IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, O'KUBASU, JJ.A. & DEVERELL, AG.J.A.)
CIVIL APPLICATION NO. NAI. 312 OF 2004 (160/2004 UR)

BETWEEN

MATHEW OSEKO …….....……....…… APPLICANT

AND

GURSHARAN SINGH BRAH T/A FINALE SAW MILLS.....RESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from theRuling of the Hgh Court of Kenya at Nairobi, MilimaniCommercial Courts (Azangalala, Ag. J.) dated 26th November, 2004 in H.C.C.C. NO. 1857 OF 2001)
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RULING OF THE COURT

This is an application by way of notice of motion brought under rule 5(2)(b) of the Court of Appeal Rules (the Rules) in which the applicant, Mathew Oseko seeks the following orders:-

> ***"(a) THAT the ruling and order of the superior court given on the 26 th October, 2004 and issued on the 23rd November, 2004 respectively in High Court Civil Case Number 1857 of 2001 be stayed until the Applicant's intended appeal is lodged, heard and determined.***
>
> ***(b) THAT the costs of this application be provided for".***

The genesis of this matter is a suit filed in the superior court being High Court Civil Suit No. 1857 of 2001 in which the respondent sued the applicant for breach of contract. Summary judgment was entered pursuant to an application by the respondent (as the plaintiff in the superior court) in respect of which the applicant neither filed any replying affidavit or grounds of opposition nor appeared at the hearing to oppose the same. Being dissatisfied by the entry of summary judgment the applicant filed an application to set aside the said judgment which application came up for hearing before Azangalala, J. Having considered what was urged before him the learned Judge granted the application by stating as follows:-

> ***"In the result, I am inclined to exercise my discretion in favour of the defendant by ordering that the judgment and decree herein and all consequential orders be and are hereby set aside. This will be on terms that the defendant shall deposit in Court a sum of K.Shs.1,668,551.25 within fourty five (45) days from the date hereof failing which the summary judgment entered against him will be reinstated and this application will stand dismissed. The defendant sha ll also pay to the plaintiff the costs of this application and all thrown away costs. Order accordingly."***

Mr. Billing, the learned Counsel for the applicant, submitted that in the application for summary judgment the respondent had failed to disclose the fact that the applicant had already paid about Shs.2.6 million. Mr. Billing was of the view that since the learned Judge set aside the ex parte judgment it was punitive on his client (the applicant herein) to be asked to deposit Shs.1.6 million and especially when it is to be observed that the respondent had not asked for the setting aside to be on terms.

Ms. Muriu, the learned counsel for the respondent, was of the view that the discretion was exercised properly by the learned Judge. She thought that a deposit of Shs.1.7 million was not too large a sum as to cripple the practice of the applicant.

The principles applicable to an application under rule 5(2) (b) of the Rules are now well settled. Firstly, the applicant has to show that the intended appeal is not frivolous or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory if the application is not granted. There is a long line of authorities on these principles but we only cite ***Reuben & 9 Others vs. Nderito & Another*** **[1989] KLR.459** in which this Court stated:-

> ***"In dealing with rule 5(2)(b) this Court exercises original jurisdiction and this has been stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (a new) on the propri ety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivo lous or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful would be rendered nugatory. See Stanley Munga Githunguri vs. Jimba Credit Corporation Ltd Civil Applicat ion NAI 161 of 1988."***

Applying the above to this application, we would say that we are satisfied that the intended appeal is not frivolous. As regards the nugatory aspect of the matter, we are of the view that this Court has to consider the interests of both parties to the dispute. Doing the best we can in the circumstances of this application, the order that commends itself to us is that a stay be granted but on terms. Consequently, we grant a stay on condition that the applicant deposits a sum of Shs.1.0 million in an interesting earning account to be opened in the joint names of the advocates for the parties.

This amount is to be deposited in the said account within 45 days of this ruling. Costs of the application shall be in the intended appeal.

Dated and delivered at Nairobi this 17 th day of December, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

W.S. DEVERELL

……..

AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR