



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & MURGOR, J.J.A)

CIVIL APPLICATION NO. 66 OF 2020

BETWEEN

JOSEPH WANJOHI.....1ST APPLICANT

JANE WAMBUI.....2ND APPLICANT

SIDJOE MANUFACTURES & SUPPLIERS.....3RD APPLICANT

MARUDIANO ZONE LIMITED.....4TH APPLICANT

AND

ASSETS RECOVERY AGENCY.....RESPONDENT

(Being an Application for Stay of Execution of the Judgment of the High Court of Kenya at Nairobi, Anti-Corruption and Economic Crimes Division, (Mumbi Ngugi, J.) dated 21st February, 2020 pending the lodging, hearing and determination of an intended Appeal *in H.C.* **A.C.E.C. Application No. 7 of 2019**)

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RULING OF THE COURT

1. By a judgment dated 21st February, 2020, the High Court of Kenya (The Anti-Corruption and Economic Crimes Division) at Nairobi (Mumbi Ngugi, J.) entered judgment in favour of the respondent herein, against the applicants granting, *inter alia*, declaratory orders that the following assets are proceeds of crime and that the same be forfeited to the State: a sum of Kshs 10,589,069.90 held in Accounts No. 2039278483 and 0754417005 in the name of the 1st applicant at Barclays Bank Moi Avenue Branch, Nairobi and in the name of the 3rd applicant at Barclays Bank Muthaiga North Branch Nairobi; motor vehicles registration nos. KBU 940W Ranger Rover sport, S. Wagon and KCD 299H Mercedes Benz, DBA-207347 Saloon; Land Parcels L.R. NO. 27981/7 & I.R. 122131/65, L.R. NO. 16217/87/17 & I.R. 90025 and L.R. NO. 27981/8 & I.R. 122131/66 all registered under the name of the 4th applicant.
2. Aggrieved, the applicants filed a Notice of Appeal against the whole judgment on 28th February, 2020.
3. Subsequently, on 6th March, 2020 the applicant filed the instant Notice of Motion under Rule 5(2)(b) of this Court's rules seeking stay of execution of the Judgment and decree of the trial court pending the hearing and determination of its intended appeal against the judgment.
4. The grounds proffered in support of the motion and the depositions in the supporting affidavit sworn by the 1st applicant on 4th March, 2020 are principally that in arriving at the impugned decision, the learned Judge relied on spurious allegations made by the investigating officer and failed to consider the explanation tendered by the applicants as to how the listed properties had been acquired.
5. Learned counsel for the applicants in his submissions filed on their behalf urged that the intended appeal raises arguable points calling for determination by this Court. (See: **Co-operative Bank of Kenya Limited v. Banking Insurance & Finance Union (Kenya) (2015) eKLR**). Counsel urged that the learned Judge misapprehended the evidence before her and misapplied the law hence reaching an erroneous finding that the subject assets were proceeds of crime and ought to be forfeited to the state. Counsel maintained that the applicants' right to property were limited based on baseless suspicions, hearsay and whims of the respondent's officers, contrary to the rules of justice.
6. Counsel further contended that the intended appeal seeks a determination on whether the learned Judge was right in law in granting orders of forfeiture of assets not subject to contestation before the trial Court.

7. On the nugatory aspect, placing reliance on **Kenya Revenue Authority v. Tom Odhiambo Ojienda SC & Another (2019) eKLR**, counsel argued that the subject assets stood the risk of forfeiture by the State, which action would render the applicants' families homeless and destitute, hence they stood to suffer substantial loss and damage. Further, that on a balance of convenience, the applicants' benefits and justice outweigh the costs and inconvenience that would be caused by granting stay of execution as prayed. (See: **Oraro & Rachier Advocates v. co-operative Bank of Kenya (2000) eKLR**).

8. The respondent did not file a replying affidavit or grounds of opposition to the application and so the deponents in the applicant's affidavit have not been controverted. Although counsel for the respondent filed brief submissions in opposition of the application, we need to reiterate that submissions of counsel, which address matters of law only, cannot replace a replying affidavit which is evidence tendered on oath.

9. In the said submissions, counsel submitted, citing **Ishmael Kangunyi Thande v. Housing Finance Company of Kenya Limited, Civil Application No. Nai. 157 of 2006 (unreported)**, that the applicants' draft memorandum of appeal did not disclose reasonable grounds of appeal that may warrant this Court's exercise of its discretion in their favour. Counsel contended that there is no assertion that the respondent is incapable of restoring the forfeited assets in the event that the intended appeal is successful. Therefore, that the intended appeal would not be rendered nugatory. (See: **Reliance Bank Limited v. Norlake Investments Ltd (2002) 1 EA 227**). In sum, counsel urged that the applicants have not satisfied both limbs of the application hence the instant application ought to be dismissed.

10. This Court has carefully considered the application and submissions by learned counsel. There is a notice of appeal duly filed, which bestows upon this Court jurisdiction to entertain the instant application. (See: **Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others (2010) eKLR**). It is old hat that for this Court to grant an order of stay of execution, the applicants must satisfy this Court that their appeal is arguable and that if stay is not granted, the same would be rendered nugatory in the event that the appeal succeeds. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR**).

11. On arguability, it is trite that an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court; a single bona fide issue would suffice. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**).

12. There is no doubt whatsoever that the appeal herein is arguable. The issue of this Court determining the burden of proof in Asset recovery cases, which is indeed a new jurisprudence, is of utmost importance and will impact other cases not just the present one. The applicant has therefore, successfully demonstrated the limb on arguability.

13. As to whether the appeal would be rendered nugatory if stay is not granted in the event that the intended appeal is successful, the respondent has not rebutted the applicants' deposition that they will suffer irreparable loss if the properties are not preserved. We hold the view that if the respondent is allowed to dispose of the seized properties, it would be onerous to return the same to the applicants should their appeal succeed.

14. On the whole, we are persuaded that the applicants have also demonstrated the nugatory aspect. Having satisfied both limbs on arguability and the nugatory aspect, the applicants succeed in their application. Accordingly, we allow the same and stay the impugned judgement. For the avoidance of doubt the order we make is that the status quo prevailing as at the time of delivery of this ruling should be maintained and the seized properties should be preserved pending the hearing and determination of the applicant's appeal.

**Dated and delivered at Nairobi this 4th day of December, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**