



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: TUNOI, OWUOR & KEIWUA JJ.A)
CIVIL APPLICATION NO. NAI.309 OF 2001
BETWEEN

**DR. ERASTUS NDEGWA WANGAI trading as MERU NURSING HOME
APPLICANT**

AND

- 1. BLUE SHIELD INSURANCE CO. LTD 1ST RESPONDENT**
- 2. SUKU NAURANGA t/a ROCKY CONSTRUCTION BUILDING AND GENERAL
CONTRACTORS..... 2ND RESPONDENT**

**(An application for stay of execution pending appeal from
the judgment and decree of the High Court of Kenya
at Nairobi (Mr.Justice Etyang) dated 8th June, 2001
in
H.C.C.C. NO.119 OF 1990)**

RULING OF THE COURT

This is an application under rule 5(2)(b) of the Rules for stay of execution of the judgment and the consequential decree in Meru H.C.C.C. NO.119 of 1990 delivered on 8th June, 2001 pending the hearing and determination of Civil Appeal No.244 of 2001 which was filed in this court on 24th September, 2001.

This being an application for stay the applicant must show that his intended appeal is arguable and secondly, that unless a stay is granted then the appeal, if successful, would be rendered nugatory.

The applicant has incorporated fourteen weighty grounds of appeal in his memorandum of appeal. They challenge, in the main, the competency of the suit; the whole building contract which is the genesis of the suit in the superior court; whether, the learned Judge erred in awarding the second respondent a colossal sum of shs.1,693,173/= purportedly as anticipated profit whereas there was no basis for doing so; and also, if he erred, in awarding damages in the nature of special damages whereas the same had not been pleaded nor strictly proved.

We have carefully looked at the applicant's numerous grounds of appeal against the scholarly decision of the learned Judge which encompasses not less than forty six pages of well-reasoned judgment. Certainly, in our humble view, the appeal is not frivolous. It is indeed arguable.

In view of what we have said so far, we are unable to accept Mr. Arithi's contention that the intended appeal is frivolous.

As this is an application for a stay, we would not wish to say much more lest we touch on the merits of the entire appeal. In *Butt v. The Rent Restriction Tribunal* Civil Appeal No. NAI.6 of 1979 (unreported) Madan JA (as he then was) said:

"It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory, per Brett, L.J. in Wilson v Church (N.2) 12 Ch.D (1579) 454 at p.459."

We respectfully agree. In the present application the second respondent obtained a judgment in excess of shs.2,100,000/=. This is not a large sum of money considering the fact that the applicant has a fully operational hospital whose value was about shs.6,000,000/= ten years ago and which hospital was partly constructed by the second respondent. If he is asked to deposit the decretal amount that will most likely not ground its operations.

The upshot of the foregoing is that we hereby grant a stay of execution of the decree in Meru H.C.C.C. No.119 of 1990 but on terms. The applicant shall deposit shs.2,000,000/= in an interest bearing account in the joint names of the advocates for the applicant and the second respondent with a reputable bank within 30 days hereof. If the applicant fails to do so this application shall be deemed to have been refused. Costs of this application shall be in the appeal in any event.

Dated and delivered at Nyeri this 2nd day of November, 2001.

P.K. TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR