REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL MISC. APPLICATION NO. 111 OF 2017

MORRIS GUCHURA NJAGE T/A MORRIS NJAGE & COMPANY.....ADVOCATE/APPLICANT

VERSUS

LIZA CATHERINE WANGARI MWANGI.....CLIENT/RESPONDENT

RULING

1. The applicant herein moved this court by way of an amended notice of motion application dated 15.01.2020 and wherein the applicant prayed for the orders; -

1) *Spent*

2) *Spent*

3) *Spent*

4) *An order of stay of execution of the taxation/ ruling of Hon. M.N Gicheru dated 1.04.2019 and the orders thereof be granted pending the lodging, hearing and determination of the intended appeal.*

5) *A conservatory order be granted to maintain the status quo with respect to the decretal sums held in* ***Judicial Review No. 171 of 2014 at Nairobi between Republic –vs- Principal Secretary Ministry of \interior & Co-ordination of national Government & 4 others Ex-parte Commission of Administration of Justice*** *pending the lodging, hearing and determination of the intended appeal.*

6) *The advocate be granted leave to appeal to the Court of Appeal against the ruling dated 13.08.2019 and order thereof.*

7) *Costs of the application be provided for.*

2. The application is premised on the grounds on the face of it and further on the supporting affidavit sworn by the applicant. The applicant's case is that he was the advocate for the respondent in **HC Misc. Application No.28 of 2007 at Embu between Liza Catherine Wangari Mwangi vs Attorney General; HCCC No. 31 of 2007 at Embu between Liza Catherine Wangari Mwangi v Attorney General;** and **HCCA No. 74 of 2007 at Embu between Liza Catherine Wangari Mwangi v Attorney General** but the respondent is yet to pay the fees in the three matters. That his bill of costs in the three matters was taxed on 1.04.2019 by Hon. Gicheru and being dissatisfied with the ruling by the taxing master, he filed a reference before this court and which was dismissed with costs after which he filed a Notice of Appeal and which intended appeal raises arguable points of law with high chances of success. Further that the client is likely to withdraw the decretal sums held in **Judicial Review No. 171 of 2014 at Nairobi between Republic –vs- Principal Secretary Ministry of Interior & Co-ordination of national Government & 4 others Ex-parte Commission of Administration of Justice** as the conservatory order thereof lapsed by virtue of the ruling dated 13.08.2019 and that the client has filed an application for release of the decretal sum in High court at Nairobi and which application is scheduled for hearing on 5.02.2020.

3. The applicant further avers that unless the stay of execution and conservatory orders are granted, the applicant will suffer irreparable loss as he will not be able to recover his fees from the client/ respondent who is on record as being impecunious and therefore incapable of refunding the decretal sum should the appeal succeed. That he has been deprived of his legal fees as a result of an error of law and an error of principle committed by the taxing officer and the High Court. That he filed the appeal without unreasonable delay and further that he is ready to provide security as may be directed by the court. Further that the respondent will not suffer prejudice if the orders of stay are granted as the dispute will be finally settled by the Court of Appeal and further that in any event, she is under a duty to pay the applicant's fees.

4. The respondent opposed the application by way of a replying affidavit which is lengthy but in a nutshell, the respondent's response is that

the applicant in seeking orders of stay has not satisfied the conditions for grant of such orders as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. Further that, she stands to suffer substantial loss if the orders sought are granted as the applicant seeks to stop the respondent from withdrawing the damages awarded to her due to torture she underwent under the hands of the police and which is tantamount to subjecting her to further torture as the decretal amount the applicant seeks to prohibit her from withdrawing has been held in court for over five years without earning interest as a result of the applicant's continued greed and dissatisfaction with the rulings of the court. That the conduct of the applicant is meant to frustrate her and prevent her from enjoying the said decretal sum and as such, it is only just that the court do order that the amount taxed by Hon. Gicheru (Kshs. 729,126/-) remain in court pending the hearing and determination of the instant application and the intended appeal and the rest be released to her as she is in dire need of medical treatment. Further that the applicant has not demonstrated that he has an arguable appeal. She deposed further that the application does not meet the test for grant of conservatory orders as was outlined by the Supreme Court in **Gatirau Peter Munya –vs- Dickson Mwendwa Kithinji & 2 others (2014) eKLR** and as such, the same is misconceived, unmeritorious and vexatious and made with ill motives to deny her justice and enjoyment of the decretal amount.

5. The application was canvassed by way of written submissions wherein the applicant while quoting a number of judicial decisions submitted that he had satisfied the conditions for grant of stay of execution as provided under Order 42 Rule 6 of the Civil Procedure Rules to wit likelihood to suffer substantial loss unless the orders are granted; that the application has been brought without unreasonable delay and that he has committed to provide security as may be ordered by the court. The applicant further submitted that the application for leave to appeal to the Court of Appeal is necessary by dint of Rule 11(3) of the Advocates Remuneration Order and that the prayer for leave is not opposed by the respondent. Reliance was made on the case of **Wambugu Kariuki & Associates –vs- Invesco Assurance Company Limited (2018) eKLR** and **Muriu Mungai & Co Advocates –vs- New Kenya Co-operative Creameries Ltd (2010) eKLR** on the conditions for grant of leave to appeal to the Court of Appeal.

6. The respondent in his submissions submitted that the instant application was filed after undue delay (5 months after taxation) and further that the applicant has not yet filed any appeal apart from the notice of appeal. Further, it was submitted that the applicant has not satisfied the conditions for grant of stay of execution as provided for under Order 42 rule 6 of the Civil Procedure Rules and reliance was made on a number of judicial authorities. The respondent reiterated that the applicant has not satisfied the conditions for grant of conservatory orders to maintain the status quo with respect to the decretal sums deposited in court in **Judicial Review No. 171 of 2014** in that, the dispute at hand is a private dispute and neither has the applicant demonstrated any violations of constitutional values and objects of a specific right or freedom in the bill of rights. The respondent further submitted that the applicant has not satisfied the condition for extension of time to appeal as were laid down in **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi- Civil Application No. Nai 255 of 1997.**

7. I have considered the said application, the response thereto and the rival written submissions. As I have already noted, the applicant seeks three substantive prayers *to wit* stay of execution of the taxation/ruling of Hon. M.N Gicheru dated 1.04.2019; conservatory order be granted to maintain the status quo with respect to the decretal sums held in **Judicial Review No. 171 of 2014- Nairobi**; and the advocate be granted leave to appeal to the Court of Appeal against the ruling dated 13.08.2019. It is my view therefore that the main issue for determination therefore is **whether the said orders ought to be granted.**

8. As for the order of stay of execution of the taxation/ruling of Hon. M.N Gicheru, as the parties herein rightfully appreciated, the principles upon which the court may stay the execution of orders appealed from are settled. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), namely;

> ***(a) that substantial loss may result to the applicant unless the order is made,***
>
> ***(b) that the application has been made without unreasonable delay, and***
>
> ***(c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (****See* ***Antoine Ndiaye –v-. African Virtual University [2015] eKLR)***

9. In **Halai & another –vs- Thornton & Turpin (1963) Ltd [1990] eKLR**, the Court of Appeal, in discussing the above principles held that; -

> ***"In Rasiklal Somabhai Patel v Parklands Properties Ltd the court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI rule 4(2) of the Civil Procedure Rules under which the applicant had to satisfy the court of two matters.***
>
> ***Firstly, that substantial loss may result to the applicant unless the application is granted, which prima facie means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order. Those are the requirements under Order XLI rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior court and not those to this court, although in sub-rule (1) of the same rule reference is made to the court to which the appeal is preferred. It is, however, worth noting that as to the court to which the appeal is preferred it is at liberty to consider the application made to it and make such order thereon as may, to it, seem just….."***

10. The question therefore is whether the applicant proved the above conditions.

11. On the issue of substantial loss, the applicant deposed that the respondent herein is likely to withdraw the decretal sum held in **Judicial Review No. 171 of 2014- Nairobi** and has filed an application for release of the decretal sums in High Court Nairobi and unless the application is allowed, it will be impossible to recover the fees as the respondent is incapable of refunding the decretal sum should the appeal succeed. In ***James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR**, the Learned Judge held as follows in relation to substantial loss; -

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

12. In **Kenya Hotel Properties Limited V Willesden Investments Limited [2007] eKLR,** the Court of Appeal held that: -

"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all."

13. *In the instant application, the applicant herein did not provide sufficient reasons that the respondent herein shall not be able to pay the excess costs. I note that the applicant herein deposed that the respondent had filed an application in* **Judicial Review No. 171 of 2014- Nairobi** for the release of the decretal amount held in that case and which fact was never disputed by the respondent herein. He annexed the said application which was marked as "MGN 7". Prayer 3(d) of the said application seeks for an order that Kshs. 729,126/- be released and paid to the respondent applicant herein. In my view, the respondent has already expressed her intentions to pay the bill of costs as taxed. It is my view that the applicant does not stand to suffer substantial loss if the orders of the taxing master in taxation/ruling of Hon. M.N Gicheru dated 1.04.2019 are not set aside. The apprehension by the applicant to the effect that he will be unable to recover his fees from the respondent is unfounded. In **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, **Platt, Ag.JA** held that: -

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money".

On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

14. The applicant will have his costs as taxed by Hon. Gicheru and as such he does not stand to suffer any substantial loss.

15. Further, the intended appeal is against the decision by Hon. Gicheru and which decision was affirmed by this Court (Hon. Muchemi J). The appeal if it succeeds will have orders which will be touching on the matter herein. The Learned taxing master in taxing the bill of costs did not make any positive orders which are capable of being executed as against the applicant herein. From a reading of the ruling by the taxing master, there is absolutely no order which was made by the court.

16. The authorities on stay of execution pending appeal are clear that for an order of stay of execution to lie there must be positive requirements therein which would or could be affected or tampered by the stay. In **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR.** In **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] e KLR** the Court of Appeal (Kantai J.A) held as follows: -

'An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

'….. an order for stay of execution must be intended to serve a purpose …..' " (emphasis supplied).

(See also **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR).**

17. Further I note that the ruling against which the orders of stay are sought, is that of the trial court and not the decision of this court. However, the decision which the applicant intends to appeal against to the Court of Appeal is not the decision of the trial court but the decision of this court dismissing his appeal. In **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010**, **Makhandia, J** (as he then was) held: -

"The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled

principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."

18. It is clear therefore from the above authority that the orders of stay cannot be grant in the circumstances of this case. The orders the applicant is seeking stay thereof, are not the same as the orders the intended appeal is directed.

19. The applicant having failed to prove that he will suffer substantial loss, this court does not have the jurisdiction to proceed and determine the other conditions and in doing so, order provision of security as to costs. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"** which connotes that all three (3) conditions must be met simultaneously. The applicant must meet all the tenets – requirements of- Order 42 rule 6 of the Civil Procedure Rules. Failure to satisfy any one of the tenets stipulated in that rule is fatal to the application. (See **Equity Bank Limited –vs- Taiga Adams Company Limited [2006] eKLR).**

20. As for the prayer of conservatory order to maintain the status quo with respect to the decretal sums held in **Judicial Review No. 171 of 2014- Nairobi**, the applicant annexed to the application a copy of the orders issued by the court in the said cause on 24.10.2014. As the parties correctly appreciated, the principles for grant of conservatory orders were laid down by the Supreme Court in **Gitaru Peter Munya – vs- Dickson Mwenda Kithinji & 2 others {2014} eKLR**. The Judges of the Supreme Court in the said case held that conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. (See **Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others {2014} eKLR).**

21. In **Regency Systems –vs- County Government of Vihiga & 4 others [2020] eKLR** the Learned Judge after analyzing the conditions for grant of conservatory orders held that: -

"20. From the above authorities, it is clear that the threshold for the grant of conservatory orders in the nature of mandatory orders are far more stringent and higher than those for the grant of interlocutory injunctions under Order 40 rule 2 of the Civil Procedure Rules, 2010 since the former is a public law remedy. ……..".

As such, it is clear that the dispute herein being a civil dispute between two private citizens, it is not a proper case to issue conservatory orders. There is no public interest involved in the dispute.

22. Further, if the applicant is apprehensive as to the orders issued in the **Nairobi Judicial Review No. 171 of 2014**, he ought to have moved that court for extension of the same as opposed to seeking orders in this court. It is my view that this court cannot issue orders in another cause when full facts thereof are not disclosed by the parties. As it stands, there is no information brought before the court as to the status of the said cause. In my view, issuing orders in relation to a matter pending before another court of equal status is not only improper but might lead to conflicting orders being issued. The prayer for conservatory orders therefore fails.

23. As for the leave to appeal to the Court of Appeal against the ruling dated 13.08.2019, it appears that the same prayer was not opposed. The applicant deposed that the intended appeal raises arguable grounds and in his written submissions relied on Rule 11(3) of the Advocates Remuneration Order and the case of **Wambugu Kariuki & Associates –vs- Invesco Assurance Co. Limited (2018) eKLR.** However, the respondent submitted on a different issue being the extension of time within which to file an appeal to the Court of Appeal.

24. Under ***Rule 11(3) of the Advocates Remuneration Order*** it is provided; -

"Any person aggrieved by the decision of the Judge upon any objection referred to such order under Sub-rule (2) may, with leave of the Judge but not otherwise appeal to the Court of Appeal."

25. It is clear from the above rule that appeal to the Court of Appeal from the decision of the High Court can only be with leave of the said court. It is clear that the applicant does not have an automatic right of appeal. The decision whether or not to grant leave to appeal is discretionary as was stated by the Court of Appeal in **Kenya Shell Limited –vs- Kobil Petroleum Limited [2006] eKLR** where it was held that: -

"Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered."

In **Sango Bay Estates Ltd and Others –vs- Dresdner Bank AG [1971] EA 17: -**

"Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds

***of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of judicial discretion, a rather stronger case will have to be made out**."*

(See Muhamed Yakub & Another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999 and Machira T/A Machira & Company Advocates vs. Mwangi & Anor [2002] 2 KLR 391).

26. Further, while considering such an application, the court is called upon to exercise discretion. As a rule the discretion of the court must be exercised fairly and judiciously in the interest of justice and the key consideration that the court should have is whether the adverse party would be prejudiced and whether a just cause has been shown by the applicant to deserve the exercise of the courts discretion. (See the persuasive authority of **Wambugu Kariuki & Associates –vs- Invesco Assurance Co. Limited (2018) eKLR).**

27. I have perused the draft memorandum of appeal attached herein and it is my considered view that the same raises issues which merit judicial consideration by the Court of Appeal. I further note that the applicant filed the notice of Appeal on 20.08.2019 and which was seven days after the ruling by Hon Muchemi J (was delivered on 13.08.2019). In the earlier application dated 2.09.2019, the applicant had not sought for leave to file an appeal to the Court of Appeal until 15.01.2019 when the instant application was filed. The applicant as such delayed for five (5) months. It is my view that the said delay was not inordinate. Further, article 50 of the Constitution guarantees rights to a fair trial and which include the right to have a dispute determined in a court of law. Denying the applicant herein leave to appeal will not be in the interest of justice and in furtherance of the said rights. The respondent further will not suffer any prejudice if leave is granted. As such, it is my view that in the circumstances, the prayer for leave to appeal to the Court of Appeal ought to be allowed.

28. As for the costs, the law is that in exercise of discretion bestowed upon this court in awarding costs, costs should follow events. In this case, the applicant was partially successful. In the circumstances, each party should bear its own costs.

29. In the end, the application dated 15.01.2021 partially succeeds and it is hereby allowed in terms of prayer number 6 only.

30. It is so ordered.

Delivered, dated and signed at Embu this 3rd day of March, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent