



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.) NYR.

CIVIL APPLICATION NO. 75 OF 2019

BETWEEN

KENYA NATIONAL HIGHWAY AUTHORITY..... APPLICANT

AND

MOSES KIPKOECH ROTICH.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

HEAD OF TRAFFIC POLICE DEPARTMENT.....3RD RESPONDENT

OFFICER COMMANDING STATION

KERICHO POLICE STATION.....4TH RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL

GOVERNMENT.....5TH RESPONDENT

CABINET SECRETARY, MINISTRY OF

TRANSPORT AND INFRASTRUCTURE.....6TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....7TH RESPONDENT

ATTORNEY GENERAL.....8TH RESPONDENT

(Application for stay of execution pending the filing and determination of an appeal from the judgment and decree of the

High Court of Kenya at Kericho (Hon. Lady Justice Mumbi Ngugi) dated 1st November, 2018

in

Kericho Petition No 14 of 2016)

RULING OF THE COURT

[1] *Moses Kipkoech Rotich* (the 1st respondent) petitioned the High Court at Kericho in **Kericho Petition No 14 of 2016** alleging violation of rights in regard to the use and control of his motor vehicle registration **No. KAX 304C** which was impounded and detained by police from

3rd December, 2016 to 13th October, 2017. Upon impounding the vehicle, it was detained at the Kericho Police station until the 1st respondent filed the aforesaid suit, first of all seeking an interim order of its release, which order was issued on the 13th October, 2017. Upon hearing the main petition, the learned trial Judge, **Mumbi Ngugi, J.** found for the 1st respondent by the judgment dated, 1st November 2018 which is the subject of the applicant's intended appeal. The Judge issued the following orders:-

“i. A declaration be and is hereby issued that the actions of the 1st and 2nd Respondents of detaining motor vehicle registration No. KAX 304C Isuzu FVC lorry were illegal, an abuse of the criminal justice system and in violation of the petitioner's rights under Articles 40, 47 and 50 of the Constitution.

ii. That the 1st respondent to pay the petitioner an award in damages of Kenya Shillings Three Million (Kshs.3,000,000) for unlawful detention of his vehicle for a period of 10 months.”

[2] Aggrieved by the said orders, the applicant filed a Notice of Appeal evincing its intention to appeal. Subsequently the applicant filed the instant notice of motion dated 15th May, 2019 seeking a stay of execution of the aforesaid orders pending the hearing and determination of an intended appeal against the said judgment and decree. The application is supported by the affidavit sworn by **Dennis Higgens** on 13th May, 2019. He contends that the intended appeal is arguable; citing the provisions of **Section 67 of the Kenya Roads Act, 2017** which he claims bars the institution of legal proceedings against the applicant before an expiry of a 30-day after a statutory notice was issued which was not done by the 1st respondent before filing the Petition in the High Court and therefore the court had no jurisdiction.

[3] Moreover, the applicant contended that the circumstances in which the motor vehicle was impounded was not contested by the 1st respondent; that it was flagged down by police officers but the driver did not stop to allow the vehicle to be weighed; thus, the award given is tantamount to a reward for breaking the law. On the appeal being rendered nugatory, it was the applicants' contention that if execution proceeds and the 1st respondent is paid the decretal sum, he will not be in a position to refund the money as he has no known source of income or tangible assets from which recovery can be made.

[4] The application was opposed by the 1st respondent vide his replying affidavit sworn on 1st March 2021 stating that the appeal was not arguable owing to the undisputed evidence on record that the applicants had no legal justification to detain his vehicle for over 10 months. Further, the issues sought to be raised in the appeal especially that the impugned petition was filed without 30 days' notice was neither pleaded nor canvassed before the trial Judge and the statutory requirement cannot usurp the jurisdiction of the court to determine violation of rights.

[5] On the intended appeal being rendered nugatory, the 1st respondent stated in his replying affidavit that he is possessed of sufficient means to effect a refund of the decretal amount if it were paid to him and the appeal succeeds. He confirmed owning several properties including but not limited to **L.R NO. KERICHO/KAPSURER/7162** whose value is not less than Kshs.22,000,000.

[6] We have considered the instant motion and the replying affidavit, which was done without appearance of counsel or parties Pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. The application is predicated under the provisions of **Rule 5 (2) (b)** of this Court Rules. The applicable guidelines in regard to orders sought in this regard are well settled. For the applicant to succeed, it must establish that; the appeal is arguable and not frivolous and that if the stay order sought is not granted the appeal will be rendered nugatory. See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006** (unreported). The principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”

[7] Has the applicant demonstrated that the appeal is arguable? We think so, granted the allegations made, such as the absence of the statutory notice, although this was a constitutional petition, we think it is for the Bench that will hear the appeal to consider and determine that aspect. We will therefore not interrogate the other issues raised by the applicant as just one issue is sufficient and in fact it also need not succeed at the appeal. That was held in the case of **Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others [2014] eKLR** where the Court of Appeal stated thus:-

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication. “

[8] While we are prepared to find as we have that the applicant's intended appeal is arguable, we are not persuaded that it will be rendered nugatory if it succeeds.

This is because the 1st respondent has demonstrated his ability to refund the said sum should the applicant's appeal be successful. This being a money decree and while noting the applicant has not responded to the 1st respondent's averments regarding his ability to pay the decretal sum if the order of stay is not granted, we find the applicant has not satisfied the two limbs.

[9] In the event this application therefore fails and is dismissed with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR