



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL (APPLICATION) NO. E247 OF 2020

BETWEEN

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

AND

EUNICE NKIROTE RINGERA.....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. 869 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 and decree 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), and 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 and decree which appeal is competent and has appreciable chances of success; the respondent has already extracted a decree and she is at liberty to execute the same at any time; the applicant is willing to furnish security pending appeal as maybe directed by the court; that if execution of the said judgment and decree 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 and decree.

The application was further supported by the affidavit sworn by Emily Kirui, the Legal Officer of the applicant in which she reiterated and expounded on the grounds aforesaid. Suffice to emphasize that the respondent will suffer no prejudice if the application is allowed and that the applicant was willing to furnish reasonable security by depositing half of the decretal amount in a joint interest earning account, 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. That a letter forwarding the decree was sent to the applicant's chief executive officer on 14th August, 2020 stating that execution would ensue in seven (7) days should the applicant fail to settle the decretal sum. That should this Court not intervene and issue a temporary stay of execution, the applicant's property risks being attached which will not only paralyze its operations that include supply of electricity to the public.

The application was opposed vide a replying affidavit in which it was deposed that the application is incurably defective; the supporting affidavit of Emily Kirui is incurably defective as it does not disclose the true place of abode as required under Order 19 Rule 4 of the Civil Procedure Rules; the motion is misconceived, frivolous, scandalous, vexatious and an abuse of the court process; and is calculated to delay and prevent the respondent from enjoying the fruits of her judgment; the intended appeal had no merit or chance of success because the respondent's suit against the applicant was undefended; the applicant had 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.

The application was canvassed by way of written submissions. The applicant maintained that it had presented an arguable appeal as could be gathered from the memorandum of appeal.

As to whether the appeal would be rendered nugatory if stay is not granted, it was pointed out that the respondent was awarded a total of

Kshs. 14,000,000/- 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 is apprehensive that given the large sum involved if execution ensued, the applicant would suffer great losses which may even paralyze its operations. That the respondent had not demonstrated her financial capability to refund the decretal sum should the same be paid to her pending the hearing 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.

As for the respondent it was 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 suit before the trial court but failed to do so.

On whether the intended appeal would be rendered nugatory should stay not be granted, the respondent was of the view that the applicant had not demonstrated that it shall suffer any substantial loss in the event that stay was not granted. The respondent was 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 this application to succeed the applicant, must demonstrate that it has an arguable appeal which is not frivolous. Upon satisfying that condition, 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 & Another 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 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 of the award of compensatory and general damages which it claimed breached the common law principle 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 her 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 and decree 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 decretal sum is in excess of Kshs. 14,000,000/- which is no doubt a colossal sum of money. The applicant is apprehensive that should the amount be paid, the respondent may not be in a position to refund the same should it succeed in the appeal. Further if the amount is paid it may negatively impact on its services and operations which are of public nature. It may even paralyze its activities. 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 case, we are persuaded that the applicant has demonstrated existence of an arguable appeal which will be rendered nugatory should stay not be granted.

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

Accordingly, the application is allowed on condition that the applicant shall deposit half of the decretal sum in a joint interest earning account in the names of advocates for the parties within the next 30 days from the date of this ruling. Costs shall abide the outcome of the intended appeal.

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

R. 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