



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

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

**CIVIL APPLICATION NO. 93 OF 2017**

**BETWEEN**

**JUBILEE HAULIERS LTD.....1<sup>ST</sup> APPLICANT**

**VAPUL PATEL.....2<sup>ND</sup> APPLICANT**

**DAVID KIMOSBEI KEMEI.....3<sup>RD</sup> APPLICANT**

**AND**

**BRIAN MUCHIRI WAIHENYA.....RESPONDENT**

*(Being an Application for stay of execution against the*

*judgment of the High Court of Kenya at Nakuru (Mulwa, J.)*

*dated 27<sup>nd</sup> July, 2017 in HCCC No. 34 of 2014)*

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**RULING OF THE COURT**

The Applicants **JUBILEE HAULIERS LTD**, **VAPUL PATEL** and **DAVID KIMOSBEI KEMEI** filed a Notice of Motion dated 3<sup>rd</sup> August, 2012 and sought several orders including an order:-

**“That pending hearing and determination of the Appeals preferred herein, there be stay of execution of Justice J.N. Mulwa’s judgment in Nakuru HCCC No. 34 of 2014 delivered on 4<sup>th</sup> May, 2017 and her subsequent ruling delivered on 27<sup>th</sup> July, 2017 in the same cause.”**

The application was supported by the affidavit of JANEROSE GITONGA, the Senior Legal Officer at FIRST ASSURANCE CO. LTD sworn on 3<sup>rd</sup> August, 2017. In her affidavit, she deposed that the respondents filed Nakuru HCCC No. 34 of 2014 which was subsequently heard by Mulwa, J; that in the judgment delivered on 4<sup>th</sup> May, 2017, the applicants were held to be 100% liable for the accident that occurred on 8<sup>th</sup> February 2014; that the respondent was awarded “**a colossal amount of Ksh.28,925,844.00**”; that the applicants filed an application for stay at the High Court; that Mulwa, J. in

a ruling dated 27<sup>th</sup> July, 2017 ordered the applicants to pay a sum of Ksh.10 million to the respondent and to deposit the rest of the money in court within 30 days; that arising from the outcome of this ruling the applicants filed another Notice of Appeal.

The respondent **BRIAN MUCHIRI WAIHENYA** in a replying affidavit dated 1<sup>st</sup> September, 2017 countered the averments in the affidavit of JANEROSE GITONGA. He deposed that the applicant has no arguable appeal and that his “**family is capable of repaying...**” any amounts paid to him.

The motion came before us for hearing on 25<sup>th</sup> September, 2017. Mr. Situma learned counsel for the applicants urged the motion whilst Mr. Gekong’a learned counsel for the respondent opposed the motion.

In urging the motion Mr. Situma contended that the applicants have an arguable appeal as although they were found to have been 100% liable, there was evidence that the accident was caused by the driver of a motor vehicle registration No. KAU 325 B. On quantum, Mr. Situma submission was that the sum awarded was colossal and further that the special damages were awarded inspite of lack of supporting receipts.

On the nugatory aspect, it was Mr. Situma’s submissions that absent an order of stay, the execution would be levied against the applicants, the pendency of the hearing of the intended appeal notwithstanding.

In opposing the motion, Mr. Gekong’a submitted that the applicants do not have an arguable appeal as the respondent’s evidence in the trial court was not controverted at all and further that there were no third party proceedings to enjoin the party who the applicants fault for the causation of the accident. He refuted the applicant’s contentions that the quantum was colossal. He maintained the view that the learned judge exercised her discretion judiciously in awarding the special damages.

The motion before us is premised on **Rule 5(2)(b)** of this Court’s Rules. For an applicant to avail himself/herself of the relief under **Rule 5(2)(b)**, he/she must establish that he/she has an arguable appeal and secondly that the appeal will be rendered nugatory unless an order of stay is granted.

In the case of **STANLEY KANGETHE KINYANJUI VS TONY KETER & 5 OTHERS [2013] eKLR** this court gave an apt summary of the jurisprudence touching on applications premised on **Rule 5(2)(b)** of the rules, to wit:-

*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. See RUBEN & 9 OTHERS V NDERITU & ANOTHER (1989) KLR 459.*

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

*iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. HALAI & ANOTHER V THORNTON & TURPIN (1963) LTD. (1990) KLR 365.*

*iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. DAVID MORTON SILVERSTEIN V ATSANGO CHESONI, CIVIL APPLICATION NO. NAI 189 OF 2001.*

*v) An applicant must satisfy the court on both of the twin principles.*

*vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. DAMJI PRAGJI MANDAVIA V SARA LEE HOUSEHOLD & BODY CARE (K) LTD, CIVIL APPLICATION NO. NAI 345 OF 2004.*

*vii) 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. JOSEPH GITAHI GACHAU &*

viii) *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. DAMJI PRAGJI (supra).*

ix) *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD [2002] 1 EA 227 AT PAGE 232.*

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

xi) *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. INTERNATIONAL LABORATORY FOR RESEARCH ON ANIMAL DISEASES V KINYUA, [1990] KLR 403.*

In the motion before us, the applicant contended that the learned judge erred in finding the applicants to be 100% liable, and further that the accident was caused by the driver of motor vehicle registration No KAU 325 B who died in the accident. It was also counsel’s contention that the police had absolved the applicant from liability.

On our part and whilst appreciating that this is an application for stay pending an intended appeal which will be heard in the fullness of time, we hasten not to make definitive findings. Be that as it may and from the record it would appear that the applicants did not call any witness to rebuff the testimony of the respondent and his witnesses. Secondly, contrary to the assertion by the applicants, the record before us does not show that the police absolved the applicant from blame. On the quantum, we note that the sum awarded as damages for pain and suffering was 8,000,000.00 and the rest of the awards were in respect of several heads under special damages. We have therefore come to the inevitable conclusion that the applicants have not demonstrated that they have an arguable appeal to succeed in an application under **Rule 5(2)(b)** of our rules.

Having come to the above conclusion, we do not deem it necessary to address the aspect of the appeal being rendered nugatory, absent stay of execution. This is because as stated herein before, an applicant has to establish the two limbs of arguability and the appeal being rendered nugatory unless stay is granted to succeed in an application under **Rule 5(2)(b)** of our rules.

The upshot of the above is that the motion is devoid of merit and it is dismissed with costs.

*Dated and delivered at Nakuru this 27<sup>th</sup> day of September, 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**