



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), KARANJA & GATEMBU, JJ. A.)

CIVIL APPLICATION NO. 107 OF 2019

BETWEEN

PETER SAFARI SHEHE.....APPLICANT

AND

MADZAYO MRIMA & JADI ADVOCATE.....RESPONDENT

(Being an application for stay pending the hearing and determination of an intended appeal from an Order of the High Court of Malindi (J.R. Nyakundi, J.) delivered on 15th October, 2019 in High Court Misc. Appl. No. 1 of 2015)

RULING OF THE COURT

The applicant sought to restrain the respondent by an order of temporary injunction from selling a Tipper Lorry registration number KCC 846S which had been attached to satisfy advocate/client bill of costs taxed at Kshs.2,000,000.

Upon consideration of the application, Nyakundi, J. was not persuaded that the conditions precedent for the grant of an interlocutory injunction under **Order 40 Rule (1)(2)** of the Civil Procedure Rules were met and rejected the application with costs to the respondent.

The applicant has now approached this Court asking that that decision be stayed as he lodges an appeal to challenge it. In support of the application and to fulfill the requirements of **Rule 5(2)(b)** of the **Court of Appeal Rules** under which it is premised, the applicant has stated that the intended appeal is arguable on the question whether or not the respondent was entitled to the sum awarded; and that the appeal will serve no purpose if successful, absent temporary orders to restrain the respondent from disposing of the lorry.

There is no reply to the application.

We reiterate that the applicant has the burden of showing that the appeal is arguable and in addition that if an order of stay is not granted, the appeal, if successful, will be of no purpose to him. We stress too that the applicant must satisfy both limbs. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR.

Without expressing any definitive view on the arguability of the appeal, it is doubtful that the manner the learned Judge exercised his discretion in the matter can be faulted.

We similarly do not see how the appeal, if successful, will be rendered nugatory. But of significance is that the learned Judge did not make any positive order capable of being stayed. He merely dismissed the applicant's application for injunction.

Having failed on both limbs, though failing on limb would have been enough to dispose of the application, the applicant's motion has no merit. It is accordingly dismissed with no orders as to costs.

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

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR