



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 307 OF 2019

BETWEEN

BOARD OF GOVERNORS OF

OUR LADY OF MERCY GIRLS

SECONDARY SCHOOL.....APPLICANT

AND

CASTLE INVESTMENTS COMPANY LIMITED...RESPONDENT

(An application for stay of execution pending lodging, hearing and determination of an intended appeal from the Ruling of High Court at Nairobi (Githua, J) delivered on the 3rd July, 2019

In

Misc. Application No. 780 of 2017)

RULING OF THE COURT

This Notice of Motion dated 24th September 2019 is brought by **the applicant, Board of Governors of Our Lady of Mercy Girls Secondary School** pursuant to a ruling of the High Court (Githua, J) delivered on 3rd July 2019 and seeks orders of stay of execution of the orders of the High Court pending the hearing and determination of this motion, and the intended appeal. The motion was brought on grounds that **the respondent, Castle Investments Company Limited** had already taken steps to execute the orders; that the appeal was arguable, and that the applicant would suffer irreparable harm if the orders were executed.

The background to the application is, that in a contract entered into between the parties, the respondent was contracted to construct an office and a classroom block for the applicant. After the construction was completed, the respondent demanded payment of a sum of Kshs. 677,320 which amount the applicant refused to pay for the reason that the construction works were not fully completed. The dispute was referred to arbitration in terms of the agreement, and the arbitrator rendered an award on 24th August 2014. The award which determined that the applicant pay an amount of Kshs. 459,858.60 in full and final settlement of the sums due was thereafter adopted as an order of the court. The applicant was dissatisfied with the arbitrator's decision, and in a motion dated 1st February 2017, it sought to have the High Court set aside the award.

The respondent vigorously opposed the application, and on hearing the parties' submissions the learned judge declined to grant the orders sought and instead ordered the applicant to pay the sums awarded by the arbitrator together with interest. It is this order for which the applicant seeks a stay of execution in the motion filed herein. The application was supported by an affidavit sworn by **Ben Otunga**, the applicant's Board member which merely stated that it had taken steps to file the appeal and that the orders were merited.

In a replying affidavit sworn by **David Kamau Gitau**, a director of the respondent, it was averred that the allegation that the decree was obtained unprocedurally was unwarranted, as the applicant had not specified any process that had been violated; that the respondent had been unduly and unjustifiably denied the sums due to it, and the application was without basis, frivolous and an abuse of the court process.

In the submissions learned counsel, **Mr. N. Pala** for the applicant argued that the appeal was arguable for the reasons that the High Court

adopted a defective award which was rendered on 24th August 2014 and served on the applicant three years after the award was issued on 25th January 2018. Another ground was that the learned judge failed to appreciate that the sums were not due to the applicant because the firm that tendered for the works was different from the firm that submitted the invoice for payment of the works. On the nugatory aspect, it was asserted that the payment was disputed and therefore ought not to be paid.

Opposing the application **Ms. Wangui** learned counsel for the respondent submitted that the issues being raised were addressed in the award that was adopted by the High Court, and that the firms that executed the contract were the same, as were the directors; that therefore these were not arguable issues. Counsel urged that in the event we allow the motion, this Court should order the deposit of the adjudged sums in court.

We have considered the pleadings and the submissions of the parties. It is well established that, two principles that guide the court in a **rule 5 (2) (b)** application such as this are, firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Secondly, that unless he or she is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012**.

We would also add that in dealing with applications under **rule 5 (2) (b)**, the court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See **Ruben & Others vs Nderitu & Another (1989) KLR 459**.

The pleadings and submissions that we have sought to set out above have briefly outlined the particular facts of this case. The applicant's contention is that the award that was rendered on 24th August 2014 was defective as it was served on it on 25th January 2017, which was three years after it was rendered. The applicant's other argument is that, the learned judge failed to appreciate that payment was not due to the respondent as the entity that initially tendered for the works and the one seeking payment differed. In our view these are arguable issues.

With regard to whether the appeal would be rendered nugatory in the event it were to succeed, the applicant has not provided any reason or basis upon which we should grant the orders of stay of execution. We have not been told that execution is imminent, or that the respondent is a 'man of straw' and therefore incapable of refunding the sums paid to it. We have merely been told that the sums specified in the award are unwarranted. In so far as this application is concerned, the reasoning proffered is insufficient, and does not satisfy the requirements for grant of the orders sought. The applicant has not shown that in the event the orders are not granted the intended appeal would be rendered nugatory.

In sum, the second limb having failed, the Notice of Motion dated 24th September 2019 for stay of execution of the orders of the High Court is disallowed and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR