



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI J.J.A.)

CIVIL APPLICATION NO. 145 OF 2020

BETWEEN

JOSEPH NJUGUNA THAIRU.....APPLICANT

AND

COUNTY SECRETARY, NAIROBI CITY COUNTY.....1ST RESPONDENT

CHIEF FINANCE OFFICER/COUNTY TREASURER

NAIROBI CITY COUNTY..... 2ND RESPONDENT

HON. ATTORNEY GENERAL..... 3RD RESPONDENT

(An application for stay of execution of the judgment of the High Court of Kenya

(Judicial Review Division) (J. M. Mativo, J.) dated 14th May, 2020

in

JR Misc. Civil Application No. 182 of 2019)

RULING OF THE COURT

Before us is a Notice of Motion dated 5th June, 2020, under sections 3, 3A and 3B of the **Appellate Jurisdiction Act, Cap 9** of the **Laws of Kenya, Rules 1(2), 5(2)(b), 41 and 42** of the **Court of Appeal Rules, 2010, Order 42, Rule 6(1)** of the **Civil Procedure Rules, 2010** and **all other enabling provisions of the law** seeking orders that:

“3. This Honourable Court be pleased to stay the execution of the order of the High Court in JR Miscellaneous Civil Application No. 182 of 2019 made on 14th May, 2020 awarding costs to the respondents pending the hearing and determination of the intended appeal.

4. This Honourable Court be pleased to stay further proceedings resulting from the judgment of the High Court in JR Miscellaneous Civil Application No. 182 of 2019 made on 14th May, 2020 and the resultant decree thereof.

6. This honourable court be at liberty to issue further orders and or directions as it may deem fit and just to serve the ends of justice owing to the special circumstances of this case.

7. Costs of and incidentals to this application abide the result of the intended appeal.”

It is supported by grounds on its body and a supporting affidavit of **Joseph Njuguna Thairu** together with annexures thereto. It has been opposed by a replying affidavit of 1st and 2nd respondent sworn by **Johnson Akongo** on 28th July, 2020 together with annexures thereto

and grounds of opposition dated 28th July, 2020. It was canvassed virtually via the Go-To-Meeting platform due to the current Covid-19 pandemic challenges, through rival pleading, written submissions and legal authorities relied upon by the respective parties herein in support of their rival positions.

The background to the application albeit in a summary is that the applicant filed High Court of Kenya Judicial Review Misc. Civil Application No. 182 of 2019 against the respondents seeking an order of mandamus to compel the respondents to pay him the balance of kshs.3,169,605.00 being the decretal sum in respect of the decree issued on 28th May, 2013 in Nairobi High Court Civil Suit No. 85 of 2013 of kshs. 3,41,965.00 and costs of the suit as taxed and evidenced by the certificate of taxation dated 15th September, 2013 of kshs. 137,640.75 less the amount paid of kshs. 1,110,000.00, interest on the said sum of kshs. 2,169,605.00 at the rate of 14% p.a from the date of judgment until payment in full; notice to show cause to issue upon default of payment by the respondents for them to show cause why they should not be cited for contempt of court, costs of and incidental to the application and the application for leave be granted to the applicant together with an attendant order for any other relief that the Court may deem fit to grant. The judicial review notice of motion was resisted by a replying affidavit of the 1st and 2nd respondents sworn by **John Sam Akongo** on 26th September, 2019, heard on merit and dismissed on 14th May, 2020.

The applicant was aggrieved and on 27th May, 2020 timeously filed a notice of appeal dated 22nd May, 2020 on which the application is anchored. Applicant submissions have been of no use as they relate to reasons as to why his application ought to have been certified urgent. We are left with no option but to rely on his averments in the supporting affidavit in our determination of the application. The applicant relies on the memorandum of appeal annexed to the application in satisfaction of the first prerequisite of demonstration of existence of an intended arguable appeal. In it, the applicant intends to raise seven (7) grounds of appeal faulting the learned trial Judge for: erroneously holding that the applicant's motion was fatally incompetent for failure to comply with **section 21 of the Government Proceedings Act, Cap 40, Laws of Kenya** and **order 29, Rule 3 of the Civil Procedure Rules, 2010**, upholding procedural technicalities thereby thwarting applicant's right to enjoy the fruits of his judgment, failing to consider 1st and 2nd respondents admission and part payment of his claim; misapprehending the nature and extent of the 1st and 2nd respondents objections to applicant's claim against them based on failure to present his claim before the pending bills validation committee as opposed to service of certificate of order and costs against the government and lastly, erroneously dismissing applicant's application and awarding costs to the respondents.

In support of proof of the nugatory aspect of the application, the applicant contends that there is threat of execution of the order on the award of costs against him which is the very substratum of the intended appeal thereby rendering it nugatory should it ultimately succeed.

In support of the above submissions, the applicant relied on the following authorities **Henry Muli Munguti & 6 Others vs. Cyrus Robbert Sala Zibu & 13 Others [2018] eKLR**; **Bata Brands SA & Another vs. Umoja Rubber Products [2019] eKLR**; **New Kenya Co-operative Creameries Ltd vs. Olga Ouma Adede [2015] eKLR**; **Diamond Hasham Lalji & Another vs. Attorney General & 4 Others [2015] eKLR**; and lastly, **Musa Hassan Bulhan vs. Kenya Airways Limited & Another [2006] eKLR**, all on the exercise of the Court's mandate under **Rule 47 of the Court of Appeal Rules** with regard to circumstances under which a matter may be certified as urgent. Second, in support of his submission that if taxation and execution of the resulting bill of costs were to proceed to their logical conclusion before the intended appeal is heard, the intended appeal would in the premises be rendered nugatory.

In rebuttal, the 1st and 2nd respondents aver and submit that the application under consideration should either be struck out or dismissed for the reason that it is not only incompetent but also defective. Neither does it lie as what the applicant seeks to forestall is a negative order incapable of being stayed. It is also tainted with applicant's failure to disclose material particulars pertinent to the determination of issues in controversy herein as between the rival parties in the application under consideration; granting the order sought herein would greatly prejudice the 1st and 2nd respondents who were irregularly brought to court by the applicant who failed to follow the set down procedures for seeking judicial review remedies against them. They also contend that the application as laid does not meet the threshold for granting relief under **Rule 5(2)(b) of the Court of Appeal Rules** especially when the record is explicit that the trial court's finding that the judicial review proceedings were incurably defective was well founded on the material laid before the trial court as there was clear demonstration that the applicant failed to follow the laid down procedures and the law for seeking judicial review reliefs against them.

It is also the 1st and 2nd respondents' submissions that the application is merely speculative for lack of proof of either existence of a bill of costs already filed by them against the applicant nor proof of any intention on their part to do so; all the cases cited by the applicant in support of the application are irrelevant to the issue in controversy in the application under consideration. Lastly, that there is also no proof from the applicant that the 2nd respondent would not be in a position to refund costs should execution for the same issue and the appeal ultimately succeeds.

In light of the totality of the above submissions, the 1st and 2nd respondents urged the Court not to exercise its discretion in favour of the applicant as prayed for in the application under consideration and instead urged that the application be dismissed with costs to them.

To support the above averments and submissions, the 1st respondents among others relied on the case of **William Wambugu Wahome vs. The Registrar of Trade Unions & Another [2006] eKLR** for the holding that a dismissal order being negative in nature as opposed to a positive order requiring a party to do something is incapable of being stayed.

Our invitation to intervene on behalf of applicant has been invoked under **Rule 5(2)(b)** of the Court's **Rules**. It provides:

“in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

The principles that guide the Court in the discharge of its mandate under the said provisions and which we fully adopt are as crystallized by the Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**. These require demonstration that the appeal or intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the applicant should the appeal ultimately succeed.

In satisfaction of the first prerequisite, the applicant relies on the annexed memorandum of appeal whose contents are already highlighted above and which we therefore find no need to rehash. Our take on the same is that in law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Considering the above threshold in light of applicant's intended grounds of appeal highlighted above, we are satisfied that the grounds of appeal raised in the draft memorandum of appeal annexed to the application are arguable, their ultimate success or otherwise notwithstanding.

On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

The applicant's position is that there are fears that the respondent may proceed to tax and execute costs awarded in their favour against him.

In rebuttal, the 1st and 2nd respondents have contended that there is no proof of any bill of costs filed by them, a position not rebutted by the applicant. Since this was the sole reason advanced by the applicant in support of the second prerequisite of the intended appeal being rendered nugatory, the threshold for granting the relief under the above **Rule** has not been satisfied as the position in law is that both prerequisites under the said **Rule** have to be satisfied before a party can be granted relief. Since only one prerequisite was satisfied, the application fails.

In the result and on the basis of the totality of the above assessment and reasoning, we find no merit in the application. It is accordingly dismissed with costs to the 1st and 2nd respondents who prosecuted the application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR