IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. NAI 324 OF 2018

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

IITAYASON NEEPE.......................................1ST APPLICANT

LADY LORI KENYA LIMITED..................2ND APPLICANT

ORYX SAFARI LIMITED............................3RD APPLICANT

AND

ELIZABETH GUTTMAN........................1ST RESPONDENT

MATTHEW SHELTON...........................2ND RESPONDENT

(An application for stay of proceedings pending appeal from the rulings and orders of the

High Court of Kenya at Nairobi (A. Mbogholi, J.) delivered on the 8th, 9th and 10th of May, 2018

in

H.C.C.C. No. 410 of 2012)

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RULING OF THE COURT

1. This ruling is in respect of an application for stay of proceedings in **H.C.C.C. No. 410 of 2012, Elizabeth Guttman & Another v Iitayason Neepe & Others**, pending hearing and determination of an intended appeal.

2. The basis of the application is that in the course of proceedings in the aforesaid High Court matter several **"extremely prejudicial interlocutory Rulings were consecutively delivered in that suit on 8th, 9th and 10th days of May, 2018, effectively shutting out the applicants from the proceedings and preventing the applicants from effectively defending themselves against the rules of natural justice".**

3. The applicants argued that those rulings were extremely biased in favour of the respondents; the rulings allowed the respondents to unjustifiably produce photocopies of documents against the rules of evidence; allowed the respondents to produce medical reports and other medical evidence without calling the makers of the documents; allowed the respondents to produce their employer's unverified and unverifiable alleged documentation to support fabricated colossal claims amounting to thousands of dollars against the rules of evidence; and allowed the respondents to call last minute expert witnesses to produce last minute new documents filed a day before trial without leave and which were new to the applicants.

4. The net effect of the said rulings, the applicants contended, was to take away their right to cross examine the would be proper witnesses on the documents; to shut out the applicants from the proceedings and/or prevent them from effectively defending themselves, which is contrary

to the rules of natural justice.

5. The applicants sought and were granted leave to appeal against the said rulings and have filed notice of appeal. However, the applicants' application for stay of proceedings pending appeal was declined by the High Court.

6. The applicants verily believe that their intended appeal has high chances of success, and that unless the High Court proceedings are stayed the intended appeal shall be rendered nugatory because the trial will be finalized in their absence or without having been accorded an opportunity to cross examine relevant witnesses who would have been the appropriate persons to produce various documents sought to be relied upon by the respondents.

7. **Mr. Moses Kinyanjui**, learned counsel for the applicants, told this Court that without the applicants' approval, complex medical reports were produced by the respondents without calling the doctors who examined the respondents and prepared the reports; that one of the respondents suffered soft tissue injuries, yet he was claiming more than half a million dollars because the medical report, that was produced without calling the maker, indicated that the particular respondent had suffered psychological damage, yet the applicants had not been granted an opportunity to challenge that conclusion by cross examining the maker thereof.

8. The respondents opposed the application. The 2nd respondent stated in his replying affidavit that together with his wife, the 1st respondent, both residents of the United Kingdom, filed the High Court suit on 16th August, 2012 seeking compensation following a helicopter accident in Kenya on 17th August 2010. They argued that the application for stay of proceedings is not arguable and is a vexatious attempt to frustrate the expeditious finalization of the suit.

9. The respondents further argued that the applicants' intended appeal seeks to challenge rulings made by the High Court in May 2018, partly on matters of production of evidence on issues which were never raised by the applicants during the pre-trial directions and other subsequent dates when the case came up for pre-trial mentions before the trial judge; that part of the complaints raised by the applicants in their intended appeal concerns the evidence of an expert witness and a complaint over documents which the expert made reference to in his evidence, but which was only a substitution of an earlier expert witness who could not be available for the trial, and his testimony was identical to that of an earlier expert witness, whose statement the applicants had been served with and were well aware of for more than a year before the trial date.

10. The respondents refuted the applicants' contention that they had been shut out of the proceedings, saying that the applicants were and had been ably represented by counsel at every stage of the proceedings; that during the trial and after the impugned rulings were made the applicants, through their counsel, were able to subject the evidence adduced by the expert witness and the respondents to intense cross-examination.

11. Lastly, the respondents argued that even if their appeal were to succeed, the applicants had not demonstrated how the results of their intended appeal would be rendered worthless. They therefore urged the Court to dismiss the application.

12. Highlighting the contents of the respondents' replying affidavit, **Mr. Remigeo Mugambi,** learned counsel for the respondents, pointed out that the applicants had not availed to this Court the High Court proceedings and therefore the Court does not have the benefit of knowing what actually transpired on the material days. He added that since 2012 when the suit was filed, the applicants had not filed any notice to produce; and that the respondents had served upon the applicants all the documents that they were going to rely on well in advance.

13. In a brief reply, Mr. Kinyanjui submitted that there was no agreed bundle of documents; that therefore the default position is to avail all the necessary witnesses to adduce the required evidence so that they are cross-examined, unless there is an agreement to the contrary.

Counsel further submitted that unless the applicants appealed against the impugned interlocutory rulings, they shall be shut out from questioning the same in future.

14. We have considered the application, affidavits on record, submissions by counsel and the authorities cited. The principles that guide this Court in dealing with an application under **rule 5(2) (b)** of this **Court's Rules** as this one are now well settled. The Court must be satisfied that the appeal or intended appeal is arguable; and that the appeal or intended appeal, if successful, shall be rendered nugatory unless the Court grants the orders sought. See **STANLEY KANG'ETHE KINYANJUI v TONY KETTER & 5 OTHERS [2013] eKLR.**

15. An arguable appeal is not one which must necessarily succeed, but one which ought to be fully argued, and only one single bona fide arguable ground will suffice.

16. In opposing this application, the respondents' counsel cited, *inter alia*, the learned authors of **Halsbury's Laws of England, 4th Edition Vol. 37** paragraph 442 at page 330 which reads as follows:

> ***"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantial merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."***

Counsel submitted that the applicants ought to wait until the final judgment of the trial court is rendered and lodge an all embracing appeal if at all they are not satisfied with the judgment.

17. On the other hand, the applicants' counsel submitted that unless this Court stays the High Court proceedings pending the hearing and determination of the intended appeal, they will be greatly prejudiced as they will have missed an opportunity to challenge the respondents'

evidence in cross-examination before a decision is made; and the intended appeal will have been rendered nugatory. He cited this Court's decision in **NATIONAL BANK OF KENYA LIMITED & ANOTHER v GEOFFREY WAHOME MUOTIA [2016] eKLR.**

18. As a general principle, courts in this country are reluctant to stay proceedings pending an interlocutory appeal, given that delay in administration of justice is a perennial complaint that has always been raised by the citizenry against the Judiciary. That does not however mean that such an order cannot be granted. This Court has discretion to order such stay in appropriate circumstances. The discretion must however be exercised judiciously, taking into consideration the peculiar circumstances of each case.

19. Regarding arguability of the intended appeal, it is not in dispute that there was no agreed bundle of documents that was to be produced without calling the makers thereof as required under the **Evidence Act**; and more so expert witnesses. It is important for trial Courts to observe the provisions of **Section 35** of the **Evidence Act** regarding admissibility of documentary evidence as to facts in issue which require, *inter alia,* production of the original document and calling the makers thereof as witnesses. Of course there are instances when the court may waive such requirements but such instances must be clearly documented and justified.

20. A perusal of the affidavits on record and the impugned ruling appears to indicate that there were several critical documents that were admitted without calling the makers thereof as witnesses and without consent of the applicants. Whether that was right or not and whether it was done within the exceptions stipulated in the Evidence Act is certainly an arguable issue. We so find.

21. Turning to the nugatory aspect, the respondents have already closed their case. If the orders sought are not granted, the proceedings in the High Court will continue and the trial court will render its judgment. The applicants will have lost the opportunity to cross examine the makers of the various documents, yet the trial court's findings may be informed by the contents of the said documents and what the respondents said in regard thereto. It therefore means that the intended appeal will have been rendered nugatory. That will not be cured by filing an appeal against the final decision.

22. All in all, we are inclined to exercise our discretion in favour of the applicants. Consequently, we grant stay of proceedings in H.C.C.C. No. 410 of 2012 pending hearing and determination of the intended appeal. We further direct that the applicants shall file and serve the intended appeal within 45 days from the date of delivery of this ruling failing which the orders of stay shall automatically lapse without further ado. Once filed, the appeal shall set down for hearing on priority basis.

The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 5th day of April, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR