



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: WAKI, VISRAM & NYAMU, JJ.A)**  
**CIVIL APPLICATION NO. NAI. 291 OF 2010 (UR. 203/2010)**

**BETWEEN**

**IL NWESI COMPANY LIMITED.....1<sup>ST</sup> APPLICANT**

**THE LEWA WILDLIFE CONSERVANCY LIMITED.....2<sup>ND</sup> APPLICANT**

**IAN HAMISH CRAIG.....3<sup>RD</sup> APPLICANT**

**AND**

**WENDY MARTIN.....RESPONDENT**

*(An application for stay of the judgment and decree of the superior court pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Ang’awa, J.) dated 28<sup>th</sup> November, 2008*

**in**

**H.C.C.C. No. 513 OF 2003)**

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**RULING OF THE COURT**

The three applicants in the motion dated 16<sup>th</sup> December, 2010, seek one substantive order under **rule 5 (2) (b)** of the rules of this Court in the following terms: -

*“2. That the judgment and decree of the superior court in civil Suit No. 513 of 2003 made on the 28<sup>th</sup> of November, 2008 by Ang’awa J against the applicants jointly and severally on quantum, are hereby stayed pending the lodging, hearing and determination of the applicant’s intended appeal.”*

There are well established guiding principles in the exercise of this Court’s discretion under **rule 5 (2) (b)**. The applicant ought to show, firstly, that the intended appeal is arguable even on a solitary issue, and it will be arguable if it is not frivolous. Secondly, and in addition, the applicant ought to show that unless the order sought is granted, the success of the intended appeal would be rendered nugatory. Those are the

principles which learned counsel for the applicants, Mr. Mohamed Nyaoga appearing with Ms. Wanjiru Ngige urged us to find were met in this motion.

A short background to the application is necessary. About 11 years ago, in June, 2000, **Mrs. Wendy Martin**, the respondent herein, who is a British citizen, joined her family and friends on a safari to the world famous Lewa Wildlife Conservancy in Laikipia. It is common ground that they lawfully checked into a self catering lodge known as **Il Ngwesi** (“*the lodge*”) on 1<sup>st</sup> June, 2000 and were thus lawful visitors. It is also common ground that the following morning, Wendy together with three other people went out on a “*bush run*” or jogging away from the lodge when a rogue elephant suddenly appeared and attacked her. She was seriously gored by the beast and sustained indisputably serious injuries which were subsequently attended to in Nairobi and England. After about 21 operations and medical expenses in excess of Sterling £760,000, Wendy sought to establish liability against the three applicants and to recover the medical expenses as well as general damages for pain suffering and loss of amenities. She believed that the 1<sup>st</sup> applicant, Il Ngwesi Company Ltd (“*the company*”) and the second applicant, Lewa Wildlife Conservancy (“*the conservancy*”) were one and the same organization and that the third respondent Ian Craig (*Craig*) was a common Director in both. She also believed that the company was the owner and occupier of the lodge while the conservancy was the owner of the contiguous land from which the rogue elephant emerged. Finally she believed that the conservancy and Craig so controlled, directed and advised the company in the management, administration, marketing, and other activities in the lodge, that they were deemed to be in occupational control of the lodge. On the foregoing basis, Wendy sued all three for breach of their common duty of care under **section 3** of the Occupiers Liability Act, (“*the Act*”) as well as for negligence of their servants or agents.

In its defence, the Company denied that it owned the lodge or was its occupier as defined under the Act or that it owed any duty of care to Wendy. It also denied that the conservancy and Craig had anything to do with the lodge admitting only that Craig was a mere director in both but had no independent liability for either of them. It asserted that the lodge was owned by a group of persons known as Il Ngwesi Group Ranch. The conservancy and Craig reiterated those denials and contended that they were wrongly sued since Wendy’s claim was traceable to a wild animal and therefore it ought to be pursued under the **Wildlife (Conservation and Management) Act, Cap 376**, Laws of Kenya.

The dispute fell for hearing and determination before Ang’awa J who in the end was persuaded that the respondent was a lawful guest in the lodge who suffered serious injuries; that the conservancy and Craig did control, and advise the company or the lodge on the activities carried out at the lodge for the benefit of the guests; that the company, the conservancy and Craig owed a duty of care to Wendy by virtue of **section 3** of the Occupiers Liability Act both inside the lodge and its environs; that the liability of the three was joint and several at 100%; and that the liability was not relieved under the provisions of the Wildlife (Conservation and Management) Act. On the issue of quantum of damages, the learned Judge assessed special damages at Sterling £529,026.12 and Kshs.1.5 million in general damages, all with interest thereon and costs of the suit.

We are told by Mr. Nyaoga that the applicants will challenge the findings on both liability and quantum on no less than 11 grounds listed in a draft memorandum of appeal, the main one being the finding that the three applicants or either of them was an “*occupier*”, properly so defined under the Act, of the lodge or the ranch or environs on which it stood. He further submitted that there was no finding made on the ownership of the land contiguous to the lodge where the accident occurred and therefore no liability could attach to any of the applicants, particularly when the main cause of action was not based on negligence. There will also be a challenge on the quantum of damages awarded.

As for the nugatory aspect, Mr. Nyaoga submitted that the damages payable were in excess of Kshs.120 million, the payment of which would cause grave hardship to any of the three applicants. The conservancy was a non-profit making company limited by guarantee for charitable conservation of wildlife; the company had only the lodge to manage and had no other source of income; while Craig was a mere Director in both with limited income. Such hardship, he submitted, was a relevant consideration as stated by this Court in **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 218**. Furthermore, the applicant was not a Kenyan citizen and was resident in the United Kingdom with no known source of

income or assets and therefore recovery of the decretal sum, if paid, would be impossible. Her intention to enforce payment of the decretal amount before the appeal is heard was manifested by an application made in the superior court and pending determination, that execution be levied before taxation. Such eventuality, he submitted, would destroy the applicants and render the intended appeal meaningless.

In response to those submissions, learned counsel for the respondent Mr. Oraro, who was assisted by Mr. Julius Kemboy, contended that the intended appeal was frivolous and could not surmount the first test of arguability. That is because the main issue intended to be argued on appeal, that is to say, the occupation and control of the premises upon which the injury took place, was amply proved in oral evidence by Craig and through documentary evidence which the applicants had withheld from discovery until the trial court, in a considered ruling, forced them to produce their audited accounts for several years, insurance policies and other documents relevant to the issue. In all that evidence the nexus and inter relationship between the group ranch and the three applicants was established beyond doubt. At any rate, Mr. Oraro submitted, the burden of disproving ownership is on the person who affirms that he is not the owner. That is **section 116** of the Evidence Act. In view of the evidence on record, therefore, the defences of the applicants fall apart and render the issue of ownership frivolous to raise anymore. It was also Mr. Oraro's view on quantum that although arguability may be presumed in many cases, in this particular case there was specific proof of special damages, discounting only the sum received from the respondent's insurers. No issue can therefore arise as to whether damages were due to the respondent.

As for the nugatory aspect, Mr. Oraro submitted, correctly in our view, that it would depend on the facts and circumstances of each particular case. Considering that the accident in this case occurred 11 years ago; that judgment on liability was in 2007; that no appeal has been filed on liability; that there are no diligent or any serious efforts made to obtain the lower court's proceedings for filing any appeal; that the respondent has remained in a terrible state of health for more than eleven years; that the applicants have all along exhibited an evasive attitude even before this court; and that there were reciprocal arrangements for enforcement of decrees between England and Kenya, Mr. Oraro submitted that there was no reason to grant any order for stay.

We have carefully considered the application and the submissions of learned counsel on both sides of the argument. Speaking for ourselves, we do not think the issue of liability which is intended to be raised on appeal is a frivolous one. The fact that the issue is arguable, however, does not mean it will succeed on appeal, but that is not the test. In our view at this stage, the application of the common law test of liability under **section 3** of the Occupiers Liability Act, which is the main cause of action in this matter, is not without difficulty. The ownership of the *locus in quo* where the respondent sustained injuries is not the only consideration, as it is also necessary to show that the occupier had immediate control and supervision of the dangerous or defective premises which are complained about. It is also not clear whether the cause of action was purely based on the Act or was also based on the tort of negligence. Furthermore, the intended challenge on the quantum of general damages cannot be said, with any seriousness, to be frivolous. In sum, the applicant surmounts the first test of the principles stated above.

As for the nugatory aspect, we have reviewed the history of the case and we agree with Mr. Oraro that the degree of diligence exercised by the applicants in pursuing the intended appeal is fairly wanting. On the authority of the ***Reliance Bank Case*** (supra) and ***Oraro and Rachier Advocates v Co-operative Bank of Kenya Ltd [1999] LLR 1118*** we have considered the balance of convenience and the conflicting claims on both sides. We have considered that in a decree for payment of money, the inability of the other side to refund the decretal sum, if paid over to it, is not the only thing that would render the appeal nugatory. We have considered the enormity of the decretal amount to be paid by the applicants and the physical and emotional state of the respondent. We have considered the citizenship of the respondent and the undisputed fact that one of the applicants has since died and there are undisputed assertions that the other applicants may well deal with their properties in a manner prejudicial to the respondent during the execution process. Finally, we have considered the provisions of **sections 3A** and **3B** of the Appellate Jurisdiction Act which the applicants have also invoked. These are fairly recent (July, 2009) amendments in the law requiring that the court, in exercise of its powers or in interpretation of the provisions of the Act, shall facilitate the just, expeditious, proportionate and affordable resolution of the matters before

it. Such is the overriding objective of the Act. There has, however, been considerable learning on the application of those provisions so far and we may repeat what this Court said in **City Chemist (NBI) & Another v Oriental Commercial Bank Ltd** Civil Appl. No. NAI. 302/2008 (UR).

**“The overriding objective thus confers on the court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. One view taken by this Court, differently constituted, is that:**

*‘The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases.’*

- See **Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates** Civil Appl. NAI. 293/09.

The court in the same decision stated as follows: -

**“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”**

In all those circumstances, the order that commends itself to us is to grant a conditional order for stay. Accordingly, there shall be a stay of execution as prayed in the motion on condition that the applicants, jointly or severally deposit in court the sum in aggregate of 50% of the decretal amount exclusive of taxed costs or alternatively provide a Banker’s guarantee from a reputable bank in Kenya to cover the entire decretal amount. In either case the applicants shall comply with the order within 30 days of this order, and in default, the application shall stand dismissed with costs. If the order is complied with, the costs of the motion shall abide the outcome of the intended appeal.

It is so ordered.

***Dated and delivered at Nairobi this 1<sup>st</sup> day of April, 2011.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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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**

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