



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU, SICHALE, JJ. A)

CIVIL APPEAL (APPLICATION) NO. 322 OF 2019

BETWEEN

SUNTRA INVESTMENT BANK LIMITED.....APPLICANT

AND

NICHOLAS WILLIAM BENTLEY – BUCKLE &

DEBORAH MARY BENTLEY – BUCKLE (Suing

in their capacity as executors of the estate of

ANTHONY WILLIAM BENTLEY – BUCKLE (deceased)....1ST RESPONDENT

CUSTODY & REGISTRAR SERVICES LIMITED.....2ND RESPONDENT

(An application for stay of execution of the decision of the High Court of Kenya at Nairobi (Mary Kasango, J.) delivered on 30th May, 2019 pending the hearing and determination of the Appeal filed herein

in

HCCC NO. 480 OF 2014

RULING OF THE COURT

1. The High Court (Kasango, J) rendered a judgment on 30th May, 2019 in favour of the 1st respondent (herein) who were the plaintiffs in the High Court suit against Suntra Investment Bank (the appellant) and another giving orders as follows:-

(a) The 1st and 2nd Defendants shall equally restore to the Plaintiffs the 99,100 East African Breweries Shares of Anthony William Bently- Buckle (deceased) within 90 days from the date of the judgement.

(b) The 1st and 2nd Defendants shall each pay the Plaintiffs general damages of Ksh.10 (ten) million with interest at Court rate from the date of filing suit until payment in full.

(c) The 1st and 2nd Defendants shall equally pay the Plaintiffs with each defendant paying half of such costs of this suit taxed costs.

2. Being aggrieved by these orders, the appellant filed the Notice of Appeal dated 10th June, 2019 challenging the said judgment. That Notice of Appeal is the basis of the Notice of Motion dated 4th September, 2019 filed pursuant to **Rule 5(2) b** of the Rules of this Court, under certificate of urgency, which is now the subject of this Ruling.

3. In the said Notice of Motion, the applicant seeks in the main an order as follows:-

“That a stay be issued against execution and/or implementation of the orders of the High Court issued on 30th May 2019 in H.C.C.C. No. 480/2014, Nicholas William Bentley-Buckle & Another vs Custody & Registrar Services Limited & Another pending the hearing and determination of the Appeal filed herein.

4. The application was heard on 11th November, 2019 where the applicant was represented by learned counsel Mr. Ngatia while the respondents were represented by learned counsel Mr. Oyomba and Mr. Hiram Nyaburi. After hearing the parties, the Court reserved the Ruling for 21st February, 2020 and in the meantime ordered that there be no execution of the impugned judgment pending delivery of the said Ruling.

5. It would appear however that as the Ruling was pending, the parties herein engaged the High Court in respect of an application for review of the impugned judgment and the said judgment was subsequently amended, in effect replacing the judgment appealed from which is subject of this Ruling.

6. Following that development, the firm of Oyomba Mosota & Wamwea, on record for the 1st respondent wrote to the Deputy Registrar of this Court on 13th January, 2020 forwarding the amended judgment and also intimating that since the judgment appealed from had already been replaced, this application had been rendered untenable and the same ought to be withdrawn. The applicant resisted the said suggestion and in its response to the said letter urged us to proceed to prepare and deliver this Ruling as earlier intended.

7. We hold the view that the amended judgment is just an attachment to the letter dated 13th January, 2020 and does not form part of the application which is the subject of this Ruling. We shall therefore proceed and deliver ourselves on the application as if the amended judgment does not exist. In any event the Notice of Motion in question is still live and the applicant cannot be forced or coerced in any way to withdraw it.

8. We start by explaining the delay in delivery of this Ruling on the scheduled date. It is common knowledge that the Court proceeded on recess between 21st December, 2019 and 13th January, 2020. Before the ruling was prepared, one member of the bench proceeded on leave and resumed duty on 17th February, 2020 when the entire bench was sitting in Nakuru for the week. In the meantime, having seen the letter dated 13th January, 2020, the Presiding Judge gave directions that the matter be placed for mention before any bench for the applicant to seek leave to withdraw the application in view of the developments in the matter. This did not however happen as the applicant indicated it had no intention of withdrawing the application and asked the Court to proceed and deliver the Ruling. These developments occasioned the delay in preparation and delivery of the ruling which is highly regretted.

9. That said, we shall proceed to determine the application on its merits. According to the applicant, it has an arguable appeal particularly based on the following reasons: that the learned Judge awarded Ksh.four million (4,000,000/-) for negligence against the applicant and 2nd respondent (**Custody Registrar Services Limited**) when the same had not been pleaded. This according to Mr. Ngatia is an arguable point. Secondly, that the court awarded interest on the said amount to be calculated from the date of filing suit instead of from the date of judgment, and that too was an arguable point. Mr. Ngatia concluded by urging that the order for restitution of the shares would also be difficult to comply with as the shares have already been sold. He urged that the limb on arguability had been established.

10. On the nugatory aspect, counsel urged that the 1st respondents who are the executors of the Will of the Estate of the late Anthony William Bentley – Buckle, both reside in England and they have no assets in Kenya. If the amount awarded to them in the judgment is released and the appeal succeeds later, it would be difficult for the applicant to recover the money and the appeal would therefore be rendered nugatory. He urged us to allow the application.

11. On his part, Mr. Oyomba opposed the application. He relied on the replying affidavit sworn by Nicholas William Bentley – Buckle, one of the executors of the deceased's Will along with the written submissions filed on 7th November, 2019 and list of authorities. On arguability, he maintained that the appeal was not arguable. In the first instance, negligence had been specifically pleaded and proved and so it was not correct for the applicant to claim that damages for negligence had not been pleaded. He referred the Court to the body of the plaint where the particulars of negligence had been enumerated.

12. On the nugatory aspect Mr. Oyomba posited that the deceased's assets are still in the country, and that even though the respondents reside in England, any money paid to them can be paid back in the event the appeal succeeds. Placing reliance on *inter alia* the case of **Kenya Shell Limited vs Benjamin Karuga Kibiru (1986) KLR 410**, counsel submitted that this being a money decree, there would be no justification to stay it.

13. We have considered the application along with the rival affidavits, written submissions and the oral highlights by learned counsel. We have also considered the law, particularly as espoused in the authorities cited to us. It is settled that for an applicant to succeed in an application such as the one before us he/she must establish the twin principles of arguability and nugatory aspect. See **Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd., – Civil Appl. No. Nai. 93/02 (ur)**.

Has the applicant placed before us an arguable appeal? An arguable appeal, this Court has stated time and again is not necessarily an appeal that must succeed at the full hearing, but one that raises an issue or issues of law that are deserving of consideration by this Court. (See **KENYA RAILWAYS CORPORATION V. EDERMANN PROPERTIES LTD CA No. Nai. 176 of 2012**). In the same vein, to make out an arguable appeal, the applicant does not have to establish a multitude or multiplicity of arguable issues. It will suffice if he or she can establish even one bona fide issue deserving consideration by this Court. (See **KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION CA No. Nai. 72 of 2001**).

It is also incumbent on the applicant to establish both limbs and proving only one of them will not aid its case.

14. Has the appellant established arguability of its appeal? In this case there is an issue, which is by no means frivolous as to whether damages for negligence had been sought. We observe from the plaint that instances of the alleged negligence are particularised in paragraph 8 thereof. However in the prayers, there is no prayer for an award of general damages for negligence, yet they were awarded. We find that issue arguable and one calling for determination by the Court that will be seized of the appeal. We are also not persuaded that the question of whether interest can be awarded on general damages from the date of filing suit is an idle one. We are therefore satisfied that the applicant has established the first principle on arguability.

15. Does the intended appeal stand to be rendered nugatory if an order for stay of execution is not granted? The purpose of the inquiry into whether an intended appeal, if successful, will be rendered nugatory is, as stated by this Court in **AHMED MUSA ISMAEL V. KUMBA OLE NTAMORUA & 4 OTHERS (CA No. 256 of 2013)** as follows:-

“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

16. It is common ground that the 1st respondent resides outside the jurisdiction of this Court. If the

money is paid to them, it may be difficult or cumbersome to recover the same. From the foregoing, we are satisfied that the applicant has satisfied the twin principles as required by law and the Notice of Motion ought to be allowed. With this in mind, and considering the application in entirety, balancing the interests of both parties, the order that commends itself to us is one allowing the application and giving a conditional stay as parties wait for the hearing and determination of the appeal, which we note has been filed and served.

17. The Notice of Motion dated 4th September, 2019 is therefore allowed to the extent that the execution of the judgment dated 30th May, 2019 is hereby stayed on condition that the applicant deposits Ksh. 5 million in Court within 45 days from the date hereof pending hearing and determination of the appeal, failing which the order of stay will automatically lapse. We further order that costs of the application be in the appeal.

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

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR