



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: NAMBUYE, OKWENGU & ASIKE-MAKHANDIA J.J.A.]

CIVIL APPLICATION NO. 20 OF 2021

BETWEEN

THE COUNTY SECRETARY COUNTY

GOVERNMENT OF BUSIA.....APPLICANT

AND

MANWARI & CO. ADVOCATES.....RESPONDENT

(Being an application for stay of the entire ruling of the High Court of Kenya

(K. W. Kiarie, J.) dated 12th March, 2020 in Busia H.C.C.A No.16 of 2018)

RULING OF THE COURT

Before us is a Notice of Motion dated 3rd March, 2021 under **Sections 3, 3A and 3B of the Appellate Jurisdiction Act, Rules 5(2)(b) and 42 of the Court of Appeal Rules**, substantively seeking an order of stay of execution of the decision of **K. W. Kiarie, J.** dated and delivered on 12th March, 2020 in Busia High Court, **Civil Appeal No.16 of 2018** pending hearing and determination of the intended appeal together with an attendant order for costs.

The motion is supported by grounds on its body and a supporting affidavit of **Nicodemus Mulaku**, the County Secretary sworn on 3rd March, 2020 together with annexures thereto. It has been opposed by a replying affidavit of **Julius Orina Manwari**, sworn on 12th April, 2021 together with annexures thereto. It was canvassed through rival pleadings, written submissions and legal authorities relied upon by advocates for the respective parties in support of their opposing positions, in their absence and without oral highlighting.

The background to the application albeit in summary form is that the respondent, is a law firm. It was variously instructed by the defunct Busia Municipal Council (“**the Council**”) to render professional services involving litigation in various civil matters in which the Council was involved as a party. At the conclusion of those matters, the respondent demanded payment of professional fees for services rendered which the Council failed and or neglected to settle. It is this conduct on the part of the Council that prompted the respondent to file 75 Advocate – Client bills of costs before the trial court for taxation. These were settled either through taxation or alternatively agreed by consent, to the total tune of Kshs.7,804,294.00. Demand for payment of the above resulting sum was also made which the Council failed to settle. This is what prompted the respondent to file Judicial Review proceedings pursuant to **Order 53 Rule 4(1) of the Civil Procedure Rules** (JR proceedings) vide **Busia Judicial Review No. 15 of 2011; Republic vs. Municipal Council of Busia & Another Ex-parte Manwari & Company Advocates**, seeking orders of mandamus to compel the Council’s Chief Executive Officer to pay them the above amount. The Council contested the JR proceedings. **L. Kimaru, J.** in a ruling delivered on his behalf on 30th July, 2013 by **F. Tuiyot, J.** expressed himself *inter alia* as follows:

“In the premises therefore, this court allows the Ex parte Applicant’s application to be granted the Judicial Review orders of Mandamus. The Respondents are ordered to pay the Ex parte Applicant the sum of Kshs.7,804,294.00 within thirty (30) days of this court’s ruling. The Respondents are hereby compelled by order of Mandamus to the pay the above sum in performance of their statutory duty. The Ex parte Applicant shall have the costs of this application and costs for the application which sought to be granted leave to file the present application for Judicial Review. It is so ordered”

The applicant was aggrieved and filed **Busia Civil Appeal No.16 of 2018 County Secretary County Government of Busia vs. Manwari & Company Advocates** seeking to set aside a warrant of arrest issued against one **Nicodemus Mulaku**, the Busia County Secretary in execution of a decree in **Judicial Review No. 15 of 2011**. On 25th March, 2019 **Kiarie Wa Kiarie, J** delivered a ruling setting aside the said warrant of arrest with costs to the applicant.

The respondent was aggrieved and filed a Notice of Motion under **section 80(a)** of the **Civil Procedure Act, Order 45 Rule 1(1)** and **Order 51** of the **Civil Procedure Rules**, seeking review and setting aside of the ruling delivered on 25th March, 2020 together with an attendant order for provision of costs resulting in a ruling delivered by **Kiarie Wa Kiarie, J** on 12th March, 2019 *inter alia* as follows;

“In the instant application, I am satisfied that there are sufficient reasons to review my orders of 25th March 2019 in terms of the consent the parties had entered. The respondent/applicant is therefore at liberty to execute.”

The applicant was aggrieved and filed a notice of appeal dated 8th February, 2021 on which the application under consideration is anchored.

Supporting the application, the applicant avers and submits that the twin prerequisites for granting relief under the above **Rule** has been satisfied. In support of satisfaction of the first prerequisite, applicants rely on the annexed draft memorandum of appeal containing four (4) grounds of appeal in which he intends to fault the learned Judge *inter alia*; for failure to: appreciate that the debts and liabilities attributed to the defunct Municipal Council of Busia did not automatically become debts and liabilities of the County Government of Busia; totally address his mind as regards the clearly laid down procedures to be followed in dealing with debts and liabilities of the defunct Municipal Council of Busia; appreciate that the County Government of Busia was not a legal successor of the defunct Municipal Council of Busia; consider the primary issue of the illegality of the consent that was raised in the application for review, all of which applicant contends are arguable with high chances of success.

Turning to the satisfaction of the second prerequisite, the applicant asserts that if the relief sought is not granted, there is danger of its officials being arrested and punished for contempt of court orders.

To buttress the above submissions, the applicant relies on the case of **The Interim County Secretary, County Government of Kakamega vs. Republic Ex-parte Ali Adam & Another** [2017] eKLR and **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others** [2013] eKLR, both on the threshold for granting relief under **Rule 5(2)(b)** of the **Court of Appeal Rules**.

In rebuttal, the respondent relies on the case of **Flora Wasike vs Wamboko** [1976-1985] E.A.625 and contends that success of the application under consideration would frustrate the consent executed by the respective parties herein and endorsed by the court approving the mode of settlement of applicant's indebtedness to the respondent.

Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law already stated above. **Rules 42** is merely procedural and need no further interrogation. **Section 3** donates power to the Court to discharge its mandate under the **Act** while **sections 3A** and **3B** enshrines the overriding objective principle of the Court. It is sufficient for us to say that the overriding objective principle of the court which is now trite is that it simply donates power to the Court to discharge its mandate with greater latitude.

The substantive provision for granting the relief sought under **Rule 5(2)(b)** of the Court's **Rules**, provides as follows:

“5(2)(b) in any civil proceedings, where a notice of appeal had 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.

Our take on the said crystallized principles is that in order to succeed in an application of this nature, an applicant has to satisfy the threshold for granting relief under the said provisions namely, demonstration that the appeal or the 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 successful appellant.

The applicant relies on the annexed draft memorandum of appeal whose contents are already highlighted above in support of their contention that they have satisfied the first prerequisite of this Rule. 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**.

In light of the above threshold, we are satisfied that the grounds of appeal set out 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.

Applicant's argument with regard to satisfaction of this prerequisite is that there are fears of imminent arrest and committal to civil jail for contempt of court orders if payment of Kshs.15,263,613.00 to the respondent is not made. The respondent's response to the above fears and which was not rebutted by the applicant, is that the respective parties herein have already struck a consent on the mode of liquidation of the

decretal sum. Second, that there is no imminent danger of execution until there is proof of default on the consent order. Third, that the applicant's default on the agreed mode of payment if any will simply give rise to execution for the balance of the amount found as still outstanding as due and payable to them. Fourth, they are in a position to repay back to the applicant any sum paid to them in execution of the decree herein should the applicant succeed in their intended appeal. Lack of rebuttal by the applicant of respondent's above contention, is sufficient basis for us to hold that the second prerequisite has not been satisfied.

The position in law is that both prerequisites must be satisfied before a party can be granted relief under **Rule 5(2)(b)** of the **Court of Appeal Rules**. Since only one prerequisite has been satisfied, the application is unsustainable.

In the result and on the basis of the above assessment and reasoning, we find no merit in the application. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR