IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & ASIKE - MAKHANDIA, JJ.A)

CIVIL APPLICATION NO. NAI 168 OF 2020

BETWEEN

MUMILORA LIMITED T/A

BARAKA ROSES.....APPLICANT

AND

LUCY WAMBUI YINDA.....RESPONDENT

*Being an application for stay of execution pending the hearing and determination of the intended appeal from the Ruling and order of the High Court of Kenya (Commercial & Tax Division – Milimani) Nairobi, (**Justice W. A. Okwany**) delivered on 14th May, 2020*

in

HCCC No. 173 of 2019

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RULING OF THE COURT

[**1**] By a ruling delivered on 14th May 2020, the High Court (**Okwany, J**) granted an order for judgment on admission to be entered in favour of **Lucy Wambui Yinda** (now the respondent), against **Mumilora Limited t/a Baraka Roses** (now the applicant) for Kshs. 32,124,986 together with interest and costs.

[**2**] The applicant who is aggrieved by the judgment of the High Court, has filed a motion before us under Rule 5(2)(b) of the Court of Appeal Rules for an order of stay of execution of the judgment pending the hearing and determination of its appeal against the judgment.

[**3**] The applicant contends through grounds stated on the body of the motion, an affidavit sworn by its director, **Njeri Waruguru Mahihu** and written submissions filed by its advocate, that the applicant has an arguable appeal against the judgment of the High Court. This includes the issues whether the letter relied upon by the High Court as an admission originated from the applicant and whether the author of the letter had authority to bind the applicant and whether the applicant has a counterclaim against the respondent.

[**4**] In regard to the issue of nugatory, the applicant contends that the amount of Kshs. 32,124,986 that is subject of the judgment is a colossal sum which the respondent, who was sacked by the applicant due to poor management skills, and who currently has no job would not be able to refund should the order of stay not be granted and the applicant succeeds in its appeal.

[**5**] The respondent opposes the motion through a replying affidavit, grounds of opposition, and written submissions filed by her advocate.

She maintains that the applicant's motion is defective as the applicant did not comply with Rule 77 (1) of the Court of Appeal Rules, with regard to the service of the notice of appeal on the respondent.

[**6**] The respondent swore that she had advanced to the applicant a total sum of Kshs. 25,000,000 through cash deposits into the applicant's bank account, and also incurred various expenses on behalf of the applicant on the understanding that the expenses would be reimbursed. She contended that the total amount of money advanced to the applicant by way of cash deposits and expenses incurred on its behalf was Kshs. 32,124,986 which debt the applicant had admitted.

[**7**] In the submissions, the respondent maintained that the applicant does not have an arguable appeal as the judgment entered against it by the High Court was on the basis of the applicant's clear and unambiguous admission of its indebtedness to the respondent. Relying on **Choitram vs Nazari [1984] eKLR**, counsel for the respondent argued that the High Court could not exercise its discretion in a manner that renders nugatory the express provisions of the law that provides for summary judgment on admission. The respondent pointed out that no counterclaim was raised by the applicant and that summary judgment was properly entered, and therefore no arguable issue arises.

[**8**] On the nugatory aspect, the respondent relying on **Kenya Shell Limited vs Benjamin Karuga Kibiru & Anor [1986] eKLR**, submitted that there was no evidence tendered by the applicant of her inability to refund the decretal sum should the appeal be successful. The respondent maintained that she is involved in business for gain, and that the applicant has not demonstrated that it will suffer irreversible harm if an order of stay for execution is not granted. The Court was urged that the application lacks merit and should therefore be dismissed with costs.

[**9**] Under Rule 77 of the Court Rules an appellant is required to serve the notice of appeal on all person directly affected by the appeal, within 7 days from the date of lodging the notice. This rule does not give any provision regarding failure to serve the notice as required. However, Rule 84 of the Court Rules gives a general provision on failure to comply with any essential step, as follows:

> **84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**
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> **Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.**

[**10**] In our view the respondent could only take up the issue regarding the failure to file the notice of appeal within time, under Rule 84 of the Court Rules, by applying to have the notice of appeal struck out within 30 days from the day they were served with the notice, or became aware of the notice. There being no such application before us, it is not open to this Court to address the issue. [**11**] Coming back to the crux of the motion before us, as correctly submitted by the respondent's advocate, this Court has laid down two twin principles for granting an order of stay of execution under Rule 5(2)(b) of the Court of Appeal Rules. These are: that the appeal must be arguable, and not frivolous, and secondly, that the appeal will be rendered nugatory if an order of stay of execution is not granted - (**David Morton Silverstein vs Atsango Chesoni [2002] eKLR**).

[**12**] In this case, the High Court entered judgment on admission against the applicant based on letters from the applicant that were exhibited by the respondent. The respondent had at paragraphs 20, 21 and 22 of the plaint, pleaded that the applicant had admitted owing the respondent Kshs. 32,124,986 made up of cash deposits of Kshs. 29,000,000 paid into the applicant's bank accounts and Kshs. 3,124,986 being expenses incurred by the respondent for and on behalf of the applicant. These admissions are contained in an email dated 26th January 2019 and letter dated 26th February 2019, which were the subject of the respondent's application for judgment on admission. In the defence, the applicant had at paragraph 12, denied paragraphs 20, 21 and 22 of the plaint and maintained that there was no admission of indebtedness. At no point did the applicant raise an issue in the defence that the documents, subject of the admission were not from it or not authorized by it. The issue that the applicant now purports to raise, cannot be an arguable issue as it does not arise from the pleadings.

[**13**] As regards whether the appeal would be rendered nugatory if the order of stay of execution is not issued, the decree is a monetary decree. Although the amount is a hefty sum, the applicant has not convinced us that the respondent would not be able to refund the amount should the appeal be successful. Indeed, the respondent does not appear to be a woman of straw, given the monies that were allegedly advanced to the applicant.

[**14**] For the above reasons, we find that the applicant has failed to satisfy the twin principle of arguability and nugatory aspect. The application is therefore dismissed. This being a matter involving a family business, we do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

ASIKE MAKHANDIA

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR