



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, ASIKE-MAKHANDIA & GATEMBU, JJA)

CIVIL APPLICATION NO. 153 OF 2019

BETWEEN

LAKE VICTORIA SOUTH WATER SERVICE BOARD.....APPLICANT

AND

SELINE AKOTH OYIENGO.....RESPONDENT

(An application for stay of execution of the Ruling of the Environment &

Land Court at Kisumu (S.M. Kibunja, J.) dated 10th July, 2019 in ELC Case No. 51 of 2013)

RULING OF THE COURT

Before us is a notice of motion application dated 29th November, 2019 in which the applicant prays for an order for stay of execution of the ruling of the Environment & Land Court “ELC” (S.M. Kibunja, J.) delivered on 10th July, 2019.

The application is brought under Rule 5(2) (b) of the Court of Appeal Rules and Section 3B of the Appellate Jurisdiction Act. It is premised on the grounds that; the applicant was dissatisfied with the ruling of the trial court dismissing its application to set aside the interlocutory judgment entered against it on 26th October, 2015 and now intends to appeal against the said ruling. That the respondent has shown interest in executing the impugned ruling. That the applicant has an arguable appeal with very good prospects of success and the same will be rendered nugatory if the respondent proceeds with the execution hence it is only fair that the execution is stopped.

The application was further supported by the affidavit of **Eng. Daniel Oronje**, the Ag. Chief Executive Officer/ Managing Director of the applicant in which he reiterated the grounds in the application save that should the respondent execute the decree, the applicant will suffer irreparable loss as the land in dispute has water reservoirs that supply water to families and homes within the larger part of Kisumu city, and execution will occasion a water shortage in the entire city. That the character of the land in dispute was altered with deep water reservoirs and huge underground water tanks hence the orders made were in vain as the land can no longer be habitable. That the respondent shall suffer no prejudice should the order sought be granted but on the contrary, the applicant stands to suffer prejudice not compensable by damages.

There was no response by the respondent to the application.

Having considered the application, the grounds and affidavit in support thereof and the law, we ask ourselves whether the applicant has satisfied the laid down principles for grant of stay of execution pending appeal, being whether the intended appeal is arguable and secondly, if the intended appeal shall be rendered nugatory should the application for stay be refused.

In considering the application, the court is minded to avoid going into the merits of the intended appeal as this will be the preserve of the bench that will hear and determine the main appeal.

It is trite that the jurisdiction of this Court under Rule 5(2) (b) is original, independent and discretionary. The discretion is to be exercised judiciously and with reason; not on the craze of impulse or pity. In the case of **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR**, 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.”

For the applicant to be successful, he must demonstrate that he has an arguable appeal hence the appeal is not frivolous and upon satisfying that principle, he has 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 understood 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 did not annex a draft memorandum of appeal or otherwise indicate the intended grounds of appeal and in the absence of the same, we cannot tell whether the intended appeal is arguable or frivolous. We note that the applicant filed an application to set aside a default judgment entered against it, which application was dismissed by the court. There was no positive order made against the applicant capable of execution, hence there can be no stay of execution of such an order. This is not an order capable of being stayed. The refusal simply meant that the applicant stays in the situation it was in before coming to court and therefore the issues of substantial loss that it is likely to suffer and or the appeal being rendered nugatory does not arise. In case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others** [2016] eKLR, this Court expounded on stay of execution of a negative order, stating thus:

“16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”

On whether the appeal will be rendered nugatory should the impugned ruling not be stayed, we note that factors which can render an appeal nugatory are 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 risk of execution as the said order is incapable of execution; so that the intended appeal will not be rendered nugatory if the order to stay is declined.

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 in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of **Stanley Kangethe Kinyanjui** (supra). The upshot is that we decline to grant a stay of execution pending the hearing and determination of the intended appeal. The application dated 29th November, 2019 is accordingly dismissed.

Costs of the application to abide the outcome of the intended appeal.

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

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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