



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & SICHALE, JJ. A)

CIVIL APPLICATION NO. E026 OF 2021

BETWEEN

CENTRAL BANK OF KENYA.....APPLICANT

AND

MAKHECHA & COMPANY ADVOCATES.....1ST RESPONDENT

MORAN AUCTIONEERS.....2ND RESPONDENT

(Being an application for injunction under Rule 5(2)(b) of the Court of Appeal Rules pending the filing,

hearing and determination of an appeal from the ruling and order of the High Court of Kenya

at Nairobi (Majanja, J.) dated 12th June, 2020 in Misc. Application No. 296 of 2012)

RULING OF THE COURT

1. Following a disagreement between the 1st respondent and the applicant over legal fees, the 1st respondent filed its advocate/client bill of costs on 15th May, 2012 for the sum of Kshs.25, 299, 686. The bill was initially taxed on 12th October, 2012 at Kshs. 8,917,163 causing the 1st respondent to lodge a reference in the High Court, **Misc. Applic. No. 296 of 2012**, which was dismissed vide a ruling dated 23th January, 2013.
2. However, on 8th December, 2017 this Court in an appeal, **Civil Appeal No. 48 of 2014**, set aside the High Court's ruling and substituted the same with an order taxing the bill of costs as drawn. Towards that end, a certificate of costs dated 16th December, 2019 was issued for Kshs.25, 299, 686.90.
3. Subsequently, the 1st respondent through an application dated 16th January, 2020 sought *inter alia*, interest on the taxed amount plus costs. In a ruling dated 12th June, 2020 Majanja, J. awarded the 1st respondent interest at the rate of 12% per annum from 15th May, 2012 until payment in full together with costs which he assessed at Kshs. 20,000. The reason for doing so was that the learned Judge found that the 1st respondent had been kept out of what would have been the benefit of its money from the time the bill was filed.
4. Intent on challenging the above ruling, particularly on the issue of interest, the applicant filed a notice of appeal on 26th June, 2020. Later on, the applicant was served with warrants of attachment and a notice of proclamation of attachment on 28th January, 2021 by the 2nd respondent on account of the impugned ruling. Consequently, the applicant filed the current motion dated 2nd February, 2020 praying for stay of execution of the said ruling together with any consequential orders, warrants of attachment and notice of proclamation of attachment pending the lodging and determination of the intended appeal.
5. According to the applicant, the intended appeal was arguable, in that, the learned Judge had failed to properly exercise his discretion in awarding interest. Expounding further, the applicant faulted the learned Judge for disregarding the evidence on record, which in its view clearly demonstrated that it was not responsible for the delay, if any, in payment of the taxed costs to the 1st respondent. That as per the ruling dated 23rd January, 2013, which upheld the initial taxation, the High Court had held that the applicant did not owe the 1st respondent having already paid it over and above the taxed amount; that it was unmerited for the learned Judge to condemn the applicant to pay interest for the period when the appeal, lodged by the 1st respondent, was still pending; that up until the determination of the appeal the amount

payable to the 1st respondent had not been ascertained or become due and that it had since paid the taxed costs in full.

6. The applicant was also apprehensive that upon the expiry of the warrants of attachment and the notice of proclamation of attachment, the attached property would be disposed by public auction; and that the sale of the attached property would not only hamper the applicant's functions but would also have far reaching consequences on the economy which cannot be compensated by damages. Moreover, as per the applicant, the 1st respondent was impecunious and was unable to pay its debts as evinced by a Garnishee Order *Nisi* which had been served on the applicant in respect of a judgment entered against the 1st respondent in H.C.C.C No. 474 of 2007 for the sum of Kshs.10,000,000. All in all, the applicant urged that unless the order sought is granted the intended appeal would be defeated.

7. On the 1st respondent's part, the intended appeal was frivolous as, the applicant had not annexed a draft memorandum of appeal to the motion; it revolved around the award of interest which was a matter of discretion and the applicant had not demonstrated any impropriety on the part of the learned Judge in the exercise of that discretion; that contrary to the applicant's assertion, it was the applicant's failure to meet the fee note that provoked the 1st respondent to file the bill of costs which resulted in protracted litigation for over 10 years; the 1st respondent was denied use of its money during the pendency of the litigation hence entitled to interest.

8. The 1st respondent expressed concern on the applicant's capability to settle the interest in future should the intended appeal fail. According to the 1st respondent, its apprehension was due to the current state of the economy as well as the information in the public domain pertaining to the applicant's daily expenditure, (whatever that meant). The 1st respondent urged that the applicant had not offered any security and in any event, the amount attached by the 2nd respondent's proclamation was less the garnishee amount.

9. Though our jurisdiction in a motion such as the one before us is discretionary and unfettered, the applicant is required to establish twin principles; that its intended appeal is arguable; and that it would be rendered nugatory in the event it succeeds if the orders sought are not granted. See **Martin Tindi Khaemba vs. Law Society of Kenya & 2 others [2019] eKLR.**

10. It is not in dispute that the applicant had not annexed a draft memorandum of appeal. Nevertheless, we were able to assess the arguability of the intended of appeal from the grounds set out on the face of the motion and the supporting affidavit. See **Somak Travels Limited - versus- Gladys Aganyo [2016] eKLR.**

11. Whilst we are cognisant that an appellate court does not readily interfere with the exercise of discretion by the trial court, we find that, whether the 1st respondent was entitled to interest on the taxed amount; and whether the same should have been computed from the date of filing the advocate/client bill of costs are issues which warrant consideration by this Court in the intended appeal.

12. Both the applicant and the 1st respondent expressed doubt on the capability of the other to meet the interest should the intended appeal succeed or fail respectively. It is well settled that the legal duty fell on each of them to establish their contention. See **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR.**

13. In our view, the applicant's apprehension on the capability of the 1st respondent to refund the interest reflected as Kshs.12, 024, 493 in the annexed warrants of attachment and notice of proclamation of attachment is not unfounded. More so, in light of the garnishee order *nisi* for the sum of Kshs.10, 000,000 served on the applicant in respect of a judgment entered against the 1st respondent in another matter, which the 1st respondent had not paid. Further, the 1st respondent had not discharged the burden, which shifted to it, to demonstrate its ability to reconstitute the interest should applicant succeed in the intended appeal. See **Migori County Government & Another vs. Migori County Transport Sacco [2018] eKLR.**

14. As for the 1st respondent, we find that there is nothing to support its allegation that the applicant would not be able to meet the interest in future should the intended appeal fail.

15. Accordingly, the applicant having met the twin principles, we are inclined to stay the execution of the ruling dated 12th June, 2020 pending the lodging and determination of the intended appeal. Costs of the motion shall abide by the outcome of the intended appeal.

Dated and delivered at Nairobi this 9th day of July, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

(signed)

DEPUTY REGISTRAR