IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.) CIVIL APPLICATION NO. NAI. 166 OF 2014

BETWEEN

KENYA PIPELINE COMPANY LIMITED…….…… APPLICANT

AND

DUNCAN NDERITU NDEGWA ……...…..... 1ST RESPONDENT

L.Z. ENGINEERING CONSTRUCTION LTD. ……..……. 2ND RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (P. Nyamweya, J) dated 1st August, 2013)

in

H.C.C.C NO. 2577 OF 1990)

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RULING OF THE COURT

The application before us is brought under **Article 164(3)** of the **Constitution, Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Rule 1(2), 5(2)(b)** of the **Court of Appeal Rules** seeking *inter alia* an order to stay execution of the decree arising from the Judgment in H.C.C.C No. 2577 of 1990 pending the lodging, hearing and determination of an intended appeal to this Court.

The proceedings before the High Court were commenced through a plaint dated 25th May, 1990 where **Duncan Nderitu Ndegwa**, (**the "1st**

respondent"), filed suit against **Kenya Pipeline Company Limited (the "applicant")** and **L.Z. Engineering Construction Limited**, (**the "2nd respondent")**. It was claimed in the suit that the 1st respondent was the owner of landed property known as L.R. No. 12422/22 situate at Karura in Nairobi and that the applicant was the registered owner of an adjacent parcel of land L.R. No. 12422/23. Further, that the applicant had contracted the 2nd respondent to develop its said premises by erecting several houses, roads, and other related works, and that in the process of carrying out the works, the applicant and the 2nd respondent committed several acts of trespass on the 1st respondent's property particulars which were set out in the plaint.

It was claimed in the plaint that as a result of those acts of trespass, the 1st respondent's said property measuring about 6.7 acres was totally wasted while the remainder of the parcel measuring about 13.19 acres had been rendered landlocked, inaccessible and unusable.

Thus the 1st respondent asked the High Court for the following remedies against the applicant and the 2nd respondent: special damages being the value of the land in the sum of Kshs.16,700,000/-; mesne profits at the rate of 50,000/- per month from the date of filing suit until its determination; general damages; an injunction to restrain the defendants jointly and severally from continuing /repeating wrongful acts and interest on damages awarded.

The applicant filed a defence dated 18th July, 1990 and admitted being the owner of the suit property Land Reference No. 12422/23. However it denied committing the acts of trespass alleged by the 1st respondent. The applicant stated that it instructed the 2nd respondent to develop its premises by erecting several houses, roads, and other related works, as an independent contractor who was directly responsible and liable to third parties for any loss, damage, claim or injury connected or arising in the course of the works.

The 2nd respondent filed a defence dated 29th June, 1990 and wholly denied the 1st respondent's suit.

After hearing the parties, judgment was entered for the 1st respondent against the 2nd respondent based on admission and the Court directed that the suit proceed for assessment of damages.

On hearing the case, the learned judge of the High Court, P. Nyamweya, J, found that the 2nd respondent was the servant of the applicant and the applicant's liability as an employer of the 2nd respondent was complete and total. She awarded the 1st respondent special damages Kshs.3,284,760/=, and loss of profits at Kshs.50,000/= per month with interest of each at court rates from the date of filing suit until payment in full. She also awarded general damages at Kshs.100,000/= as compensation for the infringement of the plaintiff's right to use and enjoy the suit property as a result of trespass.

It is that decision that has provoked the intended appeal against the decision in its entirety and the application before us to stay the execution pending the hearing and determination of the intended appeal. When the matter came before us the parties presented written submissions and appeared before us for highlighting.

Mr. Cyprian Wekesa, learned counsel for the applicant, *inter alia* submitted that the applicants have an arguable appeal as shown in the draft Memorandum of Appeal which was annexed to the Motion. Learned counsel urged that whether or not the 2nd respondent was a servant of the applicant, or an independent contractor and whether the applicant could be vicariously liable for trespass and torts of the 2nd respondent was an arguable point. On this issue counsel submitted further that the 2nd respondent was awarded the tender for construction works after a competitive tendering process hence it was not an employee or servant of the applicant. He contended that it is arguable whether the applicant exercised a high degree of control over the manner in which the 2nd respondent carried out work as mandated under the contract. The applicant submitted that the learned judge erred in making a finding on the evidence presented by the applicant, that is, that the 2nd respondent was not an independent contractor and that the applicant was vicariously liable for the tort of trespass alleged against the 2nd respondent by the 1st respondent. Learned counsel further submitted that it was arguable whether there was legal basis for the trial court to award special damages for "cost of reinstatement" and "loss of profits" when the same were neither pleaded nor proved.

On the nugatory aspect, learned counsel for the applicant submitted that the payment of the judgment sum would cripple the operations of the applicant, a strategic State Corporation, and that this would render the intended appeal nugatory. On the other hand the applicant contended that the 1st respondent who is of advanced years has surrendered his title to parcel of land L.R. No. 12422/22 for subdivision and

transferred the subdivisions to 3rd parties and the applicant does not have knowledge of the personal wealth of the 1st respondent that it would recoup if the appeal was to succeed.

Miss Edna Oginda, the learned counsel for the 1st respondent opposed the application and submitted that there was no arguable appeal. According to counsel it had not been shown that the learned judge had exercised her discretion wrongly in entering judgment for the 1st respondent. On the nugatory aspect, learned counsel submitted that the 1st respondent is a man of means and is more than able to repay the judgment sum. This was evidenced by the fact that the 1st respondent was a major shareholder of National Industrial Credit Bank **("NIC").** Furthermore, counsel relied on the case of Kenya **Shell Limited v. Benjamin Karuga Kibiru & Anor [1986] KLR 410** in which it was held that it is not normal in money decrees for the appeal to be rendered nugatory, if payment is made.

The principles applicable for the determination of applications under ***rule 5 (2) (b)*** of this Court's Rules are now well settled, as was observed by

this Court in **Patrick Mweu Musimba v. Richard N. Kalembe Ndile & 3 others [2013] eKLR** in the following way:

> ***"The law applicable in respect of applications under Rule 5(2)(b) of the Court of Appeal Rules is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective. See Githunguri vs Simba Credit Corporation Ltd 2 [1988] KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982-88] 1088,*** *and* ***Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd [2006] eKLR 1."***

We have perused the Motion, the respective affidavits and considered the learned counsels' rival submissions. Whether or not the 2nd respondent was an employee of the applicant or was performing the contracted works as an independent contractor is obviously an arguable point. So is the point whether the trial court could award what would seem to be special damages without the same being specifically pleaded and proved.

As for the nugatory aspect, we find that this being a money decree, onus is on the 1st respondent to show that he is a man of means. This Court in **NAIROBI CIVIL APPLICATION NO. 238 OF 2005 National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (UR)** stated:

> ***"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."***

Further as regards to money decrees in the case of **Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)** this Court stated thus:

> ***"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."***

Although the 1st respondent has stated through production of what appears to be a newspaper report that he is a shareholder of a bank it has not been demonstrated what that shareholding represents in terms of money. We note that the decree drawn is for a colossal sum in excess of Kshs.60,000,000/=. The applicant is a State Corporation engaged in management of the oil sector. Asking it to pay such a sum of money to the 1st applicant who may not be able to pay it back may very well render the intended appeal nugatory.

We are satisfied that the applicant has satisfied both limbs of the principles which we apply in applications such as this. In the event, and being a money decree, we are of the respectful opinion that we should grant a conditional stay of execution of the decree pending the intended appeal. We therefore order that the Motion be and is hereby allowed on condition that the applicant shall deposit Kshs.15,000,000/= in an interest earning account in the joint names of the advocates for the parties within 30 days of today in default the Motion to stand dismissed. Costs of the Motion shall be in the appeal.

Dated and Delivered at Nairobi this 11th day of December, 2015.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

…….

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