



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), KARANJA & KOOME, JJ.A)

CIVIL APPLICATION NO. 141 OF 2018

BETWEEN

CASTLE FOREST LODGE LIMITED.....APPLICANT

AND

JLB (*suing on his own behalf and as Administrator of the Estate of*

SMB and MCB).....1<sup>ST</sup> RESPONDENT

KENYA WILDLIFE SERVICE.....2<sup>ND</sup> RESPONDENT

KENYA FOREST SERVICE.....3<sup>RD</sup> RESPONDENT

*(An application for stay Orders of execution pending the filing, hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated 22<sup>nd</sup> June, 2018*

in

NYR. H.C.C.C. No. 130 of 2012

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RULING OF THE COURT

1. On or about the 3<sup>rd</sup> of January, 2010 the 1<sup>st</sup> respondent, **JLB**, accompanied by his wife, an infant daughter and three other adult relatives booked themselves as visitors or tourists at a Lodge within the Mount Kenya Forest Game Reserve that was operated by the applicant. The following day, the 1<sup>st</sup> respondent in the company of his family went on a nature walk in the forest under the guidance of a tour guide introduced to them by the applicant's manager. By a sad twist of fate, an irate elephant charged at them and although the 1<sup>st</sup> respondent, his other three relatives and the tour guide managed to escape, the respondent's wife and daughter were not lucky; they were trampled to death by the elephant.

2. The 1<sup>st</sup> respondent sued the applicant for loss of his wife and daughter as the owner of the Lodge where they were staying on account of negligence and breach of duty of care to them as lawful occupiers of the Lodge. The suit was defended by the applicant **Castle Forest Lodge Limited**, Kenya **Wildlife Service** and **Kenya Forest Service** (2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively) who were subsequently joined as interested parties. The suit fell for hearing before **Ngaah, J.** who delivered a judgment on 22<sup>nd</sup> June, 2018, in favour of the 1<sup>st</sup> respondent in the following terms:-

**“I will therefore make an award of US\$ 9,885 in special damages.**

**[97] In summary, my final award is broken down as follows:**

**1. (a) Sharon Mary Brown**

**(i) Lost years**

**360,540**

(ii) Loss of expectation of life	150,000
(iii) Pain and suffering	00
(iv) Special damages	9,295

*(The amounts in United States Dollars except for the award for loss of expectation of life which is in Kenya Currency.)*

**(b) MB**

(i) Lost years	00
(ii) Loss of expectation of life	50,000
(iii) Pain and Suffering	10,000
(iv) Special damages	650

*(The amounts in Kenya Currency except for Special damages which is in United States Dollars)*

**2. Interest at court rates from the date of filing suit till payment in full.**

**3. The plaintiff shall have costs of the suit. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall also have the costs of the suit against the 1<sup>st</sup> defendant.**

**4. The awards made in United States dollars may be paid in that currency or, in the alternative, shall be converted to Kenya currency at the Central Bank of Kenya rates prevailing at the time of payment or at the execution of the judgment. (See *Beluf Establishment versus Attorney General (1993) eKLR*.)”**

3. Aggrieved by the aforesaid, the applicant filed a Notice of Appeal on 4<sup>th</sup> July, 2018, applied for certified copies of proceedings and filed the instant notice of motion under **Rule 5 (2) (b)** of the Court of Appeal Rules on 18<sup>th</sup> November, 2018 seeking stay of execution pending the hearing and determination of the intended appeal. The application is supported by the grounds stated in the body thereto and two affidavits sworn by **MEILA VAL, AAR** a director of the applicant and an attached memorandum of the intended appeal. The applicant posits that he has an arguable appeal on the grounds that it operates the Lodge on the basis of a lease from the **Kenya Forest Services** (the 3<sup>rd</sup> respondent) for a period of twenty (20) years from the year 2015 which is for a designated area of 10.5 Hectares of land.

4. The applicant contends that the Judge failed to evaluate the evidence that was presented to the effect that the 1<sup>st</sup> respondent had signed a registration card that exempts them from liability for personal injury. The applicant is therefore challenging the issue of liability which was 100% apportioned to it and no portion or indemnity was ordered against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who own the forest and the animals in the forest. Further, the applicant claimed that the sums awarded are far too exaggerated and would cripple the applicant which is a small boutique hotel. On the nugatory aspect, the applicant stated that should the appeal succeed, the appeal will be rendered nugatory as the applicant is a foreigner who has no known assets in Kenya. The applicant placed reliance on the cases of **Attorney General vs. Okiya Omtatah Okoiti & Another [2019] eKLR; Gideon Lister Kaaria vs. National Band [2011] eKLR and Stanely Kangethe Kinyanjui vs. Tony Keter and 5 Others [2013] e KLR**. The general principle of law running through all those cases that was referred to by the applicant is that the Court of Appeal will exercise its original jurisdiction and discretion and grant stay of execution if the applicant has established the intended appeal is arguable and that the same would be rendered nugatory absent of stay order. The applicant urged us to grant the orders as prayed.

5. This application was vehemently opposed by all the respondents. On the part of the 1<sup>st</sup> respondent, he filed a replying affidavit and written submissions stating that the applicant had failed to justify the two limbs to warrant the granting of the orders; that the two grounds stated were not arguable as there were no third-party proceedings taken against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to indemnify the applicant and no evidence was given to show negligence on their part. On the nugatory aspect, the applicant was said to be a quintessential high-end boutique tourist hotel that prides itself in excellent delivery of services that should be able to settle the decree. In the alternative, they urged that the applicant should be ordered to deposit the said sum as security in the event that the appeal should fail and it is unable to settle the decree.

6. The application was also opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on more or less the same grounds. First of all, the applicant was accused of filing the instant application late, merely to frustrate or wade off the costs that were awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which have already been taxed; that the applicant went to slumber after the judgment and filed the instant application on 15<sup>th</sup> November, 2018 which was not served upon the 3<sup>rd</sup> respondent until the 4<sup>th</sup> February, 2019. Counsel emphasized that what may render an appeal nugatory must be considered within the circumstances of each case. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents also echoed the grounds raised by the 1<sup>st</sup> respondent reiterating that the grounds were not arguable and urged the application be dismissed with costs.

7. We have deliberated on this motion, the submissions and the authorities cited within the principles applicable under **Rule 5 (2) (b)** of this Court’s Rules which are old hat as stated by this Court in numerous cases especially in the case Of **Trust Bank Limited And Anor vs. Investech Bank Ltd & 3 Ors, Civil Application Nos. NAI. 258 & 315 OF 1999, (Unreported):-**

**“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, or 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. ...”**

8. Applying the above principles to the facts of this case, we find the one single ground raised by the applicant that challenges the findings by the learned trial Judge that the applicant was wholly answerable for the accident and apportioned the total liability an arguable one. This is with the usual caution that an arguable appeal, does not necessarily mean that 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 as was decided in **Dennis Mogambi Mang’are vs. Attorney General & 3 Others, Civil Application No. NAI. 265 of 2011 (UR 175/2011)** where 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.”**

9. On the nugatory aspect, we have to balance the circumstances of the applicant who stated on oath that it is a small boutique tourist lodge that will not be able to settle the decretal sum if the decree is executed and that it occupies the property where the Lodge is situated on the basis of a lease agreement with the 3<sup>rd</sup> respondent. On the other hand, the 1<sup>st</sup> respondent is an individual decree holder who is concerned about the ability to satisfy the decree in view of its own admission and the fact that he himself is a foreigner who has no known assets in Kenya.

10. **Balancing** the two competing circumstances in this matter, we are persuaded that a conditional stay would serve the interests of both parties. We accordingly grant a stay of execution on condition that the applicant deposits within forty-five (45) days from the date of this ruling the sum of USD 150,000 (United States Dollars one hundred and fifty thousand) or its equivalent in Kenya Shillings in a joint account in the name of the advocates’ firms representing the applicant and the 1<sup>st</sup> respondent and the account be an interest earning one in a reputable bank to be maintained as such until the appeal is determined or upon further orders of the Court. In default, the application for stay to automatically stand dismissed.

It is so ordered.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**