



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, JJA)

CIVIL APPLICATION NO. NAI 349 OF 2018 (UR 283/2018)

BETWEEN

COMMISSIONER OF POLICE AND.....1ST APPLICANT

THE HON. ATTORNEY GENERAL.....2ND APPLICANT

AND

INTRASPEED LOGISTICS LTD.....1ST RESPONDENT

DOOBA ENTREPRISES LTD.....2ND RESPONDENT

WILLEX UGANDA LTD.....3RD RESPONDENT

SEBCO UGANDA LTD.....4TH RESPONDENT

KPL LTD.....5TH RESPONDENT

SULEIMAN BATEGANYA.....6TH RESPONDENT

DAVID MUSANA.....7TH RESPONDENT

BUNYONYI SAFARIS LTD.....8TH RESPONDENT

SEVEN HILLS IMPEX LTD.....9TH RESPONDENT

UGANDA AGRICULTURAL TOOLS LTD.....10TH RESPONDENT

BOARD CITY LTD.....11TH RESPONDENT

ARTHUR TURY AHIKAYO.....12TH RESPONDENT

BIDCO (U) LTD.....13TH RESPONDENT

KAMPALA CITY TRADERS ASSOCIATION....14TH RESPONDENT

KATRACO (U) LTD.....15TH RESPONDENT

MUGENGA HOLDINGS LTD.....16TH RESPONDENT

(An Application for stay of the of execution of the decree of the High Court of Kenya at Nairobi (Mboghli Msagha, J) dated 28th June, 2018

RULING OF THE COURT

1. It is common knowledge that the violence experienced in Kenya after the 2007 general elections resulted in massive loss of life and property. The respondents were victims of that violence. In their suit filed before the High Court on 22nd July 2009 they averred that on various dates between December 2007 and February 2008, their respective commercial transportation trucks ferrying goods through the country along Nakuru-Eldoret-Busia-Malaba Highway were burnt and extensively damaged. They claimed that the Government of Kenya, through the applicants, was negligent and that it breached its constitutional and statutory duty by failing to provide adequate security to them. They prayed for judgment against the applicants for special damages of USD 22,900,465.55 comprising the value of lost trucks, goods and hire of equipment as well as general damages to be assessed. The applicants denied liability in a statement of defence filed on 30th September 2009. They contended that if indeed the respondents suffered any economic loss as a result of the post-election violence, the government could not be liable.

2. It appears that on 23rd November 2017, based on an application for leave, judgment was entered in favour of the respondents against the applicants on liability and the issue of quantum was then reserved for hearing.

3. Msagha, J heard the matter. In a judgment delivered on 28th June 2018, the High Court awarded the respondents USD 47,557,081.00 for “the combined value of the plaintiffs’ loss relating to the motor vehicles destroyed”; On the claim for loss of business, the Judge stated:

“Considering the nature of their business but with little any (sic) evidence to guide the court, I consider it fair and just to assign 15% loss of business per truck per annum for a period of 6 years based on the value of each truck to cater for loss of business. I leave it to the parties to calculate the loss in that regard.”

4. The Judge also found that the respondents had “established on a balance of probability loss of goods set out as particularized in the submissions”. The 16th respondent was awarded Kshs. 20,000,000.00 for his house sold by the Bank of Africa Limited; compensation of “USD 16,813,959.25 being special damages” and loss of business “limited to 15% per annum for every truck lost for a period of 6 years based on the value of each vehicle.”

5. Dissatisfied with that decision, the applicants lodged a notice of appeal on 5th July 2018. On 27th November 2018, the applicants lodged the present application in which they seek an order of stay of execution of the judgement of the High Court pending the hearing and determination of the intended appeal.

6. Mr. K. Onyiso, learned counsel for the applicants urged in his written submissions before us, that during the hearing of the appeal, the applicants will demonstrate that the Judge was wrong in holding, among other things, that the government of Kenya failed in its obligation to provide security to the respondents when there was no evidence produced in that regard; that notwithstanding that judgement on liability had been entered, the respondents remained under an obligation to prove their case to the required standard of the balance of probabilities which they failed to do; that the Judge awarded the respondents special damages that were neither pleaded or proved; that the amounts awarded are manifestly high, illegal and unreasonable; and that the Judge failed to appreciate that the respondents claim based on the total negligence and breach of statutory duty was time barred under Section 3 of the Public Authorities Limitation Act. Counsel submitted that based on those complains, the intended appeal is arguable.

7. Counsel submitted further that unless we grant the orders sought, the intended appeal will be rendered nugatory; that if the decretal sums are released to the respondents, it will be difficult to obtain a refund, should the appeal succeed, considering that the respondents are foreigners with perfunctory interests in Kenya.

8. Learned counsel Miss. Guserwa for the respondents strenuously opposed the application. She referred to the replying affidavit of John Bosco Rusagara the Managing Director of the 1st respondent and urged that the intended appeal is misconceived, lacks merit, and is not arguable; that the applicants did not adduce any evidence during the trial with the result that the evidence presented by the respondents was not controverted; that considering the loss incurred by the respondents, it would be unfair and unjust to deny them the fruits of the judgement; that the respondents have waited for over 10 years and the applicants had more than adequate time to make budgetary provision to meet the claims; that the judgement amount was in any event a result of figures calculated and agreed upon between the parties that were then adapted as part of the judgement.

9. Furthermore, counsel urged, the application is premature as it is not possible to attach the government without taking the prerequisite procedural steps which are yet to be taken.

10. Mr. G. Karungo, learned counsel for the 16th respondent referred to the replying affidavit sworn by Tom Mogenga in opposition to the application in which the background to the judgement is set out in detail. Counsel submitted that the intended appeal is not arguable as the judgement intended to be challenged stems from consent orders; that even before the trial before the High Court, the applicant had conceded the respondents claims; that indeed the Attorney General, the 2nd applicant, did advise the government to settle the claim to avoid protracted litigation; that if the order sought is granted, the 16th respondent will suffer extreme prejudice and further irreparable loss as the bank has threatened to sell his matrimonial property in Uganda. It was submitted that the intended appeal will not be rendered nugatory if the application is declined and that in any event the process of execution has not commenced.

11. We have considered the application, the submissions and the extensive authorities cited by counsel. The legal principles applicable when considering an application of this nature are settled. For the Court to exercise its discretion in their favour, the applicants should demonstrate that the intended appeal is arguable and that if the application is declined the intended appeal, if successful, will be rendered nugatory. As stated by this Court in **Ishmael Kagunyi Thande v Housing Finance of Kenya Limited [2007] eKLR**:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

12. Counsel for the applicant's has drawn our attention to the intended grounds of appeal as set out in the draft memorandum of appeal. For instance, the applicant intends to challenge the judgement on the ground that the Judge awarded special damages that were neither pleaded or proved to the required standard. Bearing in mind that an arguable appeal is not one that must necessarily succeed and that a single issue is sufficient (see **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd Civil Application No. NAI 345 of 2004** and **Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others, Civil Application No. 124 of 2008**) we do not think that the intended appeal is frivolous. It is indeed arguable.

13. Whether an intended appeal will be rendered nugatory unless an order for stay of execution is granted is a matter dependent on the circumstances of each case. See **Reliance Bank Ltd vs. Norlake investments Ltd (2002)1 E A 227**. The Court has in the past recognised that requiring an applicant to pay a huge sum of money before an appeal is heard may render the appeal nugatory. See **Kenya Breweries Limited vs Kiambu General Transport Agency Limited, Civil Application No. 100 of 2000; Oraro & Rachier Advocates vs Cooperative Bank of Kenya Limited [2002] eKLR; Compar Investments Limited vs National Land Commission & 3 others [2016] eKLR**. In the present case, the judgement amount involved is undoubtedly astronomical. The applicants apprehend that if that amount is paid over to the respondents, and the appeal subsequently succeeds, they will be unable to obtain refund from the respondents, who they term as foreigners. In the circumstances, we think there is merit in maintaining the status quo pending the hearing and determination of the intended appeal. We accordingly allow the application in terms of prayer 2 and order that there will be a stay of execution of the judgement of the High Court given 28th June 2018 in HCCC No. 398 of 2009 pending the hearing and determination of the intended appeal.

14. To ensure the applicants do not go to sleep, we further direct the applicants to file and serve the memorandum and record of appeal (if they have not already done so) within 45 days from the date of delivery of this ruling failing which the order for stay of execution granted herein shall automatically stand discharged.

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

Orders accordingly.

Dated and delivered at Nairobi this 10th day of May, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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

DEPUTY REGISTRAR