IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, M'INOTI & SICHALE, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 245 OF 2020

BETWEEN

TWIGA CHEMICAL INDUSTRIES LIMITED ……..……..... APPLICANT

AND

GICHUKI KING'ARA & CO. ADVOCATES.……..……..…. RESPONDENT

*(An application for stay of execution of the Ruling of the Environment & Land Court at Murang'a (**E. Obaga, J.)** dated 11th June, 2020* in **ELC Misc. Appl. No. 164 of 2017)**

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RULING OF THE COURT

Before us is a notice of motion dated 26th June, 2020 in which Twiga Chemical Industries Limited "the applicant" prays for stay of execution of the ruling and order of the Environment & Land Court "ELC", **(E. Obaga, J.)** delivered on 11th June, 2020 pending the hearing and determination of an intended appeal.

The application is brought under Rules 1 (2) & 5(2) (b) of the Court of Appeal Rules and Sections 3A & 3B of the Appellate Jurisdiction Act. It is premised on the grounds that; the applicant was aggrieved by the impugned ruling by the ELC in which the decision of the taxing officer was set aside and the court directed that the Advocates' Bill of Costs dated 24th August, 2017 be re-taxed on the issues of instruction fee and getting up fees before another taxing officer on 13th July, 2020. That the ELC directed that in computation of the instruction fees, the taxing officer ought to be guided by the amount stated in an email dated 22nd April, 2016 thought it did not form part of the pleadings in court. That the learned Judge erred in failing to appreciate sufficiently or at all that the said email was not tendered in evidence and its authorship was not established. That after finding that the value of the suit property could not be ascertained from the pleadings, the learned Judge erred in directing that instruction fees be computed based on the amount indicated in the email and failed to appreciate that the respondent would gain undue financial advantage to the detriment of the applicant.

It was the applicant's further contention that the applicant has an arguable appeal with good prospects of success going by the memorandum of appeal filed on 22nd June, 2020. That unless the orders sought are granted, the appeal will be rendered nugatory as the taxation will proceed in accordance with the impugned ruling. That the application has been brought without undue delay and no prejudice will be caused to the respondent should the orders be granted.

The application was further supported by the affidavit of Hezekiah Mwangi Macharia, the director of the applicant in which he deposed to the fact that they instructed the respondent sometime in 2006 to act for them in HCCC No. 684 of 2006. However, their relationship deteriorated and the respondent subsequently ceased to act for them before the hearing and determination of the said suit. That on 1st September, 2017 the respondent filed an Advocate-Client Bill of Costs, seeking Kshs. 77,163,514/- in legal fees with Kshs. 28,977,750/- as instruction fees based on a speculative figure of Kshs. 1.5 billion as being the value of the subject matter in the suit based on an email. That the alleged email did form part of the pleadings in court and the taxing officer in exercising his discretion rejected the said email on those grounds and proceeded to award the respondent Kshs. 3,000,000/- as instruction fees. Eventually, the advocate/client bill of costs was taxed at Kshs. 5,319,992.50/-. That both parties were aggrieved by the taxation and sought to have the same reviewed with the respondent's application being allowed and the applicant's application being dismissed. That re-taxation as ordered by the High Court is scheduled for 13th July, 2020 and if stay is not granted the applicant is likely to suffer substantial loss and irreparable damage. That the application has been brought without undue delay.

The application was opposed. In a replying affidavit sworn by Peter Gichuki King'ara "the respondent", he deposed that both parties were dissatisfied with the decision of the taxing officer and sought a review. That the applicant has failed to disclose material facts to the effect

that they were given over one year to file written submission and address the issues raised in the memorandum of appeal to no avail and that the learned Judge and taxing officer had access to the original trial file. That the email in dispute was drawn to the attention of the taxing officer as one of the supporting documents filed on 6th September, 2017. That the applicant did not object to any reference to the email before the trial court hence the same cannot be raised before this Court. That it is trite that in the absence of the value of the subject matter being determinable on the pleadings, judgment or settlement, the taxing officer can use the estimated value of the suit property and consider any document presented for such determination. That the suit property is approximately 507 hectares and the approximate value at time of filing suit was Kshs. 1.5 Billion. That the applicant sought re-taxation which order has since been granted and that the applicant can challenge the tax officer's decision if dissatisfied. That the applicant has no arguable appeal and the appeal would not be rendered nugatory hence the application is a calculated attempt to delay the re-taxation and deny the respondent it's hard earned fees. That the application does not meet the threshold for stay of execution.

The application was canvassed by way of written submissions. Those submissions merely reiterated, elaborated and expounded on the grounds in support of, and opposition to the application.

Having considered the application, the grounds in support thereof, rival affidavits, submissions by counsel and the law, we take cognizance of the fact that the jurisdiction of this Court under Rule 5(2) (b) is original, independent and discretionary. The discretion however has to be exercised judiciously and with reason, and not on impulse or pity. As it has been constantly ~~been~~ stated, Rule 5(2) (b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 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, therefore he must demonstrate that he has an arguable appeal or that the intended appeal is not frivolous. 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 of execution. (See: **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999 (ur**)).

Further, in determining whether the appeal is arguable or not, it is trite that "arguable" does not mean an appeal or intended appeal that must succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court. In **Dennis Mogambi Mong'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 have considered the applicant's memorandum of appeal dated 19th June, 2020. It is common ground that the email dated 22nd April, 2016 is in dispute. The question is whether or not the taxing officer should have taken into account the email in determining the instructions and getting up fees. The answer will have to be given at a full hearing of the intended appeal. We are convinced therefore that this and the other issues raised in the memorandum of appeal are in our considered view not frivolous.

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 to 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 impugned ruling directed re-taxation of the instruction and getting up fees in the bill of costs. The said re-taxation was scheduled before the taxing officer on 25th August, 2020. On 17th August 2020 we granted a temporary stay of execution pending the delivery of this ruling. The applicant is apprehensive that should the re-taxation proceed, the taxing officer will proceed and tax the bill based on the value of property indicated in the email as directed by the ELC. As already stated the contents of the email are in dispute. However, should the taxing officer proceed with re-taxation before the appeal is heard and determined on the question whether the email is admissible or not, the appeal or intended appeal if successful, may be rendered nugatory.

There is no doubt that there is an imminent risk of execution as re-taxation has already been set down for hearing and parties directed to file written submissions. The applicant is also apprehensive that it would be a financial burden for it to recover the amount paid should the appeal succeed. It is thus in the interest of justice that the status quo be maintained. In **Reliance Bank Ltd v Norlake Investments Ltd [2002] E.A. 227**, this Court while faced with almost similar facts

stated*:*

> ***"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined."***
>
> *(Emphasis ours).*

In the circumstances of the present application, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory should stay of execution not be granted.

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."***

The applicant has further demonstrated that there is no guarantee that they will be compensated in damages should the intended appeal be successful as their assets are likely to be attached and auctioned in a bid to recover over Kshs. 70 million, hence the loss will be irreparable.

Accordingly, the application dated 26th June, 2020 is allowed and we direct that there be stay of execution of the ruling and order of the Environment & Land Court **(E. Obaga, J.)** dated 11th June, 2020.

Costs of the application shall however abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 9th day of October, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR