IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, OUKO, MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 96 OF 2013

BETWEEN

NATION MEDIA GROUP LIMITED.....APPLICANT

AND

CRADLE-THE CHILDREN'S FOUNDATION

SUING THROUGH GEOFFREY MAGANYA).....RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an intended appeal against the judgment and decree by the

Hon. Lady Justice Githua delivered on 21st December, 2012

in

H.C. MISC. CIVIL APPLICATION NO.217 OF 2011)

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RULING OF THE COURT

Application

By its application dated 6th May 2013 premised on rule 5(2)(b) of the rules of this court, **the applicant, Nation Media Group Limited**, seeks an order that:

> ***"there be a stay of execution of the judgment of the High Court (by Lady Justice Githua) dated 21st December 2012 and the decree pending the lodging, hearing and determination of the intended appeal against the said decision."***

The application was made on the grounds appearing on the face of the notice of motion and was supported by an affidavit sworn by **Sekou Owino**, the applicant's legal officer. The applicant, being aggrieved by the judgment, of the High Court (Githua, J.) in High Court Misc Civil Application No.217 of 2011 lodged and served notice of appeal in accordance with rule 75 of the rules of this court thus manifesting its intention to appeal against the said judgment. A copy of the notice of appeal was attached to the affidavit in support of the application as was also a draft memorandum of appeal. The impugned

judgment was dated and delivered on 21.12.2012.

Background

In the suit (No JR Misc App No.217 of 2011), the respondent herein, **Cradle – The Children Foundation**, sought an order of *mandamus* to compel the applicant to comply with the provisions of Section 39 of the **Persons with Disabilities Act** which has been operationalized by the Minister for Gender, Children and Social Services, vide Legal Notice Number 182 of 2009. After hearing the suit, the learned Judge found that:

> ***"the provisions of the Constitution, coupled with the express provisions of Section 39 of the Persons with Disabilities Act, impose an express obligation on all persons in the position of Nation Media Group Limited to provide to persons with hearing disability access to information that they may impart to the general public in their television programmes."***

After observing that Article 23 of the Constitution empowers the High Court to grant appropriate reliefs which may include but not limited to the reliefs stated in Article 23(3) of the Constitution, the learned Judge issued an order directing the Nation Media Group Limited to comply with its statutory obligations under Section 39 of the Persons with Disabilities Act which require all television stations to provide a sign language inset or subtitles in all newscasts, educational programmes and all programmes covering events of national significance. The learned Judge also expressed her awareness that-

> **"complying with that statutory requirement will have some financial implications on the respondent and taking this into account..."**

and proceeded to issue the following order:

> ***"I hereby issue an order directing the respondent, (Nation Media Group Limited) to provide a sign language inset or sub-titles in all its newscasts, educational and all programmes of national importance within a period of 90 days from the date of this judgment."***

It is this order by the High Court that the applicant seeks to have stayed pending the hearing and determination of the applicant's intended appeal against the said decision.

Service

Although the application appears to have been served on the respondent, **Cradle, the Children's Foundation**, the latter did not file a replying affidavit and when the application came up for hearing, only counsel for the applicant attended the hearing. Both parties appear to have been served with a hearing notice.

Hearing of the application

Mr. Geoffrey Imende, the learned counsel for the applicant, urged that the intended appeal is arguable and if successful would be rendered nugatory if stay is not granted. He contended that the applicant's right to fair hearing had been violated and that the High Court converted the judicial review application before it into a constitutional application and relied on Article 54(1)(c)of the Constitution to determine it in *limine* without further reference to the applicant. Article 54(1)(d) states that:-

> ***"54(1) a person with any disability is entitled:-***
>
> ***(c) to reasonable access to all places, public transport and information."***

Counsel for the applicant also contended that the intended appeal shall raise the issue of discrimination against the applicant ostensibly because it is the only Media House that was singled out in the suit in which it was ordered to comply with Section 39 of the **Persons with Disabilities Act**. In

alleging discrimination, we understood Counsel for the applicant to allude to Section 46E of the Kenya Information and Communications Act, Chapter 411 A which stipulates:

> ***"46E. The Kenya Broadcasting Corporation established under section 3 of the Kenya Broadcasting Corporation Act is hereby designated as the public broadcaster and shall provide public broadcasting services."***

Moreover, contended the applicant's counsel, the issue as to whether the applicant is subject to supervisory jurisdiction of the superior court below shall be contested and indeed, he said, this is reflected in the intended memorandum of appeal.

Analysis, Principles and reasons for decision

To succeed in an application founded on rule 5(2)(b) of the rules of the Court for interlocutory reliefs of stay of execution, or injunction or stay of proceedings, an applicant must satisfy the Court on the twin principles of arguability of the appeal and the nugatory effect of the appeal if stay is not granted in the event that the appeal succeeds. As shown in many decisions of this Court, an arguable appeal simply means an appeal that is not frivolous (see **Tropical Institute of Community Health Development & 8 others versus paramount Investments Ltd [2004]** e KLR. It does not mean an appeal that will succeed. In an application under rule 5(2)(b), it is not necessary for an applicant to show a plethora of arguable points. Even one arguable point is enough for the purpose of satisfying the arguability limb. As to whether the appeal will be rendered nugatory if stay is not granted in the event that the appeal succeeds, an applicant must show that the appeal shall be rendered valueless. **Black's Law Dictionary** 9th Edition defines "nugatory" as: "of no force or effect; useless; invalid;"

In the instant application, counsel for the applicant contended that the applicant is required by the order during this current *analogue era* to invest heavily in equipment which shall subsequently be discarded after digital migration and this would be irrecoverable.

In **Reliance Bank Ltd versus Nor Lake Investments ltd** [2002], EA 227 (at pg 232 para *b)* the Court expressed, in our view, with respect, correctly, the position as regards what would render an appeal nugatory when it stated:

> ***"We do not understand the position to be that in decree for payment of money, for example, the only thing that would render the success of the appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it..."***

This was a one-sided application as there was no opposition to it. But this does not mean that the threshold relating to the twin principles of arguability and the nugatory effect of the appeal if it is successful should stay be denied do not have to be demonstrated to the satisfaction of the Court. All that it means when there is no opposition is that the task of satisfying the Court on the twin principles becomes easier due to lack of opposition but the standard which is on the balance of probabilities remains the same.

Rule 5(2)(b) of the rules of this Court shows that this Court's jurisdiction to entertain and determine applications seeking stay of execution, an injunction, or stay of any further proceedings arises where an applicant has lodged a notice of appeal pursuant to rule 75 of the rules of this court. The true nature of an application under rule 5(2)(b) is interlocutory in an appeal pending before this Court. The Rule is designed to empower the Court to entertain interlocutory applications to preserve the subject matter in the pending appeal in order to ensure the just and effective determination of the appeal (see **Equity Bank Ltd v. West Link MBO Limited (Civil Application No.78 of 2011).** As correctly pointed out by this Court (Visram, Koome & Odek, JJ.A.) in the case of **Dickson Muricho Muriuki** versus **Timothy Kagondu Muriuki and 6 others** (CA Civil App No. NYR 21 of 2013 (UR 5/2013)

> ***"Rule 5(2)(b) confers power to this Court to hear interlocutory applications before the main appeal that is pending before the Court is heard and determined..."***

We have perused the application and the annextures to it and have duly considered it as well as the submissions made by counsel. The principles enunciated in the various decisions of this Court show that all that the applicant has to demonstrate on the limb of arguability of the appeal is that the appeal is arguable. In the instant application, there are issues of law reflected in the draft memorandum of appeal which counsel for the applicant amplified before us. We need not delve into their merit or otherwise in this application as the interest of the Court at this stage is not to examine the merits of the appeal or otherwise but rather to see whether the appeal is arguable. We are satisfied on the material before us that the appeal is arguable.

As regards the other limb as to whether the appeal shall be rendered nugatory if stay is not granted should the appeal eventually succeed, the applicant in its supporting affidavit avers that it is making plans to invest in digital technology towards complying with the digital migration which shall make provisions as required under Section 39 of the Persons with Disabilities Act No.14 of 2003. The applicant avers that implementation of the Order of the High Court to provide sign language sets or subtitles in all its newscasts during this *analogue era* will involve substantial investments to the tune of Ksh.40 million in initial costs and between Shs.3 million and Shs.4 million annually on maintenance and operational costs. These averments were not, in absence of a replying affidavit, controverted. It is the applicant's contention that compliance with the court order will entail investing colossal amounts of money on technology which will become obsolete when the entire country migrates to the digital broadcast and that this will occasion the applicant irreparable loss.

After carefully weighing the matter, it would be unjust to require the applicant to incur such huge sums of money that will go to waste after the digital migration. We hold the view that it would not be just to require the applicant to expend such resources in implementation of the impugned order, which will go to waste after digital migration when what the order seeks to achieve will hopefully be provided then. We take judicial notice that in a recent decision of this court differently constituted, this Court ordered digital migration to commence in September 2014. Applying the principle in the **Standard Bank Ltd. v. G. N. Kagia T/A Kagia & Co. Advocates** (Civil Appeal No.193 of 2003 (unreported) we are persuaded that these are cogent reasons showing that the appeal, if successful, will be rendered nugatory if stay is not granted.

Decision

For these reasons, we allow the application and grant an order in terms of prayer 2 of the notice of motion dated 6th May 2013. We also

order that the costs of the application shall abide the result of the appeal. We direct that the appeal be fast-tracked.

Dated and delivered at Nairobi this *30th day of May 2014.*

G. B. M. KARIUKI

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR