IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & MUSINGA, JJ.A)

CIVIL APPLICATION NO. 281 OF 2017 (UR 221/2017)

RUNDA WATER LTD...1ST APPLICANT

RUNDA ASSOCIATION...2ND APPLICANT

AND

TIMOTHY JOHN NICKLIN......................................1ST RESPONDENT

ANNE CHRISTINE NICKLIN..................................2ND RESPONDENT

*(Being an application for stay of execution pending the hearing and determination of an appeal arising from the Ruling of the High Court of Kenya at Nairobi (**L. Njuguna, J.**) delivered on 29th November, 2017*

in

H.C.C.A. No. 490 of 2016)

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RULING OF THE COURT

By an application dated 6th December, 2017 the applicants moved this Court under rule **5(2) (b)** of this Court's Rules seeking an order of injunction to restrain the respondents from attaching their properties. The intended attachment followed a ruling dated 29th November, 2017 rendered by the High Court (**Hon. Lady Justice L. Njuguna**) dismissing their application for stay of execution of the orders issued by **Mr. Orenge SRM** in CMCC No. 3062 of 2014 in which the learned magistrate had allowed the respondents to attach the applicants' properties for contempt of court following their brazen failure to honour the terms of his court order. The magistrate's court had granted a permanent injunction restraining the applicants from blocking or barricading the respondents' access to the property known as L.R No. 7785/35 through a public road known as Ruaka Road within Runda Estate in Nairobi. Further orders, in the nature of a mandatory injunction, were also issued in the respondent's favour compelling the applicants to remove barriers erected on the said road. As alluded to earlier, upon failure by the applicants to abide by the orders, the respondents successfully applied to have the applicants' properties attached for the said disobedience.

Wishing to contest the attachment orders, the applicants filed an appeal in the High Court (**HCCA No. 490 of 2016**) and contemporaneously filed an application seeking to stay execution of the orders. It is that application that culminated in the High Court's ruling dated 29th November, 2017 refusing stay of execution of the trial court's order and from which the applicants intend to appeal from as can be gleaned from the notice of appeal dated 4th December 2017.

Rule 5(2) of these Court's Rules provide that an appeal shall not operate as a stay of execution. However, it goes further to provide in rule **5(2)(b)** that where a notice of appeal has been lodged in accordance with rule **75,** the Court may order a stay of execution, an injunction or stay of proceedings on such terms as it may deem just. In invoking that jurisdiction, the applicant must satisfy this Court that the appeal or intended appeal is arguable and would be rendered nugatory if the orders sought are not granted. Further, in determining the said application this Court would be exercising judicial discretion. In the case of **Trust Bank Limited & Another v Investech Bank Limited & 3 Others, Civil Application NAI 258 & 315 of 1999** (ur) this Court observed;

> ***"the jurisdiction of the court under rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly that unless he is granted a stay the appeal or the intended appeal if successful will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case…"***

To meet the prerequisite that they have an arguable appeal, the applicants have in their application exhibited a draft memorandum of appeal showing six (6) grounds that they will be canvassing in the intended appeal. They intend to argue that the learned Judge failed to appreciate that the magistrates court lacks jurisdiction to punish for contempt as section **10 (6)** of the Magistrates' Courts Act does not empower the court to issue an order for attachment; that the Judge erred in relying on order **40 (3)** of the Civil Procedure Act to punish the applicants for contempt of a final order whereas the order was limited to temporary and interlocutory injunctions, that the magistrate failed to give the applicants opportunity to mitigate after finding them in contempt of court and instead proceeded to order attachment of their property immediately; that the magistrate failed to appreciate that removal of the road barriers transcended the respondents' interests so as to involve public interest with regard to the security of Runda residents which is inconsistent with **Article 29** of the Constitution; the execution of the order of attachment would compromise the supply of water to the residents of Runda Estate and would be a violation of their constitutional right to clean and safe water as per Article **43**.

We do not think that those grounds can be said to be frivolous. See **Consolidated Bank of Kenya Ltd v Florence Wairimu Mbugua & Anor (Administrators of the Estate of Joseph Kiarie Mbugua) (2014) eKLR.** After all, they do not have to be grounds that necessarily must succeed on appeal, they just have to be arguable. It should also be borne in mind that even one arguable ground is sufficient for purposes of satisfying the first limb. We are therefore satisfied that the applicant on the elucidated grounds of appeal above has satisfied the requirements of the first of the twin limbs.

The law behooves an applicant to satisfy the twin limbs as demonstrating only one limb would not avail the applicant the order sought if he failed to demonstrate the other limb. See **Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31.** The applicant having satisfied us on the first limb, we must now interrogate and find out whether the intended appeal would be rendered nugatory in the event the injunction sought is not granted. In their application, the applicants depone that;

> *"15. If the Application herein is not heard urgently and an order of injunction issued as prayed, the respondents will proceed to attach their properties as it would compel the Applicants to remove the security barrier thereby rendering the intended appeal nugatory.*
>
> *16. The Applicants will further suffer great and irreparable harm, loss and prejudice should the Respondents proceed to attach their properties as it would compel the Applicants to remove the security barrier thereby rendering the intended appeal nugatory.*
>
> *17. The removal of the barrier pending the hearing and determination of the appeal will seriously compromise the personal security of over a thousand residents and their families."*

During the oral hearing of the application, **Mr. Gachuhi,** learned counsel for the applicants, submitted that the 1st applicant supplies water to the members of the 2nd applicant and any attachment of its property would be detrimental to the residents as it will affect generally the supply of water. He also contended that the respondents will not suffer any prejudice if this application is allowed.

In their replying affidavit sworn in opposition to the application, the respondents contended that in the event that the applicants complied with the magistrate's orders of removing the barriers and their appeal succeeded, then the barriers could be easily reinstated. **Mr. Mugui Mungai**, learned counsel for the respondents urged that there were other assets, other than the applicant's water pump that could be attached thus not jeopardizing the Runda residents' supply of water. In response to the allegation that removal of the barriers would endanger the residents' security, counsel argued that security of the residents lay with them individually and not through the applicants.

In our view, the above concerns cannot render the intended appeal nugatory. In other words, the applicants have not demonstrated how their intended appeal would be rendered nugatory if the orders sought are not granted. They allege that in the event that the orders do not issue, then they will have to comply and remove the barriers which according to them, would render the intended appeal nugatory. That argument is, in our view, self serving and actually goes to show how complying with the lower court orders of removing the barriers cannot prejudice the applicants or render the appeal nugatory for that matter. After all, and as contended by the respondents, the barriers would be easily reinstated. In declining to issue a stay of execution order, the High Court considered the same arguments now put before us and delivered itself as follows:

> ***"After considering the arguments by the parties and the evidence from the affidavits, I find that the applicant has not explained what substantial loss they are likely to suffer if the application is not granted. In fact, the respondents' counsel submitted that if the applicants obey the lower court orders and remove the barriers they will have no business with attaching their property. In essence, this means that if the appellants obey the lower court judgment, the respondents will forego the attachment order and not execute it and therefore any loss which would have been orchestrated by attachment will be circumvented."***

We are in total agreement with the Judge's reasoning. Further, we are unable to see how the removal of the barrier will expose the residents of Runda to insecurity, as correctly observed by counsel. Lastly, Counsel for the respondent submitted without being controverted that the 2nd respondent has many other assets which can be attached and not necessarily the water pump, so that the applicants' fears of being unable to supply water to the residents in the event of attachment is far-fetched. On the whole therefore, we are satisfied that the applicants have not demonstrated how the removal of the barrier would render their intended appeal nugatory so as to satisfy the second limb.

On the other hand, allowing this application would continue to prejudice the respondents' rights of access of a public road as found by the lower court. Not only have the applicants been convicted of disobedience of a court order, they have further failed to establish how the refusal by this Court to grant the orders sought would render their appeal nugatory. In the circumstances therefore, they are undeserving of this Court's exercise of its discretion under rule 5(2)(b) in their favour.

The application ought to be dismissed and is so ordered with costs to the respondents.

Dated and delivered at Nairobi this 11th day of May, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR