



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & KIAGE, JJ. A)

CIVIL APPLICATION NO. NAI. 238 OF 2019 (UR 218/2019)

BETWEEN

LASER EYE CENTRE LIMITED.....APPLICANT

AND

PBM NOMINEES LIMITED.....RESPONDENT

(Being an Application for Stay of the Ruling and/or Order pending the hearing and determination of an Appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (Elijah Ogoti Obaga, J.) dated and delivered on 27th November, 2018

in

E.L.C. Misc. Application No. 192 of 2018)

RULING OF THE COURT

1. The applicant herein has approached this Court by way of a motion on notice brought under Section 3A and 3B of the Appellate Jurisdiction Act and Rules 5(2)(b) and 42 of the Court of Appeal Rules for orders *inter alia*:-

“2. THAT the Ruling and/or Order of the Environment and Land Court at Nairobi, dated 27th November 2018, and delivered by Hon. Justice Elijah Ogoti Obaga, inter alia dismissing the Applicant’s application with costs to the Respondent, be stayed unconditionally or on reasonable terms, pending the hearing and determination of this instant Application.

3. THAT the Ruling and/or Order of the Environment and Land Court at Nairobi, dated 27th November 2018, and delivered by Hon. Justice Elijah Ogoti Obaga, inter alia dismissing the Applicant’s application with costs to the Respondent, be stayed unconditionally or on reasonable terms, pending the hearing and determination of the intended Appeal.

4. THAT the costs of and incidental to this application do abide in the outcome of the intended appeal.”

2. The applicant is a tenant of the respondent herein following a sub-lease executed in respect of a portion it occupies on that premises known as Sarit Centre located in Westlands area of Nairobi. The applicant describes itself as an ambulatory eye surgery facility located on the 3rd floor of Sarit Centre.

3. A brief background of the application before the Court is that sometime in May 2018, the respondent was carrying out repairs on the ground, 1st and 2nd floors of its premises following damage to the building occasioned by fire. The construction inevitably came with some noise which, according to the applicant, was at such a level as to interfere with the operations of its business which involved performance of surgeries which were likely to be compromised by high noise levels.

4. Following what it deemed to be disruption of its operations, the applicant approached the respondent with a view to pursuing an amicable resolution of the matter, but that was not to be. The parties could not even agree on an arbitrator and consequently, the applicant moved to the High Court by way of Miscellaneous Application dated 30th October, 2018 seeking an injunction to restrain the respondent, from undertaking construction/renovation works which emit loud noise and vibrations in excess of the requisite statutory limits, and interfering with their quiet and peaceful possession thereof pending the reference of the dispute to arbitration.

5. The application was strenuously opposed by the respondent on grounds *inter alia*, that the construction works had been precipitated by a fire that gutted part of the Sarit Centre on 4th May, 2018 which fire affected about 16 tenants as a result of which it became inevitable to carry out repair and restoration works.

6. Upon consideration of the application, the learned Judge found that the construction works complained of by the applicant were about to be completed and the possibility of further noise that would disrupt the applicant during further construction works in the premises was only speculative. The Court further held that in or about 2016 in preparation of the construction work, the tenants' leases were renewed and they included a disclaimer clause against liabilities arising from any disruptions resulting from the respondent's construction work, and all tenants, including the applicant, had consented to those terms. The court also found that the applicant had failed to demonstrate that its clients were likely to suffer irreparable injury and dismissed the application with costs to the respondent.

7. Aggrieved, the applicant has moved to this Court by way of an appeal. In the meantime, he has brought the instant motion on notice for orders as set out earlier. The application is premised on the grounds set out on its face and supported by the applicant's supporting affidavit sworn by one Alia Mohammed, a manager of the applicant dated the 30th October, 2018.

8. Mr. Mohammed deposed that the applicant was deserving of conservatory orders and as such cannot in law or equity be condemned to pay costs of the application based only on the fact that the application had failed on account that the renovations which were the source of the noise being complained of were almost complete as at the time the ruling was rendered yet, the court had itself contributed to the delay by deferring its ruling to the 27th November, 2019.

9. It is the applicant's averment that on 6th May, 2019, the respondent filed a Party and Party Bill of Costs for the amount of Kshs. 3,120,952 and served the same upon the applicant's advocates on 23rd May, 2019 together with a Notice of Taxation dated 17th May, 2019 for execution on 20th June, 2019. Further, that taxation of the said bill of costs was scheduled for 30th July, 2019.

10. It was ~~deposed~~ deposed that the applicant's intended appeal seeks to challenge *inter alia* the decision of the trial court in awarding the respondent costs in the matter which intended appeal is arguable and raises weighty and substantial issues of law and fact and has an excellent chance of success.

11. According to the applicant, the respondent would not suffer any prejudice if the instant application is to be allowed. Conversely, the applicant would suffer great prejudice if it is condemned to pay costs before the hearing and determination of the intended appeal.

12. The application was opposed through the replying affidavit sworn on the 30th of November, 2019 by Sarit Shah, the respondent's director. He deposes that before the current sub-lease between itself and the applicant, it had intended to conduct construction of Phase 3 of Sarit Centre and all tenants had been duly notified and had accepted the conditionalities. According to Mr. Shah, the fire that engulfed parts of the respondent's premises at Sarit Centre had necessitated the necessary restoration works to enable affected business to re-open. He maintained that there was no justifiable reason to grant stay of the proceedings because they have concluded and all that remains is to file a Bill of Costs.

13. It was also contended that this Court cannot grant a stay against taxation of a Bill of Costs and that the appellant's only available recourse is a reference against the taxation proceedings before the trial court.

Further, that the instant application is an abuse of the Court process.

14. During the plenary hearing, the parties were represented by counsel. Learned counsel, Mr. Murgor, appeared together with Ms. Kala for the appellant, while Mr. Kimani holding brief for Mr. Mwangi appeared for the respondent. The application was canvassed through oral submissions supported by authorities filed before Court.

15. Urging the Court to allow the application, Mr. Murgor conceded that the construction in issue before the trial court had already been completed and that the only issue remaining was the issue of costs. On arguability, counsel emphasized that the principal issue that they will challenge before this Court on appeal would be the award of costs against the applicant notwithstanding the fact that it was not the applicant's fault that the ruling was delayed and by the time it was delivered the construction they sought to stop had virtually been completed. In counsel's view, since such delay was by the trial court, it ought not to have awarded costs.

16. He submitted that taxation of the bill of costs was coming up for a sum of about Kshs. 3,000,000. Further, that taxation before the trial court was due to take place on 17th March, 2020. He urged the Court to allow the application.

17. On his part, urging the Court to dismiss the application, Mr. Kimani submitted that the respondent relied on the averments in its replying affidavit and authorities in support of its submissions. He maintained that the applicant has not satisfied the two limbs as required.

18. On arguability, he contended that the intended appeal did not raise any arguable issues. Further, that the orders of the trial court were discretionary and the learned Judge properly exercised his discretion to dismiss the applicant's motion and the exercise of that discretion cannot be the subject of appeal.

19. On the nugatory aspect Mr. Kimani, cited the decision in **George Ole Sangui & 12 Others v. Kedong Ranch Ltd (2015) eKLR** and submitted that the orders by the trial court were negative orders hence not capable of being executed.

20. He maintained that the taxation process was still ongoing and would be before the taxing master on 17th March, 2020. He argued that the applicants had not demonstrated that the respondents would be unable to refund the costs awarded if paid. (See: **Bernard Gichohi Njira v. Kanini Njira Kathendu (2016) eKLR**). He urged the Court to dismiss the application.

21. In response, Mr. Murgor submitted that if the applicant was to succeed on the issue of costs, it would save the court's time by not having to proceed before the taxing master as there is an arguable ground of appeal arising as to the manner in which the trial Judge exercised his discretion to award costs in favour of the respondent.

22. The law in respect of applications such as the one before us is well settled. All the principles to be applied by the Court in exercising jurisdiction under Rule 5(2)(b) of this Court's rules, are succinctly set out in the case of **Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others (2013) eKLR**, which we quote here *in extenso* :-

“This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.

ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) ...

iv)...

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).

ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory 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.

23. Has the applicant satisfied the above listed requirements? It is common ground that the construction work in respect of the premises forming the subject matter of the dispute has since been completed hence the application is canvassed only as regards the issue of costs.

24. On the first limb on issue of arguability, it is the applicant's case that the learned Judge erred in law and fact in: awarding costs to the applicant; failing to appreciate that the applicant as an eye surgery facility had filed the application on its own behalf and for the benefit of its patients; failing to take into account that the matter was of public interest and for the enforcement of environmental and socio-economic right envisaged under the Constitution; and making an order as to costs which was unwarranted, without proper basis in law and injudiciously arrived at.

25. The respondent on the other hand argued that the intended appeal did not raise arguable grounds as the trial court properly exercised its discretionary powers to dismiss the application before it.

26. On the aspect of arguability, it is trite that an arguable appeal ought need not be one with high chances of success but one that raises issues that deserve the consideration and determination by this Court on appeal. The applicant maintains that the learned Judge failed to consider the fact that it was not its fault that the application, which had been filed timeously and certified urgent was not determined until the wrong complained about had dissipated. This in our view is an arguable point to be taken on appeal.

27. Has the applicant demonstrated that if the taxation is not stayed, the appeal will be rendered nugatory in the event it finally succeeds? The applicant submitted that the award of costs if stayed would save the Court's time by not having to proceed before the taxing master. It was also argued that the intended appeal had already been filed yet the costs had not yet been taxed.

28. It is evident that apart from merely stating the amount subject of the bill of costs sought to be taxed, the applicant has not demonstrated that the respondent is incapable of repaying or refunding any sums paid out as costs in the event a certificate of costs is issued by the taxing master, should the intended appeal succeed. Equally, the applicant has not shown what loss it stands to suffer if it were forced to settle the costs before the intended appeal is heard and determined. (See: **Governors Ballon Safaris Limited v. Skyship Company Limited &**

Another (2015) eKLR.

29. In the circumstances, we are not persuaded that the second limb of the application has been satisfied and the two limbs being conjunctive, this application fails to pass muster. For the foregoing reasons, we arrive at the inevitable conclusion that this application is for dismissal. We dismiss it with costs in the appeal.

Dated and delivered at Nairobi this 10th day of July, 2020.

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR