



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 176 OF 2019

BETWEEN

KISII UNIVERSITY APPLICANT

AND

RAMJI MEGHJI GUDKA LIMITED RESPONDENT

(Application for stay of execution of the judgment and decree of the High Court of Kenya at Kisii (Majanja, J.) dated 2nd July, 2019

in

KISII HCC NO. 13 OF 2013)

RULING OF THE COURT

By the motion dated 19th August, 2019 brought under **Rule 5(2)(b)** of this **Court's Rules**, the applicant **Kisii University** seeks an order of stay of execution of the decree issued against it by the High Court in Kisii pending the hearing and determination of its appeal against the same. By that decision the applicant was ordered to pay to the respondent, **Ramji Meghji Gudka Limited** the sum of **Kshs.9,131,493** plus interest thereon at 12% from the date of filing suit, as well as costs.

The application is founded on some fifteen grounds, too many by any standards, since on such application it needs satisfy only two requirements, and by an affidavit sworn on 16th August, 2019 by one **Seth Ong'uti** who is its Assistant Legal Officer. He deposes that following the judgment and decree, the applicant sought a stay of execution before the High Court, but the same was dismissed on 19th July, 2019; the applicant has an arguable appeal "*with overwhelming chances of success*" as can be gleaned from the attached memorandum of appeal; and, should execution proceed the appeal would be rendered nugatory as the applicant's operations would be adversely and negatively affected and paralysed, to its substantial loss, considering the "*colossal*" sums involved.

The respondent opposed the application by a rather lengthy replying affidavit sworn on 5th October, 2019 by **Ashwin Ramji Gudka**, its Managing Director. The affidavit deals at length with the dispute between the parties that was before the court below revolving around unpaid rent over premises demised to the applicant by the respondent. More relevantly, he swore that the applicant's appeal "*does not exhibit and/or espouse any tenable legal issues, whatsoever and/or howsoever,*" and is frivolous, merely calculated to defeat and delay the realization of the decretal sum. Further, the decree is a money decree and the respondent is well capable of repaying the entire decretal sum should the appeal succeed as the respondent is well-heeled and financially stable. At any rate, the applicant did not exhibit an *iota* of evidence as to how the appeal would be rendered nugatory if stay of execution is denied. He prayed that the application be dismissed with costs.

At the hearing of the application **Ms Odwa**, the applicant's learned counsel stated that it did have an arguable appeal raising, among others, complaints that the learned Judge erroneously failed to hold that there was no valid contract between the parties capable of being enforced; treating a letter of offer as a lease agreement contrary to **section 47** of the **Land Registration Act**; and awarding, rent arrears in respect of unoccupied premises that had been proved to be unfit for occupation.

On the nugatory aspect, counsel urged that the full decretal sum could well be up to Kshs. 13 Million when interest and costs are factored in and the applicant as a public institution with liquidity dependent on revenue from Government, it would be crippled in its operations if compelled to pay. She cited this Court's decision in **ORARO & ACHIER ADVOCATES -vs- CO-OPERATIVE BANK OF KENYA LIMITED [2000] eKLR**, and rested with the plea that to deny the stay sought would be tantamount to denying the applicant access to justice

under **Article 48** of the **Constitution**.

Ms Ochwal, learned counsel for the respondent countered that the applicant’s appeal is not arguable, and little wonder therefore that the High Court disallowed its application for stay of execution. She stated that the applicant had not demonstrated that it would be crippled if required to satisfy the decree. Moreover, the applicant’s being a public institution did not confer upon it a right to special treatment. Counsel mellowed at the end and revealed that the respondent was amenable to the application being allowed if the applicant had made a substantial deposit. As it had not done so, however, she prayed that the application be dismissed with costs.

We have given due consideration to the application, the rival affidavits, the contending submissions and the law. It is common ground that a stay of execution lies at the discretion of the Court to be exercised on a case by case basis with a view to attaining the ends of justice. The discretion is exercised judiciously and judicially on sound principle, not arbitrarily or whimsically. The principles that govern the matter are notorious: the applicant must satisfy the Court both that he has an arguable appeal, which means one that raises a *bona fide* point worthy of consideration, though it not necessarily succeed; and that if the stay is not granted the appeal would be rendered nugatory, which is another way of saying useless or of no effect, due to harm having been suffered in the intervening period.

Having looked at the memorandum of appeal and the fourteen grounds contained therein, we have no difficulty finding that the appeal is an arguable one. To pick but one point, the argument that the learned Judge granted judgment for rent inclusive of some part of the demised premises that were not occupied due to unfitness is certainly a matter to be explored on appeal. There are more but one, whether or not it will succeed in the end, is enough.

On whether the appeal would be rendered nugatory, we note that the applicant protests that to pay the over Kshs.10 Million due would adversely affect or even cripple its operations. We are not sure that an institution of its stature would be brought to its knees over such payment but, again, it is a public educational institution and a financial issue adverse to it is likely to affect learning thereat. We think that the prejudice likely to be caused upon the applicant is not to be answered by the fact merely that the respondent is well able to refund the decretal sum should the appeal succeed. Were that the case, money-dynamics could easily become the determinants of the Court’s interlocutory intervention, which is unacceptable.

In the end, we are satisfied on both limbs and so the application is for granting. It is within our discretion and jurisdiction to impose terms for the grant of stay and we do so in this case. The applicant shall pay the sum of Kshs.4.5 Million into Court within forty-five (45) days of the date hereof, failing which the stay shall automatically lapse.

The costs of the motion shall be in the appeal which we order to be expedited for hearing on priority basis.

Orders accordingly.

DATED and delivered at Kisumu this 20th day of November, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR