



**Narok County Government v Governors Baloon Safaris Limited & another (Civil Application 161 of 2020) [2022] KECA 1085 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1085 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 161 OF 2020  
HM OKWENGU & PO KIAGE, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**NAROK COUNTY GOVERNMENT ..... APPELLANT**

**AND**

**GOVERNORS BALOON SAFARIS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SKYSHIP COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution against the Ruling and Order of the High Court of Kenya at Nairobi (Okwany, J.) dated 29th May, 2020 in HCCC No. 461 of 2008)*

**JUDGMENT**

1. By its motion dated June 22, 2020 and brought under Rule 5(2)(b) of the [Court of Appeal Rules](#), Narok County Government, the applicant, seeks, in the main, the following orders;
3. That pending the hearing and determination of this Application, the Honorable Court be pleased to issue an order of stay of execution of part of the Ruling and Order delivered on 29<sup>th</sup> May, 2020 in Nairobi HCCC No. 461 of 2008 that ordered the Applicant to deposit a security sum of Kshs. 20,165,806.00 in a joint interest earning account in a banking institution of repute within thirty (30) days of the Ruling failure of which the other orders issued in the said Ruling to its benefit would lapse.
4. That pending the hearing and determination of the Applicant's Appeal, the Honorable Court be pleased to issue an order of stay of execution of part of the Ruling and Order delivered on 29<sup>th</sup> May, 2020 in Nairobi HCCC No. 461 of 2008 that ordered the Applicant to deposit a security sum of Kshs. 20,165,806.00 in a joint interest earning account in a banking institution of repute within thirty (30) days of the Ruling failure of which the other orders issued in the said Ruling to its benefit would lapse.



2. The motion is founded on 11 grounds and is supported by an affidavit sworn by Elizabeth Lolchoki, the applicant's County Secretary. She averred that the 1<sup>st</sup> respondent's party and party bill of costs were taxed at Kshs. 20,165,806 by the Deputy Registrar, Honorable Wanyama in a ruling dated May 31, 2019. Even though the applicant was disgruntled by this decision, for reasons beyond its control, it was unable to file its notice of objection and reference within the required timelines.
3. In a bid to safeguard its interests, the applicant filed a Chamber Summons application dated 20<sup>th</sup> June 2019, which in the main, sought an order of extension of time to file its notice of objection and reference and also for a stay of execution against the ruling pending the hearing and determination of the reference. Okwany, J. heard the arguments from both parties and by a ruling delivered on May 29, 2020, ordered as follows;
  - a. The execution of the Taxing Officer's orders of 31<sup>st</sup> May 2019 is hereby stayed pending hearing and determination of the Reference.
  - b. Time within which to file the Notice of Objection and Reference against the decision of the Taxing Officer delivered on 31<sup>st</sup> May 2019 is hereby extended.
  - c. The Notice of Objection and Reference filed on June 20, 2019 to be deemed to have been properly filed.
  - d. Orders (a), (b) and (c) above are granted on condition that (sic) deposits the taxed costs of Kshs. 20,165,806.00 in a joint interest earning account to be held by counsel for the plaintiff and the 2<sup>nd</sup> defendant in a banking institution of repute within 30 days from the date of this order.
  - e. In default of compliance with order (d) (sic) above orders (a), (b) and (c) will stand vacated.
4. Aggrieved, the applicants filed a notice of appeal which gives us jurisdiction to hear and determine the 5 (2) (b) application before us.
5. It is the applicant's assertion that it is a government as per the provisions of Article 6(2) and 176 of the Constitution and the Government Proceedings Act. Consequently, the security exemption as stipulated in Order 42 Rule 8 of the Civil Procedure Rules, 2010 is applicable to it. The said Rule provides;

No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.
6. Thus, by issuing the conditional order, the learned Judge was in contravention of the aforementioned Rule which clearly stipulates that the applicant cannot be required to furnish security. Further, the learned Judge failed to take into account the effect of the order which was tantamount to unjustly placing a burdensome lien on public funds that would otherwise be put to good use for the benefit of the people of Narok County in terms of service delivery, especially in the health sector due to the COVID-19 Pandemic, which was prevalent at the time. The applicant avowed that it would be detrimental if this application is not granted as the orders granted in its favor will lapse, while on the other hand, the respondents will not suffer any prejudice.
7. The respondent, through its Managing Director, Dominic Grammaticas argued that the exemption in Order 42 Rule 8 is only applicable to the Government of Kenya. Contrary to the applicant's assertions, it is not a Government as denoted in the Government Proceedings Act. Rather, it is a corporate body with perpetual succession as detailed in Section 6 of the County Government Act. Therefore, the applicant does not enjoy any special status in law and as such the learned judge did not err in the exercise



of her discretionary power. Similarly, the respondent was affected by the COVID-19 pandemic as it was forced to close down due to lack of business. Consequently, it was in dire need of the funds as it was burdened by its loan repayment obligations.

8. The principles upon which this Court grants relief under Rule 5(2)(b) of its Rules are old hat and have been rehashed by this Court numerous times. For an applicant to succeed he must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. For an appeal to be considered arguable, it must raise at least one bona fide point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See, *Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 Others* [2013] eKLR and *Kieni Plains Co. Ltd & 2 Others Vs. Ecobank Kenya Ltd* [2018] eKLR.
9. After considering the application, the replying affidavit and the submissions filed, we find that the applicant's assertion that it is a Government as per the provision of the *Government Proceedings Act* and therefore worthy of the exemption provided for in Order 42 Rule 8 is an arguable ground worthy of consideration by this Court in the appeal and we shall therefore not delve into it at this juncture. On the nugatory aspect, the applicant stands to lose the benefit of the conditional order, and in turn the intended appeal on the very issue would then be rendered nugatory, if a stay is not granted.
10. Consequently, we find that both limbs have been satisfied and therefore the application succeeds.
11. In the end, we hereby grant the injunction and stay of proceedings sought in the fourth prayer of the motion and the stay shall extend to the hearing and determination of the appeal.
12. The costs of the motion shall be in the appeal.
13. This ruling is delivered under Rule 34(4) of this Court Rules (2022), since our learned sister Koome, JA, (as she then was, now Chief Justice) left the Court of Appeal before signing it.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

