



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 207 OF 2019

BETWEEN

DAVID KIRIMI CHARLES (*Suing as the legal representative of*

ABRAHAM KAILEMIA IKIGU (DECEASED).....APPLICANT

AND

MUNTU KIRIMANIA MUNGANIA (*Suing as legal representative of*

DORIS KINANU KIRIMANIA (DECEASED).....RESPONDENT

(Application for stay of execution pending the hearing of the appeal against the judgment and decree of the High Court of Kenya at Meru (Mabeya, J.) delivered on 20th

June, 2019

in

Civil Appeal No. 74 of 2018)

RULING OF THE COURT

1. This ruling is in respect of an application by the applicant under **rules 5(2) (b), 20, 42 and 47** of this **Court's Rules**. The applicant seeks an order of stay of execution of the judgment and decree of the High Court at Meru (Mabeya, J.) in Civil Appeal No. 74 of 2014 delivered on 20th June, 2019 directing that the applicant be apprehended forthwith to continue to serve a civil jail term that had been ordered by the magistrates' court in execution of a decree.
2. The brief 'background of the matter is that the applicant was sued by the respondent in **Meru Chief Magistrates' Court Civil Suit No. 2624 of 2010** for damages arising out of an accident that occurred on 24th December, 2008. In that accident, Doris Kinanu Kirimania lost her life and her father filed a suit claiming damages. The suit was undefended and the trial court awarded judgment in the sum of **Kshs.1,022,350**.
3. The appellant was unable to pay the decretal sum and the court ordered his arrest and committal to civil jail in execution of the said decree. The appellant unsuccessfully sought to stay execution of that committal order pending hearing and determination of a Constitutional Petition that he had filed in the High Court.
4. Following dismissal of the application for stay by the trial court, the applicant preferred an appeal to the High Court. Dismissing the appeal, the learned judge held, *inter alia*, that the appellant had never challenged the *ex parte* judgment that was being executed; that the applicant had rightfully been sued since he was a legal representative of the estate of the late Abraham Kailemia Ikigu, the driver of the vehicle that caused the accident and had inherited substantial properties from that estate.

5. The applicant filed **Civil Appeal No. 260 of 2019** before this Court, pursuant to which he has now filed this application. The applicant contends that the appeal is arguable. Some of the grounds that are raised in the appeal and which his learned counsel, **Mr. Ondieki**, submits are arguable, are that the learned judge erred in law by failing to adjudicate on some relevant issues; that the learned judge exercised his discretion wrongly; that the learned judge misapprehended the facts and applied wrong legal principles; and that the order to commit the applicant to civil jail as a mode of execution of a money decree is unconstitutional as it violates **Article 11** of the **UNICCPR** as read with **Article 2(5) and 2(6)** of the **Constitution of Kenya, 2010**.

6. Lastly, counsel submitted that unless stay is granted, the appeal would be rendered nugatory, the court having ordered the applicant's apprehension forthwith **"to continue to serve his jail term"**. If he is incarcerated, counsel argued, the applicant will be unable to prosecute the appeal.

7. The application was not opposed. An affidavit of service filed on 17th September, 2019 showed that the respondent's advocates, **M/S Mokua Abiria & Associates** were served with the application on 5th September, 2019. The said advocates neither filed a replying affidavit nor attended court for the hearing of the application.

8. We have considered the application. It is settled law that in an application under **rule 5(2) (b)** of this Court's Rules an applicant must satisfy the Court that the appeal or intended appeal is arguable and that unless the orders sought are granted the appeal shall be rendered nugatory. An applicant does not have to establish a plethora or multiplicity of arguable issues, even one arguable issue will suffice. And an arguable issue is not one that must succeed upon the hearing of the appeal, it is one that is not frivolous and merits the Court's consideration. See **KENYA RAILWAYS CORPORATION v EDERMAN PROPERTIES LTD, Civil Application No. Nai. 176 of 2012**. We have no doubt that the appeal is arguable.

9. Turning to the nugatory aspect of the appeal, this Court in **RELIANCE BANK LTD v NORLAKE INVESTMENTS LTD [2002] 1 E.A. 232** held that what may render the success of an appeal nugatory must be considered in light of the circumstances of each case. In this matter, if the applicant, who is sickly, is sent to prison he may not be able to pursue his appeal or may face serious challenges in pursuing it.

10. Whereas the respondent has a decree that has so far not been satisfied, it is also important to afford the applicant an opportunity to pursue his appeal. Consequently, we hereby order stay of execution of the judgment and decree in **Meru Civil Appeal No. 74 of 2018** pending hearing and determination of **Civil Appeal No. 260 of 2019**. The appeal should be set down for hearing on priority basis in the course of this Court's current term. The costs of the application shall be in the appeal.

Dated and delivered at Nairobi this 27th day of September, 2019.

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR