



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 275 OF 2017 (UR 214/2017)

BETWEEN

HARIT SHETH ADVOCATES.....APPLICANT

AND

NZIOKA & CO. ADVOCATES.....RESPONDENT

(An application for stay of execution and enforcement proceedings pending the hearing and determination of an intended appeal from the ruling and order of the High court of Kenya at Nairobi (Sergon, J.) dated 22nd September, 2017

in

H.C.C.C. No. 187 of 2015 (O.S)

RULING OF THE COURT

The matter before court is an application dated 30th November, 2017 brought pursuant to **Rule 5(2)(b)** of the court of Appeal Rules, 2010 seeking stay of the ruling of Sergon, J. dated 22nd September, 2017 pending the hearing and determination of the intended appeal. The dispute involves unpaid legal fees secured by a professional undertaking.

Briefly, the facts are as recounted hereunder. Nzioka & Co. Advocates (hereinafter ‘the respondent’) was retained by Afrison Export Ltd and Huelands Ltd (the plaintiffs) to act for them in H.C.C.C. NO. 617 of 2012 in respect of a dispute involving the ownership of property identified as L.R. No. 7879/4. Harit Sheth Advocate (hereinafter ‘the applicant’) took over the matter from the respondent. The respondent’s outstanding legal fees of Kshs.300,000,000/= was secured by a professional undertaking contained in letters dated 29th March 2013 and 5th April, 2013. It is contended that Kshs.25,000,000/= remains unpaid.

After making a demand for the payment of the said sum, the respondent took out a motion dated 10th November 2016 seeking enforcement of the undertaking. After hearing both sides, Sergon, J. allowed the application by finding that:

“It is also not in dispute that the professional undertaking given by the respondent stated that the legal fees due to the plaintiff/applicant would be paid on a pro rata basis from the instalments remitted from the decretal amount. A quick mathematical calculation of the decretal amount remitted to the defendant/respondent now stands at Kshs.2,400,000,000/=. It is therefore not true that the respondent has not received the decretal sum in full.... In the end, I find the plaintiff/applicant has satisfactorily established his claim. Consequently the motion dated 10th November 2016 is allowed....”

Aggrieved by the ruling of Sergon, J. the applicant intends to appeal against that decision. In the meantime, the applicant brings the present application predicated on the grounds contained in the body of the application and in the supporting affidavit of Harit Sheth, a partner in the applicant’s firm. The applicant contends that it has an arguable appeal and unless the orders sought are granted the intended appeal will be rendered nugatory.

Making submissions on behalf of the applicant and expounding on the grounds contained in its application, learned counsel Mr. S. Sarvia contended that the learned judge ignored a consent order, recorded on 27th April 2016 and filed on 4th May 2016 which in essence amended the previous judgment. It is further contended that the consent binds both parties and is enforceable. Counsel submitted that if the amount demanded is paid, the applicant is likely to shut its offices with serious professional and economic consequences.

Opposing the application learned counsel Mr. Victor Arika holding brief for Mr. Joseph Nzioka, submitted that the applicant does not have an arguable appeal. Counsel contended that the consent, which is to be read together with the previous judgment, did not modify or amend it. Counsel finally urged us to dismiss the application with costs contending that there was no evidence that damages would be insufficient should be intended appeal succeed.

Turning to the application, our jurisdiction on **Rule 5(2)(b)** applications is guided by two twin principles. For the applicant to succeed he must not only show that his intended appeal is arguable but that unless the court grants him the orders sought, the appeal will be rendered nugatory. See **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. Nai. 157 of 2006.**

Is the intended appeal arguable? We are satisfied that it is. Whether the consent order dated 27th April 2016 amends the original contractual relationship between the parties herein is a fundamental legal issue which has to be determined on appeal. Further it has been contended that the applicant's law firm has yet to receive final payment for and on behalf of the plaintiffs, this issue cannot be termed as frivolous.

We turn to the second limb, will the intended appeal be rendered nugatory? We remind ourselves that we must carefully weigh the competing interests of the respective parties: to safeguard the respondent's right to enjoy its fruit of the judgment whilst ensuring that the applicant has an opportunity to ventilate its issues on appeal without suffering irreparable damage and loss should the appeal succeed. We are alive to the fact that execution involves a money decree of Kshs.25,000,000/= which is by no means a meager sum. If the said sum is paid out without any security satisfaction the applicant is likely to suffer prejudice. We are therefore convinced that the intended appeal will be rendered nugatory if we do not intervene at this stage. To quote the words of this court in **Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1EA 227** at page 237 paragraph (e):

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

Accordingly, we find merit in the applicant's application dated 30th November, 2017 and allow the same subject to the following conditions:

- (a) The applicant shall provide a bank guarantee of Kshs.25,000,000/= from a reputable bank within thirty (30) days from the date of this ruling.
- (b) The applicant shall within thirty (30) days from the date of delivery of this ruling file and serve the record of appeal.
- (c) In default of compliance with any of these conditions, the orders of stay shall be automatically discharged and the application shall stand dismissed.
- (d) Costs of the application shall abide the appeal.

Dated and delivered at Nairobi this 21st day of March, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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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