



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, J.J.A.)

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CIVIL APPLICATION NO. NAI 82 OF 2011

BETWEEN

ERWEN ELECTRONICS LIMITED 1ST APPLICANT
ARJUN RUZAIK 2ND APPLICANT
BINA RAJU PAATEL 3RD APPLICANT
BANKIM MANUBHAI PATEL 4TH APPLICANT

AND

RADIO AFRICA LIMITED 1ST RESPONDENT
LINGAM ENTERPRISES LIMITED 2ND RESPONDENT

(An application for stay of execution (pending appeal from the ruling and order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 29th April, 2010
in

H.C.C.NO.579 OF 2008)

RULING OF THE COURT

This is an application under **Rule 5(2)(b)** of this Court's Rules which seeks a stay of the execution of the judgment obtained in **High Court Civil Case No.579 of 2008** pending the hearing and determination by this Court of the intended appeal against an Order of the High Court made on 29th April, 2010.

By a plaint dated 12th September 2008, the 1st respondent sued the 2nd respondent and the four applicants. The allegations against the applicants were that by a contract in writing dated 5th February 2007, it was agreed between the applicants and the first respondent **Messrs Radio Africa Limited** that the applicants would sell and the first respondent would purchase the business of **Metro East FM Ltd** and the first and second applicants shares in the said **Metro East FM Ltd** at a price of Kshs.20 million and that the applicants would do all things necessary on their part to transfer the said business of **Metro East FM Ltd** and shares of first and second appellants therein to the first respondent free from all charges and encumbrances. The third, fourth and fifth applicants, it was alleged had warranted and guaranteed the first and second applicants performance of the conditions, terms and warranties of the contract to the first respondent, which, it would appear, included payment of tax owed to the Kenya Revenue Authority and also money owed to Kenya Broadcasting Corporation.

By a defence dated 11th December 2008, the applicants denied inter alia the existence of the said contract, the attendant warranties, conditions, terms or any breach of the alleged contract. In particular the applicants denied that there was an outstanding tax liability of 4 million owed to the Kenya Revenue Authority or a debt of Kshs.300,000 owed to the Kenya Broadcasting Corporation.

In April 2009, the 1st Respondent applied to have the applicants' statement of defence struck out under the then Order VI Rule 13 (b) (c) and (d) and to have judgment in the sum of Kshs.4.3 million entered in its favour. Judgment in favour of the 1st Respondent was eventually entered on 10th December, 2009.

In response to the entry of judgment exparte, the applicants applied to have the exparte judgment set aside but in a ruling dated 29th April, 2010 the High Court (Kimaru, J.) held that there was no defence to the 1st Respondent's claim and disallowed the application to set aside. The applicants have filed a Notice of Appeal in respect of the High Court ruling and the application for stay is based on that notice.

The applicants were represented by Kamau Karori advocate whereas the respondents were represented by Mr D. Anzala advocate.

In the main, Mr. Kamau Karori submitted that it was evident from grounds set out in the memorandum of appeal that the intended appeal is arguable. He endeavoured to refer the court to a statement of account which according to him indicated that the claimed amount of 4.3 million was not outstanding and that Kenya Revenue Authority (KRA) had not made any demand and that there was a receipt of Kshs.300,000 which should have reflected that the alleged debt owed to Kenya Broadcasting Corporation had been paid. He further submitted that in the circumstances any payment of Kshs.4.3 million would be unjust enrichment on the part of the first Respondent. He finally submitted that there were triable issues and therefore the applicants should have been allowed to defend the suit unconditionally and further that we should take into account the overriding objective and grant a stay in the circumstances.

Mr. Anzala, on his part submitted that a perusal of the defence according to the High Court, did not disclose any triable issues for trial and that the Court was correct in law to have struck out the defence because the defence was in essence a sham. He further submitted that since the subject matter of the application was a money decree, past decisions of this Court did not contemplate a stay and consequently the application for stay should be dismissed. In support of this, counsel cited the well known case of *Kenya Shell Ltd. -v- Kibiru & Another (1986) KLR 410.*

In our view, the grounds set out in the draft memorandum of appeal cannot be said to be frivolous and in particular whether in the circumstances, the applicants were in breach of the alleged contract. For this reason we think the applicants have satisfied the requirement on arguability. Turning to the second requirement on whether if a stay order was refused, the intended appeal might be rendered nugatory, although we are not oblivious of the fact that the subject matter involves a money decree, we consider it necessary to weigh the claims of hardship of the applicants as against the hardship likely to be suffered by the first respondent. On this we note that apart from the first applicant which is a company, all the other applicants are individuals. We do not consider the sum of Kshs. 4.3 million to be a small amount since the applicants would be jointly and severally liable. In our view, immediate execution would give rise to considerable hardship to the individuals and also to a possible winding up proceeding against the 1st applicant company based on the judgment debt. At the other end of the scale is the first respondent. It has not alleged that it was facing any financial threat if the payment was not made before the hearing of the intended appeal. In the circumstances, the applicants are therefore likely to suffer greater hardship than the 1st respondent as they await the hearing of the intended appeal. It would therefore be just to grant a stay. In exercising our power under **rule 5 (2) (b)** we are mandated to take a broad view of justice in terms of **sections 3A** and **3B** of the Appellate Jurisdiction Act. With this requirement in view, justice in our view would be better served by a stay and a speedy hearing of the intended appeal on merit. In the result, we grant a stay in terms of prayer four of the application dated 31st March, 2011 and further order that the costs abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 3rd day of February 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR