



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPLICATION NO. NAI. 154 OF 2012 (UR 114/2012)

BETWEEN

MADRUGADA LIMITEDAPPLICANT

AND

COSMAS KIPKOECH SIGEI RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru (Maraga, J.) dated 3rd June, 2010

in

HCCC No. 176B of 2005)

RULING OF THE COURT

1. The Applicant has moved this Court by way of Notice of Motion dated 31st May, 2012. The application is under **Rule 5 (2) (b)** of the **Court of Appeal Rules**. The order sought by the applicant in prayers 2 and 3 of the Motion are that pending the hearing and determination of the appeal lodged against the High Court Judgment being **Civil Appeal No. 54 of 2012**, this honourable Court be pleased to issue an order staying the execution of the judgment delivered by the High Court (Maraga, J.) on 3rd June, 2010, in Nakuru **HCCC NO. 176B of 2005**.
2. The respondent's claim against the applicant as stated in the plaint was for general damages for injuries suffered at his place of work at the applicant's farm. It is not in dispute that on 7th April, 2005, while working at the applicant's farm, the respondent's left hand got caught in a machine crushing the hand leading to amputation of the left hand at the wrist joint. Liability was resolved by consent at 35/65% against the applicant. The trial Judge in a judgment dated 3rd June, 2010, assessed the damages due to the respondent at Ksh. 2,262,000/=. This quantum is the subject of appeal by the applicant on the ground that it is excessive in the circumstances of the case.
3. The grounds in support of the present application is that the applicant has an arguable appeal and will suffer substantial loss and harm if the High Court judgment is executed; that the respondent

- will not be in a position to refund the decretal sum should the appeal be determined in favour of the applicant; that the intended appeal is meritorious and may be rendered nugatory if stay is not granted.
4. During the hearing of the application, learned counsel Messrs. Isaac Wamaasa appeared for the Applicant while learned counsel Messrs G.D. Gatonye holding brief for Messrs J. K. Bosek appeared for the respondent.
 5. Counsel for the applicant reiterated the grounds in support of the application and relied on the supporting affidavit dated 31st May, 2012, deposed by Messrs Jonti Barclay. A memorandum of appeal dated 19th March, 2012 and a copy of the bank guarantee are attached to the supporting affidavit. In the supporting affidavit, the applicant deposes that the judgment and decretal sum has been secured with a sum of Ksh. 1,800,000/= having been paid to the respondent and the balance secured by bank guarantee. It was submitted that the respondent shall suffer no prejudice as the entire decretal sum is secured; that the intended appeal is arguable and the respondent may not be in a position to refund the judgment sum if stay is not granted.
 6. Counsel for the respondent in opposing the application submitted that the entire judgment sum had not been paid; that the applicant has only paid Ksh 1,800,000/=; that the applicant unsuccessfully applied for stay of execution before the High Court and this Court should similarly decline to grant the stay orders; that the sum of Ksh. 1,800,000/= was received by the respondent on an entirely without prejudice basis and this should not prevent the respondent from executing the judgment; that the applicant at its own volition prepared the bank guarantee and the respondent has not consented to the guarantee to secure the balance of the decretal sum. It was submitted that the quantum of damages arrived at by the trial Judge was discerning and sound in principle and should not be interfered with by a higher court; that the present application is an abuse of the court process aimed at delaying the respondent from reaping the fruits of his judgment.
 7. We have considered the Notice of Motion and the supporting and replying affidavits as well as the submissions by counsel. The application is brought pursuant to **rule 5(2) (b)** of the **Court Rules**. The jurisdiction exercisable by this Court under **rule 5(2) (b)** is now well settled. It is original and discretionary. For the applicant to succeed, he must satisfy the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.
 8. The issue before us is whether the intended appeal is arguable and whether the appeal shall be rendered nugatory if no stay orders are granted. In the memorandum of appeal filed in this matter, the applicant urges that the sum of Ksh. 2,262,000/= awarded by the trial court is excessive; that the trial Judge erred in law and fact by failing to consider the evidence and submissions made by counsel. The respondent in opposing the application urged that the quantum of damages awarded by the trial court is sound in law. Whether the quantum awarded is excessive or not is an arguable point. We are satisfied that the applicant has been able to demonstrate that he has an arguable appeal.
 9. The next issue is whether the intended appeal shall be rendered nugatory if stay orders are not granted. It is not in dispute that the applicant in part satisfaction of the decree has paid a sum of Ksh. 1,800,000/= to the respondent and secured the balance by bank guarantee. If the appeal succeeds, the respondent shall be required to refund the sum of Ksh. 1,800,000/= which has already been paid. This state of affairs would render the appeal nugatory if stay orders are not granted. The balance of the judgment sum has been secured by a bank guarantee and we are satisfied that the respondent shall suffer no prejudice if stay is granted. The upshot is that the Notice of Motion application dated 31st May, 2012, is hereby allowed and stay of execution of the judgment dated 3rd June, 2010, delivered in **Nakuru High Court Civil Case No. 176B of 2005**, be and is hereby issued pending the hearing and determination of **Nakuru Civil Appeal No. 54 of 2012**. The costs of this application shall be in the appeal.

Dated and delivered at Nakuru this 23rd day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR