



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KOOME, SICHALE & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 165 OF 2019**

**BETWEEN**

**ST. JOHN OF GOD HOSPITAL TIGANIA**

**(THROUGH THE ADMINISTRATOR) .....1ST APPLICANT**

**CATHOLIC DIOCESE OF MERU TRUSTEES REGISTERED...2ND APPLICANT**

**AND**

**LUCY KINYA .....RESPONDENT**

(An application for stay of execution of the decree/judgment pending hearing and determination of an intended appeal against the judgment of the High Court of Kenya at Meru (Mabeya, J.) dated 19th *September, 2019* in **H.C.C.C. No. 29 of 2017**)

\*\*\*\*\*

**RULING OF THE COURT**

In the case before Mabeya, J. sitting at the High Court of Kenya at Meru, the respondent, **Lucy Kinya**, alleged that being heavily pregnant she visited **St. John of God Hospital- Tigania** (the 1st applicant) where she was admitted. A caesarian section was carried out and she delivered twins. She alleged that in the course of that operation she suffered injuries occasioned by the negligence of the applicants. It was confirmed in later medical examinations that she had become paralysed due to paraplegic injuries. Upon hearing, the judge found the applicants liable and awarded damages under various heads in a total sum of about Shs.25.6 million.

The applicants had filed a defence denying the claim but the only witness called for the applicants was **Dr. Raduma Jessy**, the doctor who had received the respondent when she reported at the hospital run by the applicants.

The applicants were not satisfied with the finding of the High Court and filed a Notice of Appeal. Attached to that notice is a draft Memorandum of Appeal where the applicants have listed 10 grounds which they intend to take on appeal.

In the Motion before us brought under **rule 5 (2) (b)** of the **rules of this Court** amongst other provisions of law it is prayed in the main that we stay execution of the judgment and decree of the High Court issued on 19th of September, 2019 pending hearing and determination of the intended appeal. In grounds in support of the application and in a supporting affidavit of **James Mwiti Miriti**, the administrator of the first applicant who was duly authorised by the second applicant, it is said that the intended appeal would be rendered nugatory if the orders sought are not granted and that there is an arguable appeal on both liability and quantum as shown in the draft memorandum of appeal. It is also said that the trial court erred in misapplying the law on the issue of liability and quantum and gave two very high awards which had not been pleaded or proved.

**Mr. D.M. Rimita** assisted by **Mr. D.M Kibicho** learned counsel for the applicants in submissions before us argued that a stay of execution granted by the High Court had since elapsed and attachment of property of the applicants was imminent. It was further submitted that liability had not been proved and that the applicants' defence had not been properly considered. According to counsel, general damages awarded were too high; that assessment of salary of a caretaker had not been properly proved and that special damages had not been strictly proved. They asked us to order a stay of execution pending appeal.

**Mr. Muia Mwanzia** learned counsel for the respondent in opposing the application relied on a replying affidavit sworn by the respondent. According to counsel, the respondent had a money decree and was entitled to the fruits of judgment. Counsel further submitted that the respondent is nursing injuries suffered at the hands of the applicants and we should in the premises strike a balance regarding the rights of the

opposing parties. He cited the case of **Nairobi Womens Hospital v Purity Kemunto [2018] eKLR** to support a proposition that we should give a conditional stay. He also cited the case of **Housing Finance Company of Kenya v Sharrock Kher Mohammed Ali Hirji and Another [2015] eKLR** in support of the same proposition. He proposed that we order half of the judgment sum to be paid directly to the respondent.

In a brief reply Mr. Rimita submitted that the respondent had not shown ability to refund the judgment sum if the intended appeal succeeded.

It is trite that in an application like this one an applicant must firstly show that the appeal or intended appeal is arguable. This is to say that such an appeal is not frivolous. Secondly, the applicant must show that the appeal or intended appeal, as the case may be, will be rendered nugatory if stay was not ordered. Those principles were well summarised 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.**

**iii. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.**

**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.**

**v. An applicant must satisfy the Court on both of the twin principles.**

**vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.**

**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.**

**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.”**

We have perused the draft Memorandum of Appeal. It is stated at ground 6 that the judge erred in law and fact by awarding general damages that are inordinately high and manifestly excessive so as to amount to an erroneous estimate in the circumstances. It is taken as a ground in ground 9 that the judge erred in law and fact in awarding a sum of Shs.3,240,000 as loss of earnings when there was no evidence to support the earning and by further using too high a multiplier and multiplicand. Upon our own consideration these are not idle points, they are arguable points. As shown in the case of **Kangethe Kinyanjui v Tony Ketter & Others** (supra) a single arguable point will suffice as an applicant is not required to present a multiplicity of arguable points. It is also correct to state that an arguable point is not one which must succeed. We are therefore persuaded that the intended appeal is arguable.

On the nugatory aspect counsel for the applicants submit that the respondent has not shown that she has ability to refund the judgment sum if the intended appeal succeeded. We did not hear Mr. Mwanzia respond to this submission. Considering the circumstances of the case and all the facts on record we think that this is a case where we should grant a conditional stay. The motion is therefore allowed on the following conditions:

**a. That the applicants shall release a sum of Shs.12,844,500 being half the judgment sum (part of which will be released to the respondent) deposited in an interest earning account in the names of counsel for the applicants and the respondent.**

**b. Out of the sum in (a) above a sum of Shs.5,000,000 will be released to the respondent.**

**c. The applicants to make the said payments within thirty (30) days of today in default the Motion will stand dismissed.**

**d. The applicants to file appeal within thirty (30) days of today in default the conditional stay will lapse.**

**e. Costs of the Motion will be in the intended appeal.**

**Dated and delivered at Nairobi this 21st Day of February, 2020.**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**