



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. 35 OF 2020

BETWEEN

KENYA RED CROSS SOCIETY.....APPLICANT

AND

MBONDO KATHEKE MWANIA.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal from the Ruling of the High Court of Kenya at Machakos (Odunga, J.) delivered on 3rd February, 2020 in Machakos High Court Misc. Application No. 393 of 2018 Formerly Kitui Misc. Application No. 89 of 2018)

RULING OF THE COURT

1. In its application dated 12th February 2020 presented under Section 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Court of Appeal Rules, the applicant seeks an order that: pending the hearing and determination of its intended appeal against a ruling of the High Court at Machakos (*G.V. Odunga, J.*) delivered on 3rd February 2020, there be a stay of execution of the judgment of the Magistrates' Court at Kitui delivered on 15th August 2018 in CMCC No. 61 of 2017 in which that court awarded the respondent general and special damages of Kshs.3,500,000.00 as compensation for personal injuries sustained in a road traffic accident.

2. The background, in brief, is that the applicant intended to appeal to the High Court against the judgment of the Magistrates' Court given on 15th August 2018, but it did not do so within the time required. It then filed an application before the High Court on 6th November 2018 seeking an order of stay of execution of the judgment and leave to file an appeal out of time. The High Court allowed that application in a ruling delivered on 23rd September 2019 and ordered the applicant to file a memorandum of appeal within 10 days "and in default the application shall stand dismissed."

As a condition for granting an order of stay of execution, the court required the applicant, in the same ruling, to deposit the decretal amount in a joint bank account in the names of the advocates. The applicant did not comply with those orders.

3. On 22nd October 2019, the applicant presented another application to the High Court seeking extension of time within which to comply with the orders given on 23rd September 2019. That application was declined in a ruling given on 19th November 2019 on the grounds that the applicant could not rely on an awkward situation created by itself to seek favourable exercise of discretion by the court.

4. Undeterred, the applicant returned to the High Court with an application dated 6th December 2019 seeking review of the ruling given on 19th November 2019. In the same application, the applicant also sought orders of reinstatement and extension of the orders given on 23rd September 2019. That application resulted in the ruling of the High Court delivered on 3rd February 2020 which is the subject of the intended appeal in terms of a notice of appeal dated 5th February 2020 and on which the application now before us is hinged.

5. The present application is supported by an affidavit sworn on 12th February 2020 by Edwine Okuta, Group Head, Legal Department of the applicant, in which the procedural background culminating in the ruling of 3rd February 2020 is set out. In a bid to demonstrate that the intended appeal is arguable, Okuta deposes that in dismissing the applicant's application for review, the learned Judge failed to exercise his judicial discretion correctly; that the Judge failed to consider that the decretal amount had been deposited in court and there was a draft memorandum of appeal setting out the applicant's grievances with the judgment of the Magistrates' court. He concludes that affidavit with an averment that the execution for the judgment amount is imminent and that the amount is substantial and that the applicant stands to suffer

irreparable loss unless a stay of execution is granted.

6. In his replying affidavit sworn on 10th March 2020, the respondent has also set out the procedural history and made reference to numerous applications made by the applicant before the High Court, culminating with the ruling of 3rd February 2020. He deposes that in light of the history of the matter, the present application is an abuse of the court process. He concludes that:

“...this current application is yet another attempt to punish me through concerted efforts not to pay me but it is a hopeless application since this claim has since been settled and I have been compensated.”

7. We have considered the application, the affidavits and the submissions. To succeed in the present application, the applicant is required to satisfy this Court that the intended appeal is arguable and that unless the orders sought are granted, the appeal if successful, will be rendered nugatory. As stated by the Court in Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR):

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

8. In its intended appeal against the ruling of 3rd February 2020, the applicant will need to demonstrate, during the hearing of the appeal, that the Judge did not properly exercise his judicial discretion by declining to grant the request for review. Given the background set out above, and without prejudging the intended appeal, we doubt that the intended appeal is arguable.

9. But even if we were to give the applicant the benefit of doubt, bearing in mind that an arguable appeal is not one that must necessarily succeed, we are not persuaded that the applicant has demonstrated that the appeal will be rendered nugatory if we decline the application, having regard in particular to the uncontested statement by respondent that the claim has since been settled and compensation paid. To grant the orders sought in those circumstances would be to act in vain as there is in effect nothing to stay.

10. Consequently, this application is hereby dismissed with costs to the respondent. Orders accordingly.

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

W. OUKO, (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR