



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: MAKHANDIA, M'INOTI, & SICHALE, JJA]

CIVIL APPLICATION NO. 239 OF 2020

BETWEEN

HON. NDIRITU MURIITHI.....APPLICANT

AND

PETER NGUGI NDONYO.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal

from the ruling and order of the High Court of Kenya at Nairobi (W. Korir, J)

dated on 7th May, 2020 in **HC Petition No. 133 Of 2017**)

RULING OF THE COURT

The applicant, **Hon. Ndiritu Muriithi** filed a Notice of Motion dated **24th June, 2020** seeking the following orders:

“

1. (spent)

2. That this Honourable Court be pleased to order a stay of execution of the Certificate of Taxation of Costs dated 8th January, 2018 as a result of the Ruling delivered by Honourable Justice W. Korir on the 17th of May, 2020 against the Appellant/Applicant, pending the hearing and determination of this application.

3. That this Honourable Court be pleased to order a stay of execution of the Certificate of Taxation of Costs dated 8th January, 2018 as a result of the Ruling delivered by Honourable Justice W. Korir on the 7th of May, 2020 against the Appellant/Applicant, pending the hearing and determination of the Appeal from the said Ruling”.

The motion was supported by an affidavit of **Hon. Ndiritu Muriithi**, (the applicant) sworn on **24th June, 2020** in which he deponed that on **21st July, 2017**, he filed a Judicial Review Application No. 133 of 2017, emanating from the Judgment of the Independent Electoral and Boundaries Commission (IEBC) Electoral Code of Conduct Enforcement Committee dated **20th July, 2017**; that his review application was dismissed with costs on **1st August, 2017**; that thereafter, the respondent proceeded to file his Party and Party Bill of costs dated **2nd August, 2017** for taxation; that the ruling thereof by the Taxing Master of the Court was delivered on **8th January, 2018**; that the applicant was dissatisfied with the said ruling and filed a Reference dated **14th February, 2018** challenging the decision of the Taxing Master and that a ruling on the said Reference was delivered virtually on **7th May, 2020** in favour of the respondent. Still dissatisfied with the ruling on Reference delivered on **7th May, 2020**, the applicant filed a Notice of Appeal to this Court dated **20th June, 2020**. The applicant also filed an application dated **26th May, 2020** seeking leave of the Court to appeal against the ruling delivered on **7th May, 2020** and an order for stay against the Certificate of Taxation of Costs resulting from the Taxing Master's ruling of **8th January, 2018**.

The application was opposed in an affidavit sworn on **19th June, 2020** by **Kirimi David**, an Advocate of the High Court having the conduct of the matter on behalf of the respondent. Counsel deponed that the respondent was awarded costs of Kshs 5,081,150.00 on **8th January,**

2018 and that he has since commenced execution; that the applicant filed reference challenging the taxation and on 6th March, 2018, that the court granted a conditional stay of execution pending the hearing of the reference and that the applicant was ordered to deposit a sum of Kshs 2.5 million in a joint interest earning account in the names of the parties' Advocates; that on 7th May, 2020, a ruling on the reference was delivered by **W. Korir, J.** who dismissed the reference with costs to the respondent and that, following the dismissal of the references, the respondent asked the applicant to sign off the deposited funds but the applicant has totally ignored and or refused to sign off the funds. The respondent urged the court to dismiss the applicant's application, allow the respondent's application and order for the immediate release of the sums held in the account as part settlement of the respondent's party to party costs.

On 17th August, 2020, the motion came before us for consideration "on written submissions with no appearance of counsel".

We have considered the record, the rival written submissions, the authorities cited and the law. As always, our jurisdiction under **Rule 5(2) (b)** is discretionary and in the judicious exercise of the discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** 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. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.**
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.**
- 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 bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2008.**
- 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.**
- 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.**
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunty, the onus shifts to the latter to rebut by evidence the claim". International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.**

We have perused the intended grounds of appeal and we are satisfied that they are not frivolous. Of course, we bear in mind that an arguable appeal is one that raises a point that deserves consideration by the Court of Appeal and not one that must necessarily succeed.

On the nugatory aspect, we are satisfied that the intended appeal will not be rendered nugatory if stay is not granted considering that this is a money decree. The respondent has demonstrated that he is a person of means and will be in a position to refund the amount paid in the event that the intended appeal succeeds. The respondent has gone to great length to show his financial ability to pay to the applicant any money that is found to be payable to him.

Under rule 5(2) of this Court's Rules, the applicant must satisfy us on both limbs. (See **Reliance Bank Ltd vs. Norlake Investments Ltd [2012] IEA 227**). Having failed to establish the limb on the nugatory aspect, the application must fail.

The upshot of the above is that we find no merit in the motion. It is hereby dismissed with costs to the respondent.

Dated and Delivered in Nairobi this 9th Day of October, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. M'INOTI

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR