



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WARSAME, GATEMBU & J. MOHAMMED J.J.A.)**

**CIVIL APPLICATION NO. 361 OF 2019 (UR316)**

**BETWEEN**

**MAINKAM LIMITED.....1ST APPLICANT**

**JAMES MAINA KAMAU.....2ND APPLICANT**

**VERSUS**

**MULTICHOICE KENYA LIMITED.....RESPONDENT**

*(An application for stay of execution pending the hearing of the appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Tuiyot, J.) dated 24th September, 2019*

*in*

*Civil Case No. 492 of 2012)*

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**RULING OF THE COURT**

1. On 24th September, 2019 **Tuiyot, J.** entered judgment in favour of the Plaintiff **Multichoice Kenya Limited** (*respondent herein*) against the defendants (*applicants herein*) for Kshs.153,457,809.00/= with interest thereon at court rates from the date of filing until payment in full. The applicants were aggrieved by the judgment and filed a notice of appeal against the whole decision on 27th September, 2019.
2. The applicants have now applied for stay of execution of the judgment pending the hearing and determination of its intended appeal against the judgment vide a notice of motion dated 19th November, 2019.
3. The applicants have also relied on a supporting affidavit sworn by **James Maina Kamau**, the 2nd applicant herein. It is averred that pursuant to the impugned decree the respondent will begin the process of execution which will render the intended appeal nugatory as the decretal sum is a colossal amount. It is the applicants' contention that they have an arguable appeal which raises substantial points of law and facts and stand to suffer irredeemable loss and damage if the orders sought are not granted.
4. The motion came up for hearing before us where the applicants were represented by learned counsel **Mr. Ondieki** while **Mr. Impano** appeared for the respondent.
5. Mr. Ondieki submitted that the intended appeal raises arguable issues. According to him the applicants were unable to raise witnesses; therefore their right to a fair trial was compromised.
6. Counsel contended that should the applicants be allowed to deposit the decretal sum, getting a refund would be difficult and urged that it would be in the interest of justice to grant the stay.
7. In opposing the application, the respondent filed a replying affidavit sworn by **Julius Juma**, the Finance Director of the respondent company. The respondent asserts that the 1st applicant is no longer an existing entity with duly authorized directors to pass a resolution authorizing the institution of court proceedings on its behalf.
8. It is also argued that at the High Court, the learned Judge found that the applicants committed fraudulent acts against the respondent. Thus

the respondent maintained that the application was frivolous and only intended to delay justice and prevent the respondent from enjoying the fruits of its judgment that the respondent has waited for over 8 years.

9. The respondent states that the applicants have not shown this Court how the appeal, if successful will be rendered nugatory by the failure to issue stay. The respondent further avers that the applicants have failed to plead or demonstrate that they would suffer such substantial loss that could not be compensated should stay not be granted in this matter.

10. The respondent argues that it is a well-known international company and should the intended appeal succeed it would have no difficulty in repaying the decretal sum to the applicants. In their view, the applicants have failed to satisfy the requirements for grant of the orders sought and urge that the application be dismissed.

11. We have carefully considered the application and submissions by learned counsel. In order to grant the applicants the order of stay of execution that is sought, the applicants are obliged to satisfy us that their intended appeal is arguable and that if we do not grant stay of execution and the appeal succeeds, it will be rendered nugatory. (See *Jaribu Holdings Ltd vs. Kenya Commercial Bank Ltd CA No. 314 of 2007*).

12. These principles were restated and amplified by this Court in the decision of *Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR* 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 [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.***

***(v) The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.***

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

***(vii) In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.***

***(viii) An applicant must satisfy the Court on both the twin principles.***

***(ix) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.***

***(x) 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.***

***(xi) 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.***

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

***(xiii) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”***

13. In the draft memorandum of appeal the applicants raise 18 grounds of appeal which in our view are simply repetitive and can be summarized to the effect that the learned Judge misdirected himself in law and in fact by failing to consider and appreciate the applicant’s evidence and submissions in totality. The applicant further faults the learned Judge for being biased in his decision.

14. As stated above, an arguable appeal is not necessarily one that has to succeed and one need not have several arguable points as one arguable point would suffice for purposes of satisfying the 1st limb of arguability. In our view the intended appeal is arguable, especially whether the trial Court failed to appreciate the applicant’s evidence.

15. As regards whether the appeal, if successful, will be rendered nugatory, it is plainly obvious to us that the respondent has been deprived of the use of their Kshs.153,457,809/= for a considerable period through the acts of the applicants, as the learned Judge found, thus exposing their business to incur losses. This is a significant amount of money which could have been put to good use to ensure the respondent continues to run effectively.

16. We note that the applicants were silent on the respondent’s inability to repay the decretal sum. In his submissions, the applicants’ counsel

only contended that by allowing the applicants to deposit the decretal amount, it would be difficult to get a refund. No reason was advanced as to why the applicants had come to this conclusion.

17. We think that by virtue of being a well-known international company of good repute, it is highly likely that the respondent would be in a position to refund the decretal sum should the appeal succeed, as it has argued. It would therefore be in the interest of justice that the respondent is allowed to enjoy the fruits of its judgment.

18. In the foregoing, we are not persuaded that the applicants have satisfied the 2nd limb under **Rule 5(2) (b)** of the **Court of Appeal Rules** and are therefore not deserving of an order of stay of execution pending the hearing and determination of their intended appeal. The application is unmerited and is hereby dismissed with costs.

*Dated and delivered at Nairobi this 8th day of May, 2020.*

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**Signed**

**DEPUTY REGISTRAR**