IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (GITHINJI, OUKO & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI. 4 OF 2015 (UR.4/2011)

BETWEEN

CHAIRMAN BOARD OF GOVERNORS NG'IYA GIRLS HIGH SCHOOL……APPLICANT

AND

MESHACK OCHIENG' T/A MECKO ENTERPRISES…….....1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF EDUCATION……...2ND RESPONDENT

ATTORNEY GENERAL……..….....….3RD RESPONDENT

SECRETARY CORDINATOR ECONOMIC STIMULOUS

PROGRAMME PUBLIC WORKS…….....….4TH RESPONDENT

CABINET SECRETARY NATIONAL TREASURY….....…….5TH RESPONDENT

(An application for stay of execution pending the filing and determination of an intended appeal from the Ruling and decree of the High Court of Kenya at Nairobi J, Kamau, J.) dated 19th December, 2014

in

MISC Civil Application No. 445 of 2013)

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RULING OF THE COURT

Before us is a Notice of Motion dated 6th January 2015 that arises from the ruling and order of J. Kamau, J. made on 19th December 2014, in which the applicant prays for orders that:

a. *There be a stay of execution of the Decree of the Superior Court dated 18th March 2014 pending the filing and determination of an intended appeal against the Ruling and Orders of the Superior Court dated 19th December 2014;*

b. *For the avoidance of doubt the 2nd, 3rd, 4th and 5th Respondents be directed not to release any*

further payment to the 1st respondent in satisfaction of the Decree of the Superior Court dated 19th December 2014;

c. *The proceedings in the Superior Court in Nairobi Milimani Commercial Court Miscellaneous Application No. 445 of 2013 be stayed pending the filing and determination of the intended appeal from the Ruling and Orders dated 19the December 2014;*

d. *The respondents herein and each of them be restrained from acting upon the said orders of the Superior Court dated 19th December 2014, whether directly or indirectly seeking to enforce them or otherwise howsoever, pending the filing and determination of the intended appeal therefrom;*

e. *AND OR the status quo prevailing on the 19th December 2014 or such other date as this Honourable Court deems fit, be preserved and maintained pending the filing and determination of the intended appeal from the said orders made by the Superior Court on 19th December 2014.*

The background to this application relates to a building contract entered into between the applicant and the 1st respondent for the construction of classrooms and an administrative block in a labour only contract in the sum of Kshs. 9,933,307.90. Subsequent to the agreement between the parties, the Government agreed to fund the project for a sum of Kshs. 30,000,000/- under the Economic Stimulus Programme (ESP) following the upgrading of Ngiya Girls to a National School and Centre of Excellence. When the construction was underway, a dispute arose between the applicant and the 1st respondent following claims by the 1st respondent that he had supplied building materials for the construction which was not a term in the labour only contract. The dispute was referred to a single arbitrator, Quantity Surveyor, Newton Dishon Maungu for determination, and who made the following award:

a. *that the Claimant's Contractual Claim/Application has merit to extend the above assessment.*

b. *the Final Payment Certificate for Kshs. 24,048,181 issued by the ESP Project Consultants, is valid for payment , and should be paid with accrued interest.*

c. *the respondents shall pay to the claimant Kshs. 30,571.250.10 which included the Final Payment Certificate for Kshs. 24,048,181.00.*

d. *the sum of Kshs 30,571,250.10 was to be paid within thirty (30) days from 30th September 2013 and in default the same would attract compound interest at commercial bank lending rate of Kshs 17.50% per annum until payment in full;*

e. *the applicant would pay the arbitrator's fees of Kshs 1,101,883.70.*

The 1st respondent instituted proceedings in the High Court seeking to have the award recognized and enforced as a judgment of the court. On 24th October 2013 Mr. Kiarie the learned State Counsel for the 3rd respondent sought clarification in respect of discrepancies in the award. On 13th November 2013, the arbitrator clarified the award as follows;

i. *award on materials: Kshs 18,942,992/.66 and*

ii. *award on labour: Kshs. 5,105,188.44/-*

iii. *Despite previous payments amounting to Kshs. 13,703,761/- no amount should be deducted from the two aforementioned awards amounting to Kshs.24,048,181/- as per a summary of statement for payment.*

On 11th December 2013, the 3rd respondent on behalf of the applicant filed a notice of motion seeking to set aside the final Award, and on 27th February 2014, the court delivered its ruling wherein J. Kamau, J.

ruled that the claim for materials fell within the arbitrator's terms of reference; that the award of Kshs. 6,523,069.10 appeared to be simple interest and therefore the court could not interfere with the award. But the court set aside the arbitrators award of compound interest at the rate of 17.5% per annum on Kshs 30,571,250.10 from September 2013 until payment in full.

Subsequent to the ruling, a consent was entered on behalf of the applicant by the 3rd respondent in which, the 1st respondent was to be paid a sums of Kshs. 31,873,133.90 together with interest as specified in the Final Award. The applicant was dissatisfied with the consent entered on their behalf, and appointed Messrs Otieno, Ragot & Company Advocates to take over the conduct of the case and to set aside the decree issued by the court. The advocates wrote to Mr. Kiarie on 24th April, 2014 informing him that they would be taking over the conduct of the suit, and on the same day filed a formal application on behalf of the applicant seeking;

i. *Spent*

ii. *Leave be granted to M/S Otieno Ragot & Company Advocates to come on record for the 2nd respondent (the applicant) in this matter in place of the Attorney General;*

iii. *Pending the hearing and determination of this application, there be a stay of execution of the decree issued herein;*

iv. *An interim order of stay of execution in terms of prayer (3) aforegoing do issue ex-parte in the first instance;*

v. *The decree issued in this suit on March 2014 be set aside;*

vi. *The consent order recorded in this suit on 18th Mach 2014 and the judgment and decree emanating therefrom be reviewed and set aside;*

vii. *The costs of this application to be provided for.*

On the same day, Gikonyo, J, granted an order of stay of execution, of the decree pending the hearing of the application, which orders the advocates were unable to extract, as the entire proceedings and court order had been removed from the court file. The order was subsequently obtained after the advocates complained, to the Deputy Registrar.

In her ruling of 19th December 2014, J. Kamau, J declined the applicant's request to be allowed to change legal representation on the grounds that the application was undated, and therefore incompetent. Further, that since the applicant was a public school, it could only be represented by the 3rd respondent as no Ministry or Department could engage the services of a consultant to render any legal services relating to the functions of the Attorney General, particularly as there was no evidence to show that the Attorney General had given approval to the change of written representation.

Being dissatisfied with the ruling of the High Court the applicant has filed Civil Appeal No. 54 of 2015 to challenge that decision and in the meantime brought the instant notice of motion under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules*** for orders of stay of execution and further proceedings. The application is premised on several grounds on its face and on a supporting affidavit sworn by ***David Okech*** the Chairman of the applicant was where in it was deponed that since the ruling was delivered the 1st respondent had been paid a sum of Kshs. 3,000,000/- and that the balance was due to be paid in the course of the financial year. It was further deponed that if the total sum of Kshs.30,000,000/- was paid to the 1st respondent he would not be in a position to refund the amount in the event the appeal were to succeed.

When the application came before us for hearing, ***Mr. D. Otieno***, learned counsel for the applicant submitted that, the application for change of legal representation was dismissed for reasons that, the

applicant was a department of government, and so could only be represented by the 3rd respondent who had not consented to the change of legal representation. In his view, whether the applicant was indeed a government department was arguable. Counsel went on to submit that, there was also the question of whether the refusal by the learned judge to allow the applicant to change counsel was in accord with Article 48 of the Constitution, as it denied the applicant the right to choose its counsel. Finally, there was the issue of the missing court documents where the learned judge failed to take into account the court's responsibility as the custodian of documents filed in court.

As to whether the appeal would be rendered nugatory if the application for stay of proceedings and execution was declined, counsel contended that the sums were in respect of a public institution and were for the purposes of upgrading the school to national school status. So that if the funds were released to the 1st respondent, the loss suffered by the applicant would be immense and that the appeal would be rendered nugatory. Counsel added that the 1st respondent had not demonstrated that he had the financial capability to repay the sums if the appeal was successful. Counsel contended that orders were also sought against the 2nd to 5th respondents, as the 1st respondent had since disclosed that while the application before the High Court was pending, a sum of Kshs. 2.2 million was paid without the knowledge or consent of the applicant.

In his response ***Mr. Meshack Ochieng'*** who appeared in person referred to his replying affidavit filed on 27th January 2015 and stated that, following the adoption of the arbiteral award in court by consent, it became final and binding on the parties.

He further stated that, Otieno, Ragot and Company Advocates were strangers to the arbitration which has since been determined, and execution of the decree against the applicant has already commenced, which execution will not affect the applicant, the students, the parents of the school or the public at large. The deponent continued that the application to set aside the award was out of time and amounted to an abuse of the court process; that in any event no appeal from arbitral proceedings lies to this Court. Mr. Ochieng' urged that the application be dismissed.

In his reply Mr. Otieno argued that, the contract between the school and the 1st respondent was a labour only contract, and the issue of variation of the contract was not for consideration by the arbitrator. The issue in dispute related to the supply of materials which had not been verified, and that the arbitrator in the award had gone well beyond the scope of the arbitration. Counsel concluded that the contract had since been terminated, the works were incomplete, and that there was an outstanding decree that was capable of being executed any time against the school.

The 2nd to 5th respondents though served on 19th February 2015 did not appear before us.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application. The jurisdiction exercisable by this Court under ***rule 5(2) (b)*** is discretionary and the applicable principles are well settled. For an applicant to succeed, two requirements must be satisfied, firstly that, the intended appeal is arguable, in that it is not frivolous; and secondly that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory. In ***Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)***, this Court stated thus:-

> ***"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-***

1. ***That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***

2. ***That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."***

Turning to the first limb of whether the applicant has an arguable appeal, it is undisputed that the issue in the main turns on the applicant's application for leave to be granted to Otieno, Ragot & Company Advocates to represent the applicant in place of the 3rd respondent. In dismissing the application, the learned judge found that the applicant was a body corporate with capacity to sue or be sued, and being a public girls boarding school that offers secondary school education to girls from all over the country and depending on subsidized school fees and grants from the Government for specific projects, placed the school under the control of the Ministry of Education. Consequently, it followed that, because it was a government entity or department, the 3rd respondent was mandated to represent it in the proceedings before the court. The court went further stated that the applicant had not demonstrated that the 3rd respondent had consented to the proceedings being taken over by a private firm as required by ***section 17 (1)*** of the ***Office of the Attorney General Act***, particularly after judgment had already been entered following the consent by the parties in respect of the arbitral award.

We consider that it is arguable whether the applicant in this case can be considered a department of Government, and therefore liable to the sole legal representation by the 3rd respondent. Furthermore, whether or not the applicant has the right to choose its counsel as specified by Article 48 of the Constitution is also an arguable issue for determination by this Court.

The second limb, is whether the appeal would be rendered nugatory should the application be denied. Though it was not argued by either of the parties, we note that the court below merely dismissed the application such that, as variously stated by this Court, there were no orders that were capable of being stayed. See ***Western College of Arts and Applied Sciences vs. Oranga & Others (1976) KLR 63***.

Yet having said that, it cannot be overlooked that what is before us is an application for stay of proceedings under ***rule 5 (2) (b)*** of this Court's rules for stay of execution of the decree and proceedings, or in the alternative, for the Court to issue a *status quo* order. It arises from the applicant's apprehension that either the outstanding decree will be executed against it, or that the sums allocated to it under the EPS will be paid to the 1st respondent, thereby jeopardising the subject matter, which would in turn render the appeal nugatory.

It is also not lost on us that, the applicant in effect is an all girls' boarding school, comprising a student community of 1000 students where any execution would result in disproportionate, irreversible and irreparable harm and suffering to the school, the student body, the parents and community as a whole to the extent that, we do not think that the applicant could be adequately compensated in damages. Furthermore, the 1st respondent has stated that he has since received an amount of Kshs.2.2 million, and yet no evidence was produced to show that he would be in a position to refund the sums in the event that the appeal is successful.

It is noteworthy that, in past decisions where the application under ***rule 5 (2) (b)*** arose from a negative or dismissal order issued by the lower court, this Court has, in seeking to address the particular circumstances of each case in a just and fair manner, having regard to the overriding objectives of the Court, issued orders for the preservation of the *status quo* pending the hearing and determination of the appeal.

In ***Joseph Karobia Gicheru vs Michael Gachoki Gicheru Civil Application No. Nai. 251 of 2009 (NYR. 28/09)*** this Court stated;

> ***"At the outset, we would like to reinforce this Court's past rulings that negative orders do not attract stay orders because there is nothing to stay in a negative order. However in the special circumstances of this case we note that there is a serious jurisdictional issue as well as an issue touching the existence or non existence of a trust concerning registered land. In order to give the parties an opportunity of ventilating the issues on appeal, we consider that by making an order for the preservation of the status quo as at the date of this ruling we shall have given effect to the overriding objective because such an order would ensure that the subject matter of the dispute is preserved until the***

> ***hearing of the appeal on merit. In the circumstances and in the spirit of the overriding objective, what commends itself as just is the making of an order preserving the*** *status quo."*

More recently, in ***Total Kenya Ltd vs Kenya Revenue Authority Civil Application No. Nai. 135 of 2012 (UR 101/2012),*** a *status quo* order was issued, despite the Court appreciating that applicant's suit had been dismissed, resulting in a negative order. It is instructive that, in addition to the exercise of the overriding objectives or (oxygen principles) required by ***section 3A and 3B*** of the ***Appellate Jurisdiction Act***, and ***Rule 1 (2)*** of the ***Court of Appeal Rules*** on the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of process, both the letter and spirit of ***Article 159 (2) (d)*** of the ***Constitution*** were faithfully applied to arrive at the resultant orders.

In similar circumstances, in ***Prof. Njuguna S. Ndung'u vs The Ethics & Anti Corruption Commission and 3 others Civil Application No. Nai. 304 of 2014 (UR 227/2014),*** *status quo* orders were granted to preserve the substratum of the appeal.

There it was stated thus,

> ***"A proper reading of this Court's decision in Equity Bank Ltd vs West Link Mbo Ltd (supra) shows that the Court has never been antipathetic towards the grant of what may be called conservatory orders in proper cases the aim being to preserve the substratum of the appeal, to maintain the*** *status quo* ***and to avoid a scenario where parties exercising their undoubted right of appeal are embarrassed by harm being visited upon them pending the appeal. It is accepted that other than flowing expressly from the Rules, the power to order a stay of execution in (sic) inherent in the Court and it may, in appropriate cases, invoke and deploy the same*** *ex-debito justiae"*

Likewise, we observe that having regard to the individual and distinct circumstances of this case, unless the subject matter of the intended appeal is preserved by way of an order of *status quo*, there is the possibility of real harm being inflicted upon the applicant to the extent that the intended appeal would be rendered nugatory.

Accordingly, in exercise of our inherent jurisdiction, we allow the applicant to the extent that we order that the *status quo* prevailing on the date of this Ruling, including of the proceedings in the High Court, be preserved and maintained pending the filing and determination of the intended appeal from the orders of the High Court of 19th December 2014,. For avoidance of doubt, status quo means that the decree of the High Court dated 18th March, 2014 shall remain unexecuted pending the filing and determination of the appeal. Cost of this application shall abide by the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 8th day of MAY, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR