more evidence in contravention of a principle that parties are bound by their pleadings. It is also taken as a ground of appeal that the judge erred in ordering release of assets to an entity that was not a party in the suit. These we find not to be frivolous grounds. They are arguable points and we recognize that the applicant is not bound to show more than one (1) arguable point to succeed on the first limb we have identified in an application like this one.

Now, what about the second limb– whether the intended appeal will be rendered nugatory if we don't grant stay of execution pending appeal?

With due respect Mr. Kiunga Kingirwa, counsel for the applicant, was not of much assistance to us in this respect. The jailing of officials for being found in contempt of court for failure to obey court orders cannot, in our view, be a ground for granting stay of execution of a regular judgment issued by a court. We noted in the proceedings that assets were donated by the respondent to the applicant to implement certain charitable works through a formal agreement entered between the applicant and the respondent. That agreement was terminated. The assets did not belong to the applicant and we doubt that the applicant would in any way be entitled to retain such assets. The assets were always intended to be applied to charitable purposes and it is reasonable that the assets identified in the judgment should be released to the Interested Party to identify a suitable NGO to implement the projects.

In the end the applicant has failed to satisfy us that the intended appeal would be rendered nugatory if we don't grant a stay of execution of the said judgment. In the event the application is dismissed. Costs will be in the intended appeal.

Dated and Delivered at Nairobi this 21st day of February, 2020.

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR