



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, M'INOTI & KANTAL, JJ.A.)**

**CIVIL APPLICATION NO. 189 OF 2019**

**ONESMUS NGUNJIRI NJENGA.....1ST APPELLANT**

**ROCK INVESTMENT COMPANY LIMITED .....2ND APPELLANT**

**AND**

**CAPTAIN SULEIMAN AMUR HAMUD .....RESPONDENT**

*(Being an application for stay of execution of the Ruling of the High Court of Kenya at Nairobi (Kasango, J.) delivered on 30th May, 2019*

*in*

**H.C.C.C. No. 262 of 2015)**

\*\*\*\*\*

**RULING OF THE COURT**

The 1st applicant, **Onesmus Ngunjiri Njenga**, and the 2nd applicant, **Rock Investment Company Limited**, were sued by the respondent, **Captain Suleiman Amur Hamud** in **H.C.C.C. No. 262 of 2015**. They were served with summons but they did not enter appearance or file a defence. Judgment was entered against them in default. As per the ruling of **Kasango, J.** of 30th May, 2019 the judge notes:

***“The 1st defendant was served with the plaint and summons on 8th June, 2015. He acknowledged that service by signing on the summons. Those summons required him to file Memorandum of Appearance within 15 days of service. The defendants do not deny that no appearance was filed (sic) within that prescribed period. It follows that judgment entered against the Defendants on 31st March, 2016 in default of appearance was a regular judgment.”***

The judge proceeds to note in the ruling that the applicants’ goods were proclaimed and thereafter a notice to show cause was served upon the 1st applicant and when that notice to show cause came up for hearing at the High Court on 10th May, 2018 the 1st applicant did not attend court and warrant of arrest was issued. The application before the judge to set aside judgment was dismissed.

In the Motion before us it is difficult to follow the prayers that are being sought. The application is said to be brought under **section 3A** of the **Civil Procedure Act, rules 41, 42 and 43** of the rules of this **Court** and **Article 159** of the **Constitution of Kenya, 2010**. In the main we are asked to grant a stay of execution of the judgment or ruling and any subsequent orders or proceedings in the said High Court case pending hearing and determination of an intended appeal; that we grant a stay of execution of the said ruling; that we grant a conservatory order restraining the respondents from arresting, harassing or otherwise interfering with the applicants’ civil liberty by purporting to commit the 1st applicant to civil jail and that we grant the 1st applicant anticipatory bail against being committed to or detained in civil prison pending determination of the intended appeal.

The history of the matter is given in the grounds in support of the motion and in the detailed affidavit of the 1st applicant.

For our purposes suffice to say that there is a regular judgment in the High Court which has not been set aside.

We are asked to stay the judgment of the High Court and orders arising therefrom pending hearing and determination of an intended appeal.

It is settled that the principles we apply in staying judgments or orders of the High Court are that an applicant must satisfy us that there is an arguable appeal that the intended appeal, or appeal, as the case may be, will be rendered nugatory absent stay. See the case of **Stanley**

**Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** which sets out those principles in detail.

In this case the applicants did not file a defence in the case in the High Court. Judgment was entered against the applicants in the year 2015. As noted by the judge in the ruling we have referred to the applicants' goods were proclaimed in May 2016. The judgment has not been set aside. Going through the record the 1st applicant variously admitted the debt owed to the respondent and the only issue was whether there would be an agreement on how the debt sum was to be paid. So there cannot be an arguable appeal. Without satisfying that limb of arguability the second limb on whether the intended appeal will be rendered nugatory does not arise. The application has no merit and it is dismissed with costs to the respondent.

**Dated and delivered at Nairobi 20th day of December, 2019.**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**