



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & ASIKE-MAKHANDIA, J.J.A)

CIVIL APPEAL (APPLICATION) NO. E248 OF 2020

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD.....APPLICANT

AND

GEORGE JOSEPH KANG'ETHE1ST RESPONDENT

ELLA KARWITHA KANG'ETHE2ND RESPONDENT

(An application for stay of execution of the Judgment of the Environment & Land Court at Kajiado (C. Ochieng', J.) dated 27th July, 2020

in

ELC Cause No. 797 of 2017)

RULING OF THE COURT

Before us is a motion on notice dated 20th August, 2020 in which the applicant prays for stay of execution of the judgment of the Environment & Land court (**C. Ochieng, J.**) dated 27th July, 2020 pending the hearing and determination of this application and the intended appeal.

The application is brought under Rule 5(2) (b) of the Court of Appeal Rules, Orders 42 Rule 6(4), 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Appellate Jurisdiction Act. It is premised on the grounds that: the applicant has preferred an appeal against the impugned judgment which appeal is arguable; the respondents have already extracted a decree in readiness of execution; that it is willing to furnish security pending the hearing and determination of the appeal as maybe directed by the court; that if execution of the said judgment is not stayed, the appeal will be rendered nugatory; and that in the premises it is only fair and just that there be stay of execution of the impugned judgment.

The application was further supported by the affidavit of Emily Kirui, the Legal Officer of the applicant. She deposed that the intended appeal had high chances of success and if execution is not stayed it will be rendered nugatory. That the respondent will suffer no prejudice if the application is allowed as it was willing to furnish reasonable security by depositing half of the decretal amount in a joint interest earning account. She deposed further that the applicant is a state corporation, thus there is no risk of it not satisfying the decree in the event the appeal did not succeed. She further stated that if this Court does not intervene and issue a temporary stay of execution, the applicant's property risks being attached which will not only paralyze its operations which include provision of electricity to the people of Kenya. Thus it was only just and expedient that this Court intervenes and grants the orders prayed for.

The application was opposed vide a replying affidavit sworn by Kangethe, George Joseph on his behalf and on behalf of the 2nd respondent. He deposed that the application as well as the supporting affidavit were incurably defective; the supporting affidavit of Emily Kirui was incurably defective; the motion was misconceived, frivolous, scandalous, vexatious and an abuse of the court process; the application was a delaying tactic aimed at frustrating and preventing the respondent from enjoying the fruits of their judgment; the intended appeal has no chance of success because the respondents' suit against the applicant was undefended; the applicant has preferred an appeal against part of the judgment hence cannot justifiably argue that the said part appeal will be rendered nugatory if the judgment is not stayed; no loss shall be visited upon the applicant as the land upon which trespass is continuing is collectively sufficient security and its market value collectively exceeds the award of the High Court and the respondents are respectable and honourable citizens of merit and credibility; and are in a

position to refund the decretal sum in the unlikely event that the intended appeal succeeds..

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

As to whether the appeal would be rendered nugatory if stay is not granted, it was pointed out that the respondents were awarded a total of Kshs. 40,000,000/- in compensatory damages, and if stay is not granted the applicant will be forced to pay the aforementioned sum which forms the substratum of the appeal and will most likely render the appeal nugatory. Counsel cited the case of **Reliance Bank Limited v Norlake Investments Ltd [2002] 1 EA 227** for this proposition. The applicant was apprehensive that given the colossal decretal amount, should execution ensue, the applicant would suffer great loss that may greatly affect its services to the people of Kenya. That the respondents had not demonstrated their financial capabilities to refund the decretal sum should the same be paid to them pending the hearing and determination of the appeal while the applicant had demonstrated its willingness to furnish security being half of the decretal sum or as the court may order as a condition for stay.

On the other hand, the respondent submitted that the applicant had failed to meet the threshold for grant of the orders sought as required under Rule 5(2) (b). Counsel relied on the case of **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Jacob Kilach [2003] eKLR** for this proposition. It was submitted that the appeal was not arguable, was frivolous and an abuse of the court process as the applicant had the chance to defend the case before the trial court but failed to do so.

On whether the intended appeal would be rendered nugatory should stay not be granted, the respondents are of the view that the applicant has not demonstrated that it shall suffer any substantial loss in the event that stay was not granted; and that the respondents are not in a position to refund the decretal sum in the event that the appeal was successful.

Having considered the application, the grounds in support thereof, the various 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 is to be exercised judiciously and with reason; not on the craze of impulse or pity. 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 herein to succeed on this application it must demonstrate that it has an arguable appeal which is not frivolous. Upon satisfying that principle, it has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. (See: **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported)).

In determining whether the appeal is arguable or not, it is trite that by arguable it does not mean that the 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. (See **Dennis Mogambi Mang'are v Attorney General & 3 others, (supra)**).

On whether the applicant has established an arguable appeal, we have considered the applicant’s memorandum of appeal. Among the issues raised and emphasized by the applicant which we think merit consideration by this Court is the contention that the award of compensatory damages was in breach of the common law doctrine of *stare decisis*. On the other hand, the respondent argued that the award of damages was well deserved in view of the fact that the applicant was in occupation and trespassing on their property. This contestation can only be determined at a full hearing. Therefore, 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 judgment 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 respondents have extracted the decree. The decretal sum no doubt is colossal. The applicant is apprehensive that should the amount be paid, the respondents may not be in a position to refund the same should it succeed on the appeal. Further, it would result in financial burden on its services which are of a public nature. 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).

We are satisfied that if we refuse the application the applicant will suffer hardship out of proportion to that of the respondents.

We note that the applicant is willing nonetheless to furnish security pending the hearing and determination of the intended appeal.

Accordingly, the application dated 20th August, 2020 is allowed. There shall be stay of execution of the decree on condition that the applicant deposits half of the decretal sum in a joint interest earning account in the names of advocates for the parties within 30 days of this ruling. Costs shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 18th day of December, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR