



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)**

**CIVIL APPLICATION NO. 19 OF 2017 (UR No. 11/017)**

**BETWEEN**

**SGT CATHERINE ELIZABETH RUSSELL.....APPLICANT**

**AND**

**ABDISATAR SHEIKH HASSAN..... RESPONDENT**

*(Being an application for stay of proceedings pending the hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nanyuki, (Kasango, J.) dated 2<sup>nd</sup> February, 2017 in*

*H. C. C. No. 12 of 2015)*

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**RULING OF THE COURT**

The appellant, **Sgt Catherine Elizabeth Russell**, made an application by Notice of Motion to this Court on 27<sup>th</sup> February, 2017 premised on **Rule 5 (2) (b)** of the **Rules of this Court** seeking orders that:-

**1. (Spent)**

**2. Pending the hearing and determination of this application, there be a stay of the proceedings in Nanyuki Chief Magistrate's Civil Case Number 37 of 2012, Abdisatar Sheikh Hassan vs. Katherine Russell and Nanyuki Chief Magistrate's Civil Case Number 63 of 2012 Mohamed Noor Maalim vs. Katherine Russell.**

**3. Pending the hearing and determination of this application, there be a stay of the proceedings in Nanyuki Chief Magistrate's Civil Case Number 12 of 2015, Abdisatar Sheikh Hassan vs. Katherine Russell.**

**4. Pending the hearing and determination of the intended appeal, there be a stay of the proceedings in Nanyuki Chief Magistrate's Civil Case Number 37 of 2012, Abdisatar Sheikh Hassan vs. Katherine Russell and Nanyuki Chief Magistrate's Civil Case Number 63 of 2012 Mohamed Noor Maalim vs. Katherine Russell.**

**5. Pending the hearing and determination of the intended appeal, there be a stay of the**

**proceedings in Nanyuki Chief Magistrate's Civil Case Number 12 of 2015, Abdisatar Sheikh Hassan vs. Katherine Russell**

**6. The costs of the application abide by the outcome of the appeal.**

The application was made on the grounds, *inter alia*, that the High Court allowed on 2<sup>nd</sup> February 2017, the respondent's appeal from a decision of the Magistrate Court in Nanyuki CM Civil Case No. 37 of 2012 (Abdisatar Sheikh Hassan vs. Katherine Russell) dismissing the Civil Suit for want of jurisdiction. The appeal was allowed following objection on jurisdiction.

The background to the matter shows that Mohamed Noor Maalim, the respondent herein, filed suit No. 63 of 2012 in the Chief Magistrate's Court in Nanyuki against the appellant claiming special and general damages arising from bodily injuries sustained by him when Katherine Russell, the applicant, allegedly drove her motor vehicle registration No. 62 KE 77 so recklessly that it knocked and injured him (the respondent).

The applicant challenged the jurisdiction of the court on the basis of foreign immunity and sought an order for the striking out of the plaint and dismissal of the suit. In his ruling dated 17<sup>th</sup> February 2012, the learned Chief Magistrate (Hon. J. N. Nyaga) upheld the objection on jurisdiction and after making a finding that the suit was "barred by the principle of sovereign immunity" because at the time of the accident giving rise to the suit the applicant was employed by the British Army Training Unit Kenya (BATUK) and the motor vehicle she was driving belonged to BATUK. The learned Magistrate therefore proceeded to make a finding that the suit by the respondent was incompetent and devoid of chances of success.

The respondent, aggrieved by the decision of the Chief Magistrate, appealed to the High Court in Nanyuki in Civil Appeal No. 12 of 2015 which reversed the decision.

In the judgment dated 2<sup>nd</sup> February 2017, the High Court (**Mary Kasango, J**) after carefully perusing **Sections 6.2, 6.3, and 6.4** of the Memorandum of Understanding (MOU) between the Government of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland held that the personnel of BATUK based in Kenya have the same responsibility and obligation under the Kenya Civil Law, just like any other Kenya citizen." Accordingly, the learned Judge allowed the respondent's Civil Appeal No. 12 of 2015 and reinstated the latter's Civil Suit No. 37 of 2012 against the applicant. It is against that judgment that the applicant has appealed to this Court, vide the latter's Notice of Appeal dated 7<sup>th</sup> February 2017 lodged in Court on 13<sup>th</sup> February, 2017. Meanwhile, the respondent who got costs in the High Court appeal has moved to tax the same with a view to recover the same.

The applicant contends that she has an arguable appeal and that if the order for stay is not granted, her appeal will be rendered nugatory as the respondent may not be able to refund the costs if paid to him.

When the application came up for hearing on 19<sup>th</sup> April 2017, Mr. J. Mwiti, learned counsel for the applicant, submitted that taxation of costs in the High Court is underway and execution will ensue from it thereby rendering the appeal nugatory. It was his submission that the respondent may not be able to refund the money if it is paid and the appellant's appeal succeeds. He urged the Court to stay execution in terms of prayers 2 and 3 (supra). Mr. Mwiti relied on the affidavit sworn on 24<sup>th</sup> February 2017 by Major Bonnie Nicole in support of the application.

Although the application was served on 27<sup>th</sup> February 2017 on Messrs J. M. Mwangi & Company, the advocates on record for the respondent, there was no appearance by the said firm or by their client. The hearing therefore proceeded *ex parte*.

We have perused the Notice of Motion by the applicant and duly considered the submissions made by Mr. Mwiti on the latter's behalf.

In considering whether to exercise its discretionary jurisdiction to grant stay under Rule 5 (2) (b) of **The Court of Appeal Rules**, the Court is guided by principles it has developed. Those principles are designed to balance two parallel propositions, first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and secondly that a litigant who is aggrieved by a decision must not be deprived of his right to challenge the impugned decision to the next higher court (see **Butt vs. Rent Restriction Tribunal [1982] KLR 417** and **Kenya Shell Ltd vs. Kabiru & Another [1986] KLR 410**).

These principles require an applicant to satisfy the court first, that he has an arguable appeal. To do this, an applicant must show that he has an arguable appeal, that is to say, that the appeal is not frivolous. It is now settled that an applicant need not demonstrate a plethora of arguable points. A solitary arguable point is sufficient. In determining whether the appeal is arguable, the Court will, advisedly, eschew delving into the merits or otherwise of the appeal lest it prejudices the intended appeal or embarrasses the court hearing it. As often repeated by this Court, an arguable appeal is not necessarily one that is bound to succeed. It is sufficient that the applicant has an appeal that is arguable even if it is on a single point of law.

A perusal of the application shows that the intended appeal is not frivolous. The issue whether the impugned decision was predicated on the Memorandum of Understanding between the Government of Kenya and the Government of the United Kingdom or on Customary International Law principle of sovereign immunity and what the law is on the point is arguable. It is our finding that the intended appeal is arguable.

As regards the second limb of the twin principle, namely, whether if stay is not granted, the appeal, if successful, shall be rendered nugatory, we have duly considered the matter. In our view, the applicant failed to satisfy us on this limb. It was not shown that the respondent is incapable of refunding the taxed costs. The onus to show this reposed on the applicant. It was not discharged. We so find.

In light of this, we are unable to grant the stay. Accordingly, we dismiss the applicant's Notice of Motion dated 24<sup>th</sup> February, 2017 which was lodged in Court on 27<sup>th</sup> February, 2017 and we award the costs of the application to the respondent.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of May, 2017.***

***G. B. M. KARIUKI SC***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

***S. ole KANTAI***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**