



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NO. NYR. 52 OF 2017 (UR 35 OF 2017)

BETWEEN

DAVID MARWA STEADY LTD.....1ST APPLICANT

STEADY LIMITED.....2ND APPLICANT

AND

NELSON NJIHIA KIMANI RESPONDENT

(Application for stay of execution of the judgment and decree of (Mulwa, J.) dated 13th April, 2017 in Nakuru HCCC CAUSE NO. 294 OF 2010)

RULING OF THE COURT

The motion dated 16th May, 2007 was filed by **DAVID MARWA** and **STEADY LIMITED**, the 1st and 2nd applicants respectively. **NELSON NJIHIA KIMANI** was named as the respondent. In the motion the applicants sought an order inter alia:

“The honourable court be pleased to grant an order of stay of execution(sic) the judgment and decree of the Honourable Court (Hon. Justice J.N. Mulwa, Judge) made on the 13th day of April 2017 vide NAKURU HCC. NO. 294 of 2010, pending the hearing and determination of the Intended Appeal to this Honourable Court against the said Judgment and Decree.”

The motion was supported by the affidavit of **DAVID MARWA** sworn on the 16th May, 2017 in which he deponed that on 10th January, 2010 the respondent filed suit against the two applicants arising from an accident that occurred on 15th September, 2009; that on 13th April, 2017 judgment was entered in favour of the respondent to the tune of Ksh.1,509,445/-; that being aggrieved, the applicants filed a Notice of Appeal dated 22nd April, 2017; that the applicants have an arguable appeal as the respondent failed to prove his claim on liability and quantum; and that the respondent had no known means of income hence the appeal would be rendered nugatory unless an order for stay is issued.

In response, the respondent swore a replying affidavit dated 19th May, 2017 and denied the averments on the applicant’s affidavit. He contended that he proved his case on liability and quantum and that contrary to the applicant’s contention the trial Judge’s findings were not based on sympathy; that he is a person of

means and he is capable of refunding the decretal sum should the appeal succeed and finally that the “...intended appeal raises no triable issue and lacks chances of success.”

On 20th June, 2017 the motion came before us for plenary hearing. In urging the motion, Mr. Oguttu learned counsel for the applicant reiterated the averments in the applicant’s affidavit in support of the motion. He relied on this court’s decision of **GOVERNORS BALLON SAFARIS LIMITED VS. SKYSHIP COMPANY LIMITED CA NO. 32 OF 2015 (UR)** for the proposition that “in considering whether an arguable appeal has been made out, it is not a requirement that the appeal will necessarily succeed. It is sufficient that the appeal appears to be one that deserves to be fully argued before the court. And besides an appeal is considered arguable if it raises a single bona fide point only. Secondly it was learned counsel’s submission that the respondent is not in any gainful employment and hence if the decretal sum was to be paid to him, he was unlikely to have it refunded and/or recovered from him.

In opposing the appeal Miss Oteyo learned counsel for the respondent conceded that the appeal was arguable. Her contention, however, was that it had no chance of success. She proposed that $\frac{3}{4}$ of the decretal sum be paid to the respondent whilst $\frac{1}{4}$ be paid into court as a condition for the grant of stay. In support of the conditional stay she relied on this court’s decision of **NATION NEWSPAPER LIMITED VS PETER BARAZA RABANDO, CA NO. 1 OF 2007** cited by the applicant in support of her contention that the interest of the parties had to be taken into account and safeguarded. She submitted that the respondent has a decree in his favour and he should not be denied the fruits of his judgment. On the nugatory aspect, it was her contention that the respondents were in a position to repay the decretal sum, should the appeal succeed. However, she did not elaborate on the respondent’s source of income and/or his financial capability.

The motion before us is brought under **Rule 5(2)(b)** of this courts rules. Two conditions must be satisfied by an applicant in order for us to grant an order of stay. Firstly, an applicant has to show that he has an arguable appeal. An arguable appeal need not be one that will succeed. Secondly, an applicant has to satisfy us that the appeal would be rendered nugatory unless an order of stay is granted. The above position was enunciated in this court’s decision of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI** (2014) eKLR wherein this court whilst considering an application under **Rule 5 (2) (b)** expressed itself as follows:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR as follows:

i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground

of appeal is raised.

x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

Applying the two principles to the motion before us we note that during the hearing before us the respondent through his counsel conceded that the applicant has an arguable appeal. It was counsel’s view, however that the appeal had no chances of success. As stated above, an arguable appeal need not be one that may necessarily succeed, but suffice to state that one that is not frivolous. It is trite law that the court considers arguability and not the chances of success.

On the nugatory aspect, although in his application and during the plenary hearing the respondent contended that he is a man of means, the said means were not demonstrated. It was left unclear to us as to the means alluded to by the respondent. Admittedly the respondent has not been in any gainful employment, courtesy of the accident. We are therefore; satisfied that the applicant has been able to satisfy the two conditions precedent before issuance of an order for stay. The motion dated 16th May, 2017 is allowed in terms of prayer 2 therein. Be that as it may and given the special circumstances of this case and whilst noting that the applicant has already filed his appeal (Appeal No. 32 of 2017), we direct that the appeal be fast tracked for hearing. Accordingly the appeal is fixed for hearing on 26th September, 2017. A hearing notice will issue to the parties. The costs of this motion shall be in the appeal.

Dated and delivered at Nyeri this 19TH day of July, 2017.

G. B. M. KARIUKI

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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