



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & SICHALE, J.J.A)

CIVIL APPLICATION NO. 212 OF 2020

BETWEEN

CAPTAIN MOTORCYCLES MANUFACTURING CO. LTD.....APPLICANT

AND

JANE MUTHONI MBERERE.....1ST RESPONDENT

DAVID OYETU KAMAU.....2ND RESPONDENT

(An application for stay of execution of the Ruling of the High Court at Nairobi (Njuguna, J.) dated 30th July, 2020

in

HC Misc. Appl No. 22 of 2020)

RULING OF THE COURT

Before us is a notice of motion application dated 3rd August, 2020 in which the applicant prays for an order for stay of execution of the decree in Thika Chief Magistrates Court Civil Case No. 358 of 2016 “*CMCC 358 of 2016*”, and stay of proceedings in High Court Civil Appeal No. E035 of 2020 “*HCCA No. E035 of 2020*”, pending the hearing and determination of the intended appeal.

The application is brought under Rule 41 of the Court of Appeal Rules and Section 3, 3A & 3B of the Appellate Jurisdiction Act. It is premised on the grounds that; the applicant was aggrieved by the impugned ruling and intends to appeal; the 1st respondent had already proclaimed the applicant’s property and it is in imminent danger of being sold hence the applicant will suffer substantial loss; the intended appeal has high chances of success going by the draft memorandum of appeal annexed in the affidavit in support of the application; the application had been made timeously without undue delay; the respondent will suffer no prejudice should the orders sought be granted but the applicant will be highly prejudiced if stay is not granted and finally, that it will be in the interest of justice that the application be allowed.

The application was further supported by the affidavit of **Peter Wanjohi Gichuki**, the applicant’s Director in which he deposed that on 21st December, 2019 the 1st respondent through Mutrix auctioneers obtained warrants of attachment and proclaimed the applicant’s 40 motorcycles and other office properties in execution of the decree issued in CMCC 358 of 2016. This prompted the applicant to file the application before the High Court seeking leave to file an appeal out of time and stay of execution. The application for leave was granted but the prayer for stay of execution of the decree was dismissed hence the applicant is apprehensive that the 1st respondent will proceed at any time to execute the decree which will in turn render the intended appeal nugatory.

In a replying affidavit sworn by Agnes M. Mutunga the advocate acting for the respondent, she deposed that the application was frivolous, incompetent, bad in law, incurably defective, an abuse of the court process, an afterthought and brought after inordinate delay. That judgment in the primary suit was delivered on 3rd October, 2019 which is over 10 months before the present application hence the application is an afterthought meant to delay execution of the decree. That the applicant has not established that it will suffer any loss should stay not be granted as the High Court rightly held or that the appeal will be rendered nugatory. That the applicant has not shown that the respondent will not be able to refund the decretal sum in the event the intended appeal is successful.

There was no response from the 2nd respondent. The application was dispensed by way of written submissions. The applicant reiterated the grounds in the supporting affidavit and urged this Court to exercise its discretion and allow the application. He placed reliance on the case of

Butt v Rent Restriction Tribunal (1982) KLR 417 for this submission. The 1st respondent on the other hand wholly relied on the replying affidavit and emphasized that the parties are bound by their pleadings. That the applicant alleges to have filed an appeal before the High Court yet he had not done so.

Having considered the application, the grounds and affidavit in support thereof, replying affidavit by the 1st respondent, submissions by counsel which we must note were not of much help, and the law, the issue for determination is whether the applicant has satisfied the laid down principles for grant of an order of stay of execution of a decree pending appeal.

The jurisdiction of this Court under Rule 5(2) (b) was not invoked. However, the applicant invoked this Court's discretion any prayers under Rule 41 of this Court's rules which provides *inter alia*:

“The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court.” Emphasis ours.

Be that as it may, we shall treat the application as if it was brought under rule 5(2)(b) of this Court's rules Since from the body of the application, it is clear as to what the applicant seeks The principles that guide the grant or refusal of stay of execution of the decree or order under Rule 5(2)(b) were laid out in the case of **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**, where this Court stated *inter alia*:

“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court.” *The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”*

Thus the applicant to be successful, it is trite that he must show that he has an arguable appeal hence the appeal is not frivolous and upon satisfying that principle, he also have the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. In **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported) this Court held thus:

“The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case -----” Emphasis ours.

In determining whether the appeal is arguable or not, it is common ground that by arguable it does not mean the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. In **Dennis Mogambi Mang'are v Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** this Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

On whether the applicant has established an arguable appeal, we note that the applicant is yet to file the appeal. However, it has annexed a draft memorandum of appeal in which he has raised nine (9) grounds of appeal among them that the learned Judge erred in law and fact in failing to consider that its property had been proclaimed and was due for sale.

We note however that the applicant seeks to stay a negative order. The order of the High Court merely dismissed the applicant's prayer for stay of execution of the decree. This order is not capable of execution hence there can be no stay of execution of such an order. The refusal simply meant that the applicant stays in the situation it was in before coming to court until the intended appeal is lodged, heard and determined. (See: **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR**). The other prayer is for stay of proceedings in CM CC No. 358 of 2016. A short answer to that request is that we have no jurisdiction to do so.

On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, we note that factors which can render an appeal nugatory should be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides. It is common ground that the order the applicant seeks to stay is a negative order. There is no immediate risk of execution as the said order is incapable of execution. However, the applicant has shown the hardship it is likely to suffer should the orders sought not be granted as its property has been proclaimed and at risk of being auctioned. That these were motorcycles were already paid for by their clients hence likely to suffer substantial loss in paying off the said clients. However, the applicant has not demonstrated that it will be near impossible for it to be compensated in damages should the intended appeal be successful as correctly disposed to the respondent. In **Mukuma v Abuoga [1988] KLR 645**, this Court held *inter alia*:

“The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”

From the circumstances of the application before us, the applicant has failed to demonstrate the existence of both limbs as required by Rule 5 (2) (b) of this Court's Rules and as reiterated in **Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31** and **Reliance**

Bank Ltd V. Norlake Investments Ltd [2012] 1 EA 227. The upshot is that we decline to grant stay of execution of the decree and stay of proceedings pending the hearing and determination of the intended appeal. The application is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. OUKO, (P)

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JUDG OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR