Kiruti & Company Advocates v Nderi & Kiingati Advocates (Civil Appeal 042 of 2021) [2021] KECA 119 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 119 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 042 OF 2021

AK MURGOR, HA OMONDI & KI LAIBUTA, JJA

OCTOBER 22, 2021

BETWEEN

KIRUTI & COMPANY ADVOCATES ..... APPLICANT

AND

NDERI & KIINGATI ADVOCATES ..... RESPONDENT

(An application for stay of execution from the judgment of the High Court of Kenya at Nyeri (Hon. Justice F. Muchemi) delivered and dated 11th February 2021 in HCCC No. 2 of 2020)

RULING

1. The application before this Honorable Court is the applicants Notice of Motion application dated 26th May, 2021, brought under certificate of urgency pursuant to Rules 5 (2) (b) of the *Court of Appeal Rules*, 2010. Seeking orders -

   (i) spent;

   (ii) that pending the hearing and determination of the intended appeal, there be a stay of execution of the judgment and order issued on 11th February 2021 in so far as it ordered the respondent to pay costs;

   (iii) that pending the hearing and determination of the intended appeal, there be a stay of further proceeding in Nyeri HCCC 2/2021; and

   (iv) costs.

   The Application is supported by a certificate of urgency and a supporting affidavit dated 26th May, 2021. A Replying Affidavit dated 20th May, 2021, is on record. The parties were directed to file written submissions for hearing on 10th August, 2021. The grounds in support of the application are as follows:

(i) Vide a ruling dated 11th February, 2021 the High Court delivered judgment in Nyeri HCCC 2/2020. The upshot of the judgment was that the applicant was to pay the respondent KShs. 25 million together with interest and costs.

(ii) That the applicant's undertaking was limited to handling of documents in the course of the conveyance transaction and the applicant's client's undertaking was for payment of the balance of the purchase price.

(iii) That the High Court judgment effectively imposed on the applicant a liability to pay a portion of the purchase price that it had not assumed in its professional undertaking.

(iv) That the sum of Kshs.25 million has already been paid to the respondent by the applicant's client.

(v) That the intended appeal will be rendered nugatory as the 30 days issued by the High Court has since lapsed and the respondent has threatened to proceed with execution on interest which is in excess of KShs. 2 million based on the rate of 8.5% which was not provided for in the undertaking, and the appellant will be forced to pay monies it had not given undertaking for.

(vi) That the execution will occasion substantial loss as it will involve the applicants' tools of trade with the potential of paralyzing the operations of the law firm.

(vii) That the applicant might not recover the monies paid to the respondent.

(viii) There is no prejudice to the respondent as the KShs. 25 million has already been paid.

(ix) That the Appeal has high chances of success.

2. The motion is opposed vide replying affidavit dated 10th August 2021 in which the respondent asserts that the application is devoid of merit and there is no likelihood of the intended appeal being rendered nugatory, as the same is a money decree capable of refund.

3. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under Rule 5 (2) (b), the applicant has to establish that:

(i) the Appeal is arguable; and

(ii) the Appeal is likely to be rendered nugatory if the stay is not granted and Appeal succeeds.

4. In the case of *Wasike vs Swala [1984] 591*, this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. An arguable Appeal is one that is not idle and/or frivolous.

5. This Court has also held in *Co-operative Bank of Kenya Ltd vs Banking Insurance and Finance Union Kenya [2014] e KLR*: 'that it is sufficient that the issues raised are arguable".

6. In Kisumu Civil Appeal 74.16, *George O. Gachie & Anor' vs Judith Akinyi Bonyo & Others,* this Court stated that "at this stage the court is not expected toinquire into the merits of the case and whether or not the appeal will succeed. It is sufficient that the applicant has met the threshold as existence of a single bona-fide issue is sufficient."

7. There is contestation as to whether the undertaking was limited to notifying his client that money was due, or whether the applicant was to be held responsible for what was due. A perusal of the draft

memorandum of appeal raises an arguable issue as regards the terms of the professional undertaking and whether or not the said amount had been remitted to the respondent.

8. An arguable appeal needs only raise a single bona fide issue/point worthy of consideration by the bench that will hear the appeal and need not be one that must necessarily succeed. The Applicant therefore has successfully demonstrated the first limb.

9. B) Will the appeal be rendered nugatory should the injunction not be granted? On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited [2002]1 EA 227* that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

10. In the case of *African Safari Club Limited vs Safe Rentals Limited, Nai Civ. App. 53/2010*, this Court held "...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and just to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

11. With regard to the nugatory aspect, the applicant argues that the Kshs.25 million has already been paid to the respondent and the respondent's client, and that if the applicants appeal is successful the respondent will be unable to refund the interest.

12. According to the applicant, the respondent has threatened to initiate execution proceedings, but is yet to actualize the threat. In our considered view, if the applicant's prayer for stay of execution is denied and the appeal eventually succeeds,the applicant will be adequately compensated by an award for damages in any event. In any event, the fact that the sum of Kshs.25,000,000/= has already been paid means that the applicant can recover the same from his client or the bank. There is nothing to suggest that the respondent is not in a position to compensate the applicant should his intended appeal be successful.

13. An applicant who comes to the Court under Rule 5(2) (b) must persuade the court on two limbs, firstly that the appeal or intended appeal is arguable, and secondly that if the application is not granted, if the appeal were to succeed, would be rendered nugatory. These two limbs must be both demonstrated as demonstrated *Mungga N.Bichage vs Richard Nyagaka Tongi & 2 Others [2013] eKLR*. Having failed to demonstrate both limbs the applicant's application is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR