



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & OKWENGU, J.J.A.)

CIVIL APPLICATION NO. 40 OF 2020

BETWEEN

UNIVERSITY OF NAIROBI.....APPLICANT

AND

RICATTI BUSINESS OF EAST AFRICA.....RESPONDENT

(An Application for stay of execution of the entire judgment of the of the High Court of Kenya at Nairobi (F. Toiyott, J.) dated and delivered on 6th December, 2019

in

HCCC No. 73 of 2015)

RULING OF THE COURT

1. **University of Nairobi** (the applicant) has moved this Court by a notice of motion dated 13th February, 2020 under **Rule 5(2)b** of the Rules of this Court seeking in the main an order that:-

“This honourable Court, pending hearing and determination of the intended appeal, be pleased to stay execution of the entire judgment of the High Court (Commercial and Admiralty Division) at Nairobi arising from the judgment of the Honourable Justice F. Tuiyott issued and delivered on 6th December, 2019 in HCCC No. 73 of 2015; Ricatti Business College of East Africa v. University of Nairobi where the Honourable Judge entered judgment in favour of the respondent as against the applicant herein in the sum of Ksh. 7,492,550.00 plus costs and interest.”

2. According to the applicant, it has an arguable appeal which will be rendered nugatory if stay orders are not granted. The applicant however, offers to deposit the “Judgment sum” with the court as security pending the hearing and determination of the appeal. In a supporting affidavit sworn by Collins F. Omondi, the acting Chief Legal Officer of the applicant, the judgment appealed against contains “numerous incidences of misinterpretation of the law of contract, the principles of waiver, causation and consequential damages which issues form substantive grounds of appeal”.

3. The applicant and Ricatti Business College of East Africa (the respondent) entered into a collaboration contract whereby the applicant accredited the respondent to offer certain diploma courses in collaboration with the applicant. According to the respondent, the applicant on 36th February, 2009 arbitrarily terminated the contract and this was the genesis of the suit filed before the High Court where the respondent claimed several reliefs including damages resulting from the purported breach of contract.

4. Having heard the parties, the High Court entered judgment in favour of the respondent and awarded it Ksh. 7,492,550.00 as damages plus costs and interests at court rates from the date of filing until payment in full.

5. It is that judgment that the applicant has appealed against and in the meantime filed this application to stay payment of the amount in question. The appellant urges that it has an arguable appeal which raises serious points of law, which will be rendered nugatory if stay is not granted.

6. We observe that such an application is everyday fare in this Court and the principles on which the Court acts if invited to exercise that

jurisdiction, is old hat. This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. In dealing with **Rule 5(2) (b)** of the Rules, the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court. See **Ruben & 9 Others v Nderitu & Another [1989] KLR 459**.

7. Has the applicant established these twin principles? On the aspect of arguability, we have perused the memorandum of appeal and we appreciate that the same raised several poignant points of law that deserve attention and determination by this Court. These include the mandate of the Commission for Higher Education as set out in the Universities Act Chapter 210 (repealed) and the Commission's role in approval of accreditation process to any registered university in Kenya. There is also the question whether the notice given in the letter of termination was sufficient or not. We remind ourselves that on whether the appeal is arguable, the applicant need not establish a multiplicity of grounds and it is sufficient if a single *bona fide* arguable ground of appeal is raised. See **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai 345 of 2004.

8. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See **Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others**, Civil Application No. 124 of 2008. From the material before us, we are satisfied that the applicant has established the limb on arguability.

9. On the 2nd limb of nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether 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. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut that allegation by evidence. See **International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403**.

10. In this case, the applicant does not claim that the respondent is impecunious, rather that if the decretal amount is paid out to the respondent, it will be difficult to have it refunded in the event the appeal succeeds. We note that as a sign of good faith, the respondent has agreed to deposit the amount in question as security pending hearing and determination of the appeal. The application was not contested and we presume that the offer to deposit the money in Court pending hearing and determination of the appeal settles well with the respondent. We agree that it will be onerous to start the process of recovering the money in the event the appeal succeeds. This would involve expending more public resources. We hold the view that if the money is deposited in Court as offered by the applicant, then there will be no prejudice suffered by the respondent. The money will be released to the relevant party after the determination of the appeal.

11. For the foregoing reasons, we are satisfied that the applicant has established both limbs to deserve orders as prayed. Accordingly, we allow the notice of motion dated 13th February, 2020 with costs in the appeal. We further order that the applicant deposits the Ksh. 7,492,550.00 in Court pending the hearing and determination of the appeal.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR