Nairobi City Council v Tom Ojienda & Associates (Civil Appeal (Application) E080 of 2022) [2022] KECA 1326 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1326 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E080 OF 2022

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 2, 2022

BETWEEN

NAIROBI CITY COUNCIL .... APPELLANT

AND

TOM OJIENDA & ASSOCIATES .... RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of appeal against the ruling and order of the Employment and Labour Relations Court at Nairobi (James Rika, J.) delivered on 22nd July 2021 in Employment and Labour Relations Court Misc. Appl. No. 171 of 2017)

RULING

1. Before us is the applicant's notice of motion dated March 16, 2022 brought under rule 1(2) and 5(2)(b) and 42 of the *Court of Appeal Rules*, 2010 seeking, *inter alia*:

    a. Stay of further proceedings in ELRC Misc Application 171 of 2017 including the re-taxation of the respondent's bill of costs dated November 27, 2017 pending the hearing and determination of this application.

    b. Stay of further proceedings in ELRC Misc Application 171 of 2017 including the re-taxation of the respondent's bill of costs dated November 27, 2017 pending the hearing and determination of the intended appeal.

    c. That costs be provided for.

2. The application is supported by the affidavit of Nancy Nduta Njoroge (learned counsel for the applicant) sworn on March 16, 2022. The main grounds raised by the applicant are:

> "2. That the honorable judge in ELRC Misc Application No 171 of 2017 delivered his ruling on July 22, 2021 being a reference against the taxing master's ruling dated November 10, 2020 where she awarded the amount of Kshs 448,328/- against the advocate/respondent bill of costs of Kshs 156,729,200/- and ordered the re-taxation of item 1 of the advocates bill of costs dated November 27, 2017 from which decision the appellant has preferred an appeal.
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> 3. That the applicant filed a notice of appeal on 26th July and requested for typed copies of the proceedings.
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> 4. That the learned judge failed to take into consideration that the taxing master was properly guided by law and exercised her discretion properly.
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> 5. That the respondent has fixed the re-taxation of the bill of costs dated November 27, 2017 based on the value of the subject matter at value of Kshs 5,444,697,804.00.
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> 6. That the applicant is apprehensive that if the application is not heard forthwith, and an interim stay order granted, the taxing master will proceed to re-tax item 1 of the bill of cost using the sum of Kshs 5,444,697,804.00 as the value of the subject matter thereby rendering the intended appeal nugatory."

3. The applicant has filed written submissions dated March 21, 2022 reiterating the averments in the supporting affidavit, and points of law on the applicable principles in an application filed under rule 5(2) (b) of the *Court of Appeal Rules*.

4. In opposition to the application, the respondent has filed written submissions dated October 7, 2022 stating that: there is no proper notice of appeal on record as the notice dated July 26, 2021 was filed before the applicant obtained leave to appeal; the intended appeal is not arguable; the intended appeal will not be rendered nugatory if stay is not granted; and that public interest is in favour of declining the grant of the orders sought.

5. When the application was called out for hearing, the applicant's advocate was absent. The court noted that the applicant had filed written submissions dated March 21, 2022 and, pursuant to rule 58(1) of the *Court of Appeal Rules*, we are required to consider the application on the basis of the written submissions.

6. To succeed in an application made under rules 5(2) (b) of the *Court of Appeal Rules*, an applicant must satisfy the twin principles that are enumerated in many decisions of this court, namely:

   i. An applicant must demonstrate that they have an arguable appeal; and

   ii. That the intended appeal or appeal if successful, will be rendered nugatory if the execution of the decree, order or proceedings is not stayed.

7. On the first limb of the twin principles, this court held in *David Morton Silversein -vs- Atsango Chesoni* [2002] eKLR that for an order of stay of execution or proceedings to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal would in the absence of an order of stay be rendered nugatory. [See also *Reliable*

Bank Ltd (in liquidation) v Norlake Investments [2002] 1 EA 227; *Nation Newspapers Limited v Peter Baraza Rabando*, CA No 1 [2007] eKLR; and *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] eKLR 31.

8. On the sufficiency of the grounds to warrant a grant of the orders of stay sought, this court in *Transouth Conveyors Limited v Kenya Revenue Authority & another* [2007] eKLR, CA No 37 of 2007, observed that a single issue will suffice, and that an applicant need not establish a multiplicity of arguable issues. Neither is the applicant required to show that the point would succeed. It only needs to be an issue that raises a serious question of law worthy of consideration by the court, or one in respect of which a reasonable argument can be put forward in support (see *Retreat Villas Limited v Equatorial Commercial Bank Limited & 2 others* CA No 40 of 2006).

9. Before we proceed to consider the application, it is necessary to consider the issue of jurisdiction that has been raised by the respondent regarding the notice of appeal. It is trite law that, for a party to invoke the jurisdiction of this court under rule 5(2) (b), it must first file a notice of appeal in accordance with rule 77 of the *Court of Appeal Rules*.

10. In *Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper Service* [2019] eKLR, this court had this to say on the matter: "A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction on itself."

11. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, the Supreme Court had this to say on this matter: "A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is one that requires leave or not. It is a jurisdictional prerequisite."

12. The respondent submits that there is no proper notice of appeal on record as the notice dated July 26, 2021 was filed before the applicant obtained leave. Upon perusal of the record, we note that there is a notice of appeal dated July 26, 2021 and a letter addressed to the deputy registrar dated July 23, 2021 and a follow up letter dated August 27, 2021 requesting for proceedings which are copied to the respondent. In view of this, there is a notice of appeal on record for the purposes of rule 77 of the *Court of Appeal Rules*. The respondent is at liberty to apply for striking out of the notice of appeal under rule 86 of the Rules of this court if he is of the view that the notice is defective, but no such application has been made. At the moment, the issue of whether the notice of appeal was filed without leave is not before us for determination. What cannot be denied is that a notice of appeal has been filed and is on record.

13. Indeed, in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* CA No Nai 238of 2005, this court was confronted with an objection similar to that raised by the respondent regarding the validity of the notice of appeal. The court expressed itself as follows:

> " The applicant filed its notice of appeal against the said decision on May 26, 2005; the court accordingly has jurisdiction to hear and determine the motion for stay. Mr Ohaga, learned counsel for the respondents …tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore the court cannot grant the order of stay prayed for. We, however take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the court has repeatedly pointed out rule 5(2) (b) does not provide that "…where a valid notice of appeal…" the rule simply provides that:
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> "In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74…"

> Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5(2) (b) is being considered."

14. Having established that a notice of appeal has been filed and that this court has jurisdiction to deal with the application, we will now turn to the applicable principles. On the first principle whether the intended appeal is arguable, the applicant has annexed a memorandum of appeal raising the following grounds: that the issue of retainer was not proved; that the learned judge failed to consider that the case related to an interlocutory application with no monetary value; that the taxing master is entitled to discretion while taxing bills; and that the figure of Kshs 5,444,697,804 that the judge held to be the basis for the taxation has no legal or factual basis.

15. Upon considering the grounds advanced for the intended appeal, we find the same arguable. As this court held in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR an "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court." As to whether the intended appeal will succeed, we leave it to the bench that will hear and determine the issues.

16. On the second principle, the applicant states that the appeal will be rendered nugatory if an order for stay is not granted as the re-taxation of the bill will render the intended appeal an academic exercise. We note that the main issue in the intended appeal is whether the learned judge erred in setting aside the sum of Kshs 448,328/= that had been taxed by the taxing master and reordering a re-taxation which should take into account the value of the subject matter , which he stated to be the sum of Kshs of 5,444,697.804.00.00. At the core of the intended appeal is the holding by the learned judge on the value that should be assigned to the subject matter as the basis for the re-taxation. The applicant's argument is that the suit in the high court had no monetary value while, on the other hand, the respondent states that the value of Kshs 5,444,697,804/= is ascertainable in the pleadings.

17. It is our view that this is one of those cases where the maintenance of the *status quo* is in the interest of both parties. If a stay is not granted and the re-taxation is done on the subject matter of Kshs 5,444,697,804/= as directed by the learned judge, the pending appeal will be rendered an academic exercise if this court was to disagree with the holding of the high court. On the other hand, if the applicant is unsuccessful in the intended appeal, the re-taxation will be done afresh taking into account the holdings of the high court. In the circumstances of this case, a stay of proceedings is necessary pending the hearing and determination of the intended appeal.

18. The upshot of the foregoing is that the applicant has satisfied the twin principles for grant of an order for stay of proceedings under rule 5(2) (b). Accordingly, we allow the application but, on the issue of costs, we order that the same shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR