IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, WARSAME & M'INOTI, JJ.A)

CIVIL APPLICATION NO. 9 OF 2017 (UR8 OF 2017)

BETWEEN

ICEA LION GENERAL INS. CO. LTD.....APPLICANT

VERSUS

THE BOARD OF GOVERNORS,

RIOMA MIXED SECONDARY SCHOOL.....1ST RESPONDENT

NICHOLAS MUNGE TAI & 23 OTHERS.....2ND RESPONDENT

(An application for stay of proceedings and/or further proceedings of the subordinate cases filed in Ogembo pending the hearing and determination of the preferred appeal herein against the decision/judgment of (W. Okwany) at Kisii delivered on 7th March, 2016)

in

HCCC NO. 24 OF 2013)

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RULING OF THE COURT

By a notice of motion dated 26th January, 2017 **ICEA LION GENERAL INS. CO. LTD** (the applicant) seeks *inter alia* orders for stay of proceedings and/or further proceedings in a myriad of cases filed at the Principal Magistrates Court in Ogembo as well as a stay against any other matter or suits that are likely to be instituted as a result of the accident that occurred on 10th July, 2013 involving motor vehicle registration number KBT 580N pending the hearing and determination of the intended appeal. The applicant had filed a suit before the superior court against **THE BOARD OF GOVERNORS, RIOMA MIXED SECONDARY SCHOOL** (1st respondent), wherein it had sought a declaration that it was not liable to settle claims arising from the aforementioned accident.

Briefly, the facts leading up to this appeal are that the applicant had comprehensively insured the 1st respondent's motor vehicle registration number KBT 580N under policy number 980-A1-118482-13. On 10th July, 2013 the respondent's aforementioned motor vehicle was involved in an accident along Itumbe-Igare road at Nyambunde area which resulted in deaths and injuries to those aboard the motor vehicle. The applicant filed the suit in the superior court wherein it contended that the 1st respondent had breached the terms of contract and/or the policy agreement because at the time of the accident the motor vehicle was overloaded and carrying excess passengers. The applicant therefore sought *inter alia* a declaration that it was not liable and/or duty bound under the policy and/or the terms of the agreement to compensate or settle the claims arising from the said accident.

The 1st respondent filed a defence and counterclaim against the applicant's suit and sought an order directing the applicant to perform its contractual obligations to the defendant, and/or all genuine third party claimants as per the insurance issued in favour of the 1st respondent. **NICHOLAS MUNGE TAI & 23 OTHERS** (the 2nd respondent), who were some of the passengers injured as a result of the accident were enjoined as interested parties. Onkwany J after hearing the matter dismissed the applicant's suit and directed the applicant to perform all its contractual obligations to the 1st respondent in respect of the genuine third party claimants.

Aggrieved by that judgment, the applicant lodged a Notice of Appeal on the 18th March, 2016. However, it was not until the 26th January, 2017 that the application for stay of proceedings before us was filed.

During the hearing Ms. Kipkesei appeared for the applicant. Counsel contended that the intended appeal was not frivolous. She referred us to the applicant's written submissions which contained the grounds supporting her contention that the appeal is arguable with high chances of succeeding. On the nugatory aspect it is contended in the written submissions that if the application is not allowed the matters pending in the subordinate courts shall proceed to hearing and the plaintiffs therein obtain judgment which they shall execute against the 1st respondent to the detriment of the applicant. It is further submitted that if the plaintiffs are paid in satisfaction of the judgments they are unlikely to refund the decretal sum because the financial capability of the respondents is unknown as a result of which the applicant stands to suffer substantial loss and damage.

Mr. Mose appeared for the 1st respondent and opposed the application. Counsel submitted that the appeal has little chances of succeeding. Counsel further submitted that about 49 cases have already been concluded. Counsel contended that the superior court dismissed the suit and thus the orders that the applicant seeks to stay are negative.

On her part Ms. Kusa who appeared for the 2nd respondent submitted that matters before the magistrate's courts have been concluded and judgment entered in favour of the 2nd respondent and notices of intention to file declaratory suits have been served on the applicant. Counsel therefore argued that there no proceedings to be stayed because the application has been overtaken by events.

It is now well settled how this court exercises its jurisdiction under **Rule 5(2)(b)** of this court's rules. As we always do in the circumstances, we follow the two laid down principles. First, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal that merits to be heard (see ***Githunguri v Jimba Corporation Limited (1988) KLR 838)***; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. In ***Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd***, ***Civil Application Number Nai. 93/02 (UR),*** **this court stated thus**:-

> ***"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-***
>
> *1.* ***That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
>
> *2.* ***That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."***

Lastly, both limbs must be demonstrated to exist before one can obtain relief under **Rule 5(2) (b).** (See ***Republic v. Kenya Anti-Corruption Commission & 2 others [2009*]** **KLR** 31).

In considering whether the appeal is arguable, we have considered the notice of motion, the supporting affidavit thereof, the applicant's submissions and its counsel's arguments in Court. We have also looked at the impugned trial court's decision the basis for the intended appeal. In the case of ***Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001*** this court addressed what is considered to be an arguable appeal thus,

> ***"He (the applicants) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision."***

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicants. (See ***Kenya Railways Corporation v. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012*** *and* ***Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No.NAI.256 of 2013*)**.

We are of the view that the applicant has raised at least one arguable point, that is, whether by the motor vehicle carrying excess passengers the 1st respondent had fundamentally breached the policy document. In the case of ***Judicial Commission of Inquiry into the Goldenberg Affairs & 3 others versus Kilach [2003] KLR 249*** it was held that that there need not be a chain of arguable points to sustain an application under Rule 5(2) (b) of the Court of Appeal Rules. Even one arguable point is sufficient.

On the nugatory aspect the applicant contended that if the stay is not granted and the 2nd respondents are paid in execution of the judgment, the respondents are unlikely to pay since their financial ability is unknown. The respondents on their part contended that some of the cases before the lower court arising as a result of the accident have already been concluded and therefore there is nothing to stay. The applicant did not challenge this submission by the respondents and therefore we can only conclude that it is true that indeed some of the cases have proceeded to their logical conclusion. This can be partly attributed to the indolence of the applicant in filing this application.

Further, we take note that what is involved herein in a money decree. This Court in the case *of* ***Meteine Ole Kilelu & 19 others v Moses K. Nailole [2009] eKLR*** stated thus:-

> ***"In a matter such as is before us where the decree appealed against is a money decree, the applicant has to show either that once the execution is done after our refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal amount is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence. The appellants needed to show for instance, that the respondent is a man of straw who once the execution takes place and is given the decretal amount, would not be able to refund it when the appeal succeeds. They neither stated so in their affidavit nor demonstrated so at the hearing of the application."***

We are therefore of the view that the applicant has failed to demonstrate that the appeal would be rendered nugatory if at all it is successful. From the foregoing it is clear to us that the applicant has failed to satisfy the second limb of the test for grant of relief under Rule 5 (2) (b).

We therefore do not find merit in the application dated the 5th June, 2017 and we accordingly dismiss it. Costs of this application to abide the outcome of the intended appeal.

Dated and Delivered at Kisumu this 21st day of February, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

K. M'INTOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR