IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, P., M'INOTI & SICHALE JJ.A.)

CIVIL APPLICATION NO.222 OF 2018

BETWEEN

NAIROBI WOMEN'S HOSPITAL.....APPLICANT

AND

PURITY KEMUNTO.....RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and orderof the High Court of Kenya at Nairobi (Msagha, J.) dated 18th July 2018

in

HCCC No. 186 OF 2009)

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RULING OF THE COURT

On 16th May 2018, the High Court of Kenya at Nairobi ***(Msagha, J.)*** entered judgment in favour of ***the respondent, Purity Kemunto***, against ***the applicant, Nairobi Women's Hospital*** in a medical negligence claim. He awarded the respondent a total sum of ***Kshs 54, 712,078*** together with costs and interest at court rates. The applicant was aggrieved by the judgment and filed a notice of appeal against the whole judgment on 23rd May 2018.

Immediately thereafter the applicant applied before the same for stay of execution of the decree pending the hearing and determination of its intended appeal against the judgment. By a ruling dated 18th July 2018, the Court granted the applicant conditional stay of execution of the decree, obliging it, in addition to paying to the respondent a sum of ***Kshs 10 million*** covered by its insurance policy, to pay to the respondent half of the decretal sum and to secure the balance by a bank guarantee. The applicant was directed to comply with the said conditions with within 30 days from the date of the judgment, failing which the respondent was at liberty to execute the decree.

The applicant was once again aggrieved by the terms of stay of execution and filed a second notice of appeal on 23rd July 2018, evincing intention to appeal to this Court. On 27th July 2018, the applicant filed the motion on notice now before us seeking stay of execution of the ruling and order of the High Court, pending the hearing and determination of its intended appeal.

It is apt to note that on 24th July 2015, the respondent and the applicant's insurer, ***ICEA Lion Insurance Company Limited***, entered into a consent judgment on liability at 90% -10%, in favour of the respondent. The applicant applied in vain to set aside that consent order, contending that it was neither consulted nor party to it. It also applied vide an application dated 12th March 2018 to join the insurance company as a party in the suit for purposes of taking over liability in terms of the consent order. That application was still pending for determination when the judgment was delivered on 16th May 2018. As it turned out, the insurance policy covered the applicant to a tune of Kshs 10 million whilst the judgment that was ultimately entered against it was far in excess of Kshs10 million.

Prosecuting the application for stay of execution, the applicant relied on an affidavit sworn by its ***Executive Director and Chief Finance Officer, Reuben Waweru*** on 27th July 2018 and submitted that the conditions imposed by the learned judge were onerous and amounted to denial of stay of execution and further that that the learned judge erred by failing to consider that the quantum awarded to the respondent was the subject of the intended appeal. The applicant added that the learned judge had erred by failing to determined its application of 12th March 2018 before judgment and to consider the respondent's ability to refund the moneys ordered to be paid to her, should its appeal ultimately succeed. Lastly the applicant argued that as a hospital, it stood to suffer substantial loss and damage if the stay of execution was not granted and that in the circumstances, its intended appeal would be rendered nugatory if it succeeded. We were urged to consider that the applicant had already been paid to the respondent Kshs 10 million under the insurance policy and that it was not necessary to impose further conditions

for stay of execution as the learned judge had done.

The respondent opposed the application on the basis of her replying affidavit sworn on 6th August 2018. She submitted that as a result of the applicant's negligence, her baby had suffered 100% disability arising from severe cerebral palsy, thus requiring daily, specialized care. She added that in the circumstances the earned judge was not at fault for requiring the applicant to pay half of the decretal amount and to secure the balance by a bank guarantee, in addition to payment of the Kshs 10 million. It was the respondent's further submission that the applicant was at liberty to recover any moneys paid to her from the insurance company, and that there was no evidence that she would not be able to repay any moneys paid to her, should the appeal succeed.

We have carefully considered the application and submissions by learned counsel. There is a notice of appeal duly filed, which gives us jurisdiction to entertain this application. (*See* ***Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR)***. To entitle the applicant to the order of stay of execution that it has sought, the applicant is obliged to satisfy us that its intended appeal is arguable and that if we do not grant stay of execution and the appeal succeeds, it will be rendered nugatory. (See ***Jaribu Holdings Ltd v Kenya Commercial Bank Ltd. CA No. 314 of 2007).*** To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a *bona fide* issue deserving full consideration by the Court. Even one *bona fide* issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues. (See ***Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001).***

The applicant intends to argue that the learned judge erred by imposing onerous terms of stay of execution while the quantum awarded to the respondent is challenged. It further faults the learned judge for failing to consider that the application for joinder of the insurance company, which entered into the consent order, is still pending for determination. We are satisfied that the applicant's intended appeal is arguable and that the issues it intends to raise are not academic or frivolous. We are obliged not to say more about the merits of the intended appeal, since that is properly the province of the full court, which we should not anticipate least we embarrass the Court when it finally hears the appeal. (See ***Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA No. 95 of 1999).*** Indeed, that the learned judge was himself prepared to grant stay of execution is a strong indicator that the intended appeal is indeed arguable.

As regards the second consideration, whether the appeal will be rendered nugatory if successful, we note that there is no evidence on record on the respondent's financial ability, except the bland statement that she is an advocate of the High Court of Kenya. In determining this application, we are also required to bear in mind and indeed balance the respective hardships the parties stand to be exposed to, taking into account the special needs of the infant as well as the position of the applicant as a hospital. (See ***Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 227***). It is common ground that the respondent has already received Kshs 10 million.

We are ultimately persuaded that the applicant has satisfied both considerations under ***rule 5(2)(b)*** of the ***Court of Appeal Rules*** and is therefore deserving of an order of stay of execution pending the hearing and determination of its intended appeal. We accordingly stay execution of the ruling and order of the High Court dated 18th July 2018, except as regards the payment of Kshs 10 million to the respondent. Costs of this appeal will abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 12th day of October, 2018

W. OUKO, P.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR