REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 6 OF 2017

SAMUEL NJAGI MWANGI.....APPELLANT

-VERSUS-

JAMES KAMAU WAINAINA.....RESPONDENT

RULING

1. The appellant **Samuel Njagi Mwangi** filed a Notice of Motion under ***Order 42 rule 6(1)*** of the **Civil Procedure rules, Section 1A** and **1B, 3A,** of the **Civil Procedure Act** seeking orders that there be a stay of execution of the orders issued in Kerugoya Chief Magistrate's Court Civil Case No. 191 of 2016 pending the hearing and determination of this appeal. That court be pleased to grant any further orders as will meet the ends of justice in this appeal.

2. The appellant had applied a temporary stay of execution pending the hearing and determination of this appeal. Interim orders of stay of execution was granted pending the hearing and determination of the application.

3. The application was based on the grounds that:

a. ***That the Appellant was sued by the Respondent who filed together with the suit the Notice of Motion application dated 6th October, 2016 and sought among other orders an order for the return of the original TLB licenses for motor vehicle registration number KCC 640Y and KBP 241F.***

b. ***That the Appellant filed a reply to the application and also filed a preliminary objection dated 12th October, 2016.***

c. ***That both the application and the preliminary objection were heard together and ruling delivered on 2nd March, 2017 dismissing the preliminary objection and allowing the respondents application.***

d. ***That the Appellant is dissatisfied with orders that were issued on 2nd March, 2017 and has filed an appeal against the said orders.***

e. ***That the Appellant has an arguable appeal with high likelihood of success.***

f. ***That the Respondent does not stand to suffer any loss if the orders of stay are granted.***

g. ***That it is in the interest of justice that the application be heard and allowed.***

4. The application is also supported by the affidavit of the appellant Samwel Njagi Mwangi sworn on 10th March, 2017. According to the Applicant, he was dissatisfied with the ruling that was delivered on 2nd July, 2017 and filed this appeal. Briefly, the Appellant is contending that the trial Court issued a mandatory injunction which injunction can only be issued in very clear circumstances and is not the case in this matter. That he was ordered to return TLB licences for motor vehicles KCC 640Y and KBP 241F which he could not do as the licences were returned to National Transport and Safety Authority upon which they were cancelled. According to the Appellant, the respondent operates under Emuki Sacco and is no longer a member of Memba Traveller Sacco Society. That the Magistrate was wrong to dismiss the Preliminary Objection.

5. The Respondent **James Kamau Wainaina** opposed the application and filed a replying affidavit sworn on 17th March, 2017 and contends that the appeal has no chances of success, the application does not therefore establish a *prima facie* case and ought to be dismissed. According to the Respondent, the Applicant acted unlawfully by plucking the TLB licences. That though the Appellant pleaded that he took disciplinary action he did not annex any documents authorizing him to execute the disciplinary action on behalf of the Sacco. Further that there are no provisions in the by-law that provide for the plucking of the TLB licences from a member who has not complied.

6. I have considered the application. The issue which arises is whether the Court should order a stay of execution pending appeal. This application is brought under **Order 42 rule 6(1) of the Civil Procedure Rules Cap. 21 Laws of Kenya** which deals with stay of execution in case of an appeal. It is provided:

> ***"No appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as it may deem just and any person aggrieved by an order for stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have the order set aside."***
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> ***(2) "No order for stay of execution shall be made under sub-rule one unless***
>
> ***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) such security as the Court orders for the due performance in such decree or order as may ultimately be binding on him has been given by the applicant."***

7. The Respondent is contending that the cited provisions do not provide for the relief sought. The above provision deals with stay of execution. The other provisions cited deals with overriding objectives of the **Civil Procedure Act and rules** and the inherent powers of the Court. It is therefore not true to say that the provisions do not provide for the relief sought. In any case **Order 51 rule 10 Civil Procedure Rules** provides that no application shall be defeated for failure to comply with the rule and no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

8. Under **Rule 5(2) (b) Court of Appeal Rules** the principles for granting a stay of execution pending appeal are that the Appellant must demonstrate there is an arguable appeal and that if stay is not granted, the appeal if successful will be rendered nugatory.

9. The Applicant has filed an appeal. The ruling of the trial magistrate ordered the Applicant to return to the Respondent licences motor vehicles registration number KBP 241F and KCC 640f. The Applicant contends that he is not able to comply with the order as the licences were returned to the National Transport and Safety Authority and are destroyed upon being returned.

10. It is submitted that the order was mandatory in nature. It is submitted for the Applicant that it is trite law that a mandatory injunction ought not to be granted at interlocutory stage unless the Applicant demonstrates that there are special circumstances. That it should be granted in very clear circumstances. The Applicant had raised a preliminary objection contending that the Court had no jurisdiction as the parties were members of the same Sacco.

11. The Magistrate appreciated that the parties were members of the same Sacco and went ahead to dismiss the preliminary objection. The trial magistrate held that it was an error which needed amendment. No party had applied for amendment and that the trial magistrate proceeded as though the pleadings were amended. It is submitted that the trial magistrate tried to force an amendment.

12. The Court ruled that the Applicant was not sued in individual capacity and then went on to say it was individual capacity. The Respondent depones that the Applicant was sued on his individual capacity. The Respondent depones that the Applicant was sued on his individual capacity. The trial court further held that the Applicant as the Chairman of the Sacco acted without authority.

13. The matters raised above show that the Applicant has an arguable appeal. In the case of **Stephene Njuguna Mwangi (Legal representative of the estate of Mwangi Mbothu (deceased) -V- Wangari Njuguna 2015 eKLR** the Court of Appeal while granting a stay held;

> ***"For the applicant to succeed, he must satisfy the twin guiding principles that the intended appeal is arguable; it is not trivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory."***

14. Before this Court the Applicant has to proof the conditions under **Order 42 Rule (6) Supra**. The applicant must proof that he is likely to suffer substantial loss. None of the grounds in support of the application allege that the Applicant is likely to suffer substantial loss. In the supporting affidavit, the Applicant depones that he has an arguable appeal but has not deposed that he is likely to suffer substantial loss. In her submissions, counsel for the Applicant submits that the matters concern issues of business and if not complied with the licences would be cancelled. That the business would go back to zero. That the loss cannot be quantified. The Applicant has referred to the communication marked SNM 2 which I have considered.

15. In considering whether a party will suffer substantial loss, the Court has to balance between the rights of the parties, that is to say, the Applicant's right to appeal and the rights of the respondent to the fruits of his judgment. The onus of proving that substantial loss would occur unless stay is issued, rests upon and must be discharged accordingly, by the Applicant.

16. It is not enough for the Applicant to say that loss will be suffered, the Applicant ought to show the substantial loss it will suffer in the event that the orders sought are not granted.

17. The Applicant has filed this appeal. The right to appeal is a constitutional right that actualizes the right to access justice, protection and benefit of the law whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory infringes on the very right of appeal. This was stated by my brother Justice F. Gikonyo in **Joseph Simiyu Mukenya -V- Agnes Naliaka Cheseto Misc. Application 42/2011** unreported. This holding is persuasive. At stake is a mandatory injunction which may be enforced if stay is not ordered. The appeal would be rendered nugatory if the Applicant complies with the order or the order is executed.

18. The correspondence referred to shows that the business of the Applicant would be suspended. Counsel for the Applicant submits that the business of the Applicant involves operation of matatus with the Sacco Society. The licences of the matatus would be cancelled and the business would go back to zero. She submits that there are 34 matatus which would stop operating. That such is substantial loss which cannot be quantified. The Applicant has shown that there is threat to suspend the operations by National Transport and Safety Authority. I find that if this were to happened, the applicant is likely to suffer substantial loss. I find that the Applicant has discharged the burden to proof that he is likely to

suffer substantial loss. The appeal may take time to be disposed off and if the business of the Applicant is suspended upon execution of the order of this court, it 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. This, it has been held is what substantial loss entails.

19. I have considered the submissions by the Respondent which I find are more on the merits of the appeal. In the present application, it is not the merits of the appeal which the Court has to consider in exercising its discretion to order stay. The Court of Appeal in the case of **Mukoma -V- Abuoga (1988) KLR** when dealing with the question of exercise of discretion by the High Court and Court of Appeal in granting an order of stay of execution held:

> ***"……the issue of substantial loss is the corner stone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

I find that where the Applicant has proved that substantial loss would occur and the appeal would be rendered nugatory the Court should exercise discretion in his favour.

20. The Applicant has not offered security nor has he proposed that he will offer security for the due performance of the order issued by the trial court. As a matter of course if stay of execution is ordered the Applicant must provide security. It is my considered view that under **Order 42 rule 6 (2) (b) Civil procedure Rules**, it is the court which is supposed to order security. It provides:

> ***"Such security as the Court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***

This ensures that the discretion of the court is unfettered when considering the application.

21. The other consideration is whether there was inordinate delay. The ruling of the Court was delivered on 2nd March, 2017. The applicant filed the Memorandum of Appeal on 10th March, 2017. This application then followed on 10th March, 2017. I find that the application was filed without unreasonable delay.

22. The Respondent submitted that the order was not attached to the application. The counsel for the applicant explained that there was delay and she had to file this application under a certificate of urgency.

23. The application indicated that it is also under **Section 1A and 1B and 3A Civil Procedure Act**. These provisions deal with overriding objective of the **Civil Procedure Act** and the **Inherent Jurisdiction of the Court.** The Court is called upon to do substantial justice unless prejudice may be occasioned to the other party. No prejudice is alleged and none has been occasioned by the failure to annex the order. There is no denial that the order was issued. The Respondent has ably defended the application. **Article 159 of the Constitution** mandates the Court to do justice without giving undue regard to technicalities of procedure. The applicant annexed the ruling. The Respondent extracted the order. The Respondent has not suffered any prejudice and the omission is not fatal. Counsel for the Respondent indeed submits that it was a procedural issue. It should therefore not bar the Court from rendering substantial justice.

24. The Applicant was seeking an order of stay of execution. What he was required to proof as pointed out above under **Order 42 rule 6 (1) (2) Supra** is that he is likely to suffer substantial loss, the application has been brought without unreasonable delay and security as may be ordered by the Court. For the reasons stated above, I find that the applicant has discharged the burden of proof sufficiently to warrant this Court to order a stay of execution. I therefore allow the application and order that there will be stay of execution pending hearing and determination of this appeal. The Applicant shall provide security by depositing Kshs.100,000/- or security of like amount in Court within 14 days. Costs to the applicant.

Dated and delivered at Kerugoya this 7th day of April, 2017.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Miano for Respondent, Mr. Muchiri holding brief for M/S Muthike for the Applicant, Court Assistant Naomi Murage this 7th day of April, 2017.

L. W. GITARI

JUDGE

7.4.2017