



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KARANJA & SICHALE, JJ.A]

CIVIL APPLICATION NO. 121 OF 2020

BETWEEN

OSEKO & OUMA ADVOCATES LLP.....APPLICANT

AND

SAMUEL GACHIE KAMITI.....RESPONDENT

(In the matter of an application for stay of execution pending the hearing and determination of the appeal from the ruling and order dated 20/12/2019 (Francis Tuiyott,J) in the High Court of Kenya at Nairobi

in

Commercial & Tax Division

Civil Suit No. 64 of 2019 (OS))

RULING OF THE COURT

1. UPON perusing the Notice of Motion dated **5th August, 2020** by the applicant brought under **Sec. 26(2) of the Court of Appeal (Organization and Administration Act) 2015, Sections 3A, 3B and 5 of the Appellate Jurisdiction Act, Rules 5(2)(b), 41, 42,43 and 47 of this Court's Rules** where the applicant seeks, *inter alia*:

(i) Stay of the interim orders issued on **28th February,2019** and **6th July, 2020**;

(ii) Stay of the order dated **20th December, 2019** directing the applicant to transfer monies held by the applicant to a joint interest earning account in the joint names of the applicant and the respondent;

(iii) Stay of the order of **20th December, 2019**, directing the applicant to release its client's file in HCC No. 543 of 2010 to the firm of **Kipkenda & Company Advocates**;

(iv) An order staying any further proceedings at the High Court, all pending the hearing and determination of the filed appeal from the orders of **Tuiyott. J.** dated **28th February, 2019, 6th July, 2020** and **20th December, 2019**; and

2. UPON perusing the affidavit of **Christine Ouma Oseko** sworn on **5th August, 2020**, in support of the application; and

3. UPON perusing the affidavit of **Samuel Gachie Kamiti** sworn on **27th August, 2020** in opposition to the motion; and

4. UPON perusing the applicant's submissions dated **10th September, 2020**, where it is contended that by the release of Kshs 45,000,000.00 together with accrued interest and its client's file will have the effect that the applicant will lose the lien it holds over unpaid legal fees, disbursements and taxes payable by the respondent, thus rendering the appeal nugatory and that it has an arguable appeal as it tends to challenge the trial judge's arrogation of jurisdiction over the substantive arbitration proceedings and failing to find that the appellant and the respondent were bound by the express provisions of the retainer agreement, to name but a few of the grounds to be relied upon by the applicant; and

5. UPON perusing the respondent's written submissions dated **16th September, 2020** in which it is submitted that the applicant's right of lien will not be compromised by depositing the sum of Kshs 45 million in a joint interesting account as this will not prejudice the applicant as both parties will have control of the funds in the joint account and that the release of the file will not prejudice the applicant as its interests on fees will be secured by the funds in the joint account; and

6. HAVING considered the principles that guide this Court in determination of rule 5(2)(b) applications as stated in **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** and noting that the applicant has not demonstrated that the appeal which has already been filed will be rendered nugatory unless the orders sought are granted, given that the order made was that the sum of Kshs 45 million be deposited in a joint interest account, thus safeguarding the applicant's interests, if at all, we make the following orders:-

(i) The motion dated **5th August, 2020** is disallowed.

(ii) The applicant shall bear the costs of this application.

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

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR