IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE & ODEK JJ.A)

CIVIL APPLICATION NO. 321 OF 2018

BETWEEN

GODFREY AJUONG OKUMU....................................APPLICANT

AND

ENGINEERS BOARD OF KENYA..........................RESPONDENT

(Being an application for injunction and stay of execution pending the hearing and determination of the intended appeal against the judgment and order of the High Court (Mativo, J.) dated 29th October 2018

in

Misc Application No. 107 of 2018)

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RULING OF THE COURT

Just two weeks after it was inspected and launched by President Uhuru Kenyatta, Sigiri bridge spanning River Nzoia's banks and linking Bunyala South and North collapsed on 26 June, 2017, injuring a number of masons who were working on it at the time. But that is not the issue before us. To establish the cause of this accident, the Engineers Board of Kenya (the respondent) constituted a committee whose report dated August, 2017 indicated that the accident occurred primarily because;

> **" ....of the wrong sequencing of the concreting of the bridge deck resulting in unbalanced forces that caused instability and failure of sections of the bridge. The wrong sequencing was as a result of failure to follow standard design requirements and adhere to standard construction procedures."**

The committee also attributed the accident to inadequacy in the supervision of the works and concluded that the ultimate responsibility for the works lay with the contractors' consortium comprising China Overseas Engineering Company (COVEC), the Design Consultant-BAC Engineering & Architecture Limited and Interphase Consultants. The applicant is the director of BAC Engineering & Architecture Limited.

Subsequent upon this report, the respondent convened a special Board disciplinary meeting on 25th January, 2018. The Board in the end found the applicant **"capable (**we believe the word is "culpable"**) of professional misconduct"** and in breach of professional obligations as stipulated under the Engineers Act and Engineers Code of Ethics. As a result, the respondent proceeded to suspend the applicant's licence for a period of 2 years with effect from 26th February, 2018, and by Gazette Notice No. 2098 caused the removal of the applicant's name from the engineers register. This obviously aggrieved the applicant who moved the High Court by a motion on notice for judicial review. He asked the court to quash, by an order of *certiorari*, the respondent's above decision. Mativo, J. in dismissing the motion said;

> **"In view of my analysis and determination of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant has not demonstrated the grounds for this court to grant the Judicial Review orders sought. Accordingly, the *ex parte* applicant's Notice of Motion dated 21st March 2018 is hereby dismissed with costs to the Respondent."**

Because the applicant intends to challenge that decision in this Court, he has, in the meantime brought the instant application for injunction and stay of execution under **Rule 5(2)(b)** of this Court's Rules. He has specifically asked that, pending the hearing and determination of the intended appeal, an order of injunction be issued to restrain the respondent from suspending his licence as an engineer and/ or from the practice of engineering; and from effecting Gazette Notice Nos.2098 of 9th March, 2018 and 3518 of 13th April, 2018.

To satisfy the arguability limb of a **5(2)(b)** application, the applicant in a draft memorandum of appeal has listed 9 grounds, the combined effect of which is that the learned Judge in error failed to find that there was no complaint to the respondent as required by **section 53** of the Engineers Act before taking disciplinary action against the applicant; that he failed to find that the respondent was the investigator, prosecutor and judge in the disciplinary proceedings; that he ought to have found that the decision by the respondent to suspend the applicant was unreasonable in view of the evidence by COVEC that the error was one of construction and not design; that the Judge ought to have found that the respondent did not give the applicant a fair hearing; and that the Judge supplemented and corrected the respondent's decision which on the face of it only found the applicant **"capable of professional misconduct"** which in their ordinary meaning do not impute any finding of guilt.

On the nugatory aspect of the application, the applicant urged us to consider that the effect of the learned Judge's decision was to deny him his livelihood in his practice as an engineer; that there is a likelihood of irreparable harm as he will serve the 2 year suspension or a substantial part of it by the time the intended appeal is heard and determined which will render the appeal nugatory; that he is an engineer of over forty years standing and will lose his clients during the years of suspension not to mention that his standing in society will be adversely affected.

On the other hand the respondent has urged us to follow the decisions in **Cortec Mining Kenya Ltd V. Cabinet Secretary, Attorney General & 8 Others**, Civil Application No. Nai 119 of 2015 and **Nairobikiru Line Services Ltd V Sub-County of Othaya & 2 Others,** Civil Application No. Nyeri 16 of 2016, and reject this application on the grounds that it has not met the threshold required under **Rule 5(2)(b)**; that there is nothing capable of being stayed or stopped by an order of injunction since there was no positive order made by the court below; that if the orders sought were to be granted their effect would be to revive the dismissed judicial review application.

Further, it was submitted that, since an injunction was not sought in the High Court, this Court cannot grant it; that prayer 3 seeking to restrain the respondent from suspending the applicant's licence is spent; that prayer 4 for injunction to restrain the respondent from effecting the G.N No. 2098 is self-effecting and has already taken effect because it does not require the respondent to take any positive step to effect it; that similarly, G.N No. 3518 is merely to notify the public of the particulars of registered engineers and engineering firms licensed to practice in Kenya and does not require the respondent's positive action to effect; that prayer 5 is superfluous as the suspension was already published in G.N No.2098 which has not been revoked. Accordingly, the respondent does not think the intended appeal is arguable or that it will be rendered nugatory if the reliefs sought in the application are not granted.

Before we consider the two traditional tests under **Rule 5(2)(b)** of this Court's rules, we intend to dispose of a procedural argument raised by the respondent's advocates, namely that this application is incompetent because the learned Judge did not make any positive order that is capable of being stayed or stopped by an order of injunction; that this Court in the case of **Shimmers Plaza Limited V. National Bank of Kenya Ltd,** Civil Application 38 of 2013, asserted firmly that:

> **"Further, we have examined the decision of the superior court made on 27th January 2012, the subject of the intended appeal. The superior court (Kimondo J.) made an order which dismissed the application for injunction. In the case of REPUBLIC – V- KENYA WILDLIFE SERVICES & 2 OTHERS Civil Application No. NAI 12 of 2007, this court stated "the superior court has not therefore ordered any of the parties to do anything or refrain from doing anything.**
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> **There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for an injunction or stay."**

Counsel also referred us to **Stanbic Bank Kenya Ltd V. Kenya Revenue Authority,** Civil Application No Nai 294 of 2007 (UR 200 of 2007); **Kenya Hotel Properties Limited V. Willesden Investments Ltd,** Civil Application No. Nai 131 of 2010 (UR 97/2010); and **F & S. Scientific Ltd. V. Kenya Revenue Authority** & **Another,** Civil Application No. 260 of 2012, where this Court has restated the principle that, where there is no positive and enforceable order made by the court below, an application for injunction or stay would be ineffective.

A close reading of the determination in **Shimmers Plaza Limited V. National Bank of Kenya Ltd** (supra) it is succinct the Court merely clarified that in an application under **5(2)(b)** reliefs sought must be specific or specified. A party seeking an order of injunction must show that it was specifically prayed for in the notice of motion brought under Rule **5(2)(b)**. The Court stated that;

> **"11. Finally, we are constrained to address ourselves to the nature of an application that is before us. The notice of motion dated 8th February 2012 is seeking an order for stay of execution. There is no specific prayer for injunctive orders. In the notice of motion, we are not being asked to grant an order of status quo ante. Mr. Billing, learned counsel for the applicant urged this court to rely on paragraph 5 of the notice of motion and grant an injunction in favour of the applicant. Paragraph 5 of the motion states that the applicant be at liberty to apply for further orders and/or directions as this honourable court may deem fit and just to grant.**
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> **12. We find that the dicta of this court in the case of STANBIC BANK KENYA LIMITED – V- KENYA REVENUE AUTHORITY NAI Civil Application No. NAI 294 of 2007 is relevant. It was stated that under Rule 5(2) (b), this court can only make three orders, namely an order staying proceedings, an order staying execution of the superior court's order and lastly, an injunction order. This is clearly spelt out in that rule. Our inherent powers revolve around these aspects only. We cannot extend those powers to the realm of creating a prayer not sought in the notice of motion and proceed to grant it as Mr. Billing is asking us to do. In any case, the prayer in the application does not seek that the status quo be maintained. In our view, to go to the extent of interpreting the prayer to include a prayer for grant of an injunction or a prayer to grant the maintenance of the status quo that was not prayed for is to go beyond the provisions of Rule 5(2)(b). As stated in the case of WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES – V – ORANGA [1976-80] 1 KLR 78, this court has no general inherent jurisdiction".**

Nowhere did the Court insist that for one to seek an order of injunction under rule **5(2)(b)** an injunction must have been sought in the Court

below. In the above case, although the Court found that the appeal was arguable, its view, on the second limb was that the High Court having merely dismissed the application for injunction, there was no positive order directing any of the parties to do anything or refrain from doing anything, hence an order of stay was not efficacious. The Court also dismissed an informal application for injunction from the bar for lack of specificity in the motion. We fully agree with that conclusion.

In the instant application, however, the applicant has applied for both stay of execution and injunction. As a matter of fact, of the five substantive prayers in the motion, four relate to injunction while only one, the last one seeks an order of stay. It appears to us that the applicant, being aware of the decisions in the long line of this Court's determination on the subject, such as the decision in **Shimmers Plaza Limited** (supra), was shy to give the prayer prominence. An order of stay is not available to the applicant his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed.

Over the years the Court has granted orders of injunction where stay of execution of further proceedings were found be inefficacious. See: **Equity Bank Limited v West Link Mbo Limited**, Civil Application 78 of 2011.This is because under **rule 5(2)(b**) the Court has jurisdiction to grant only three orders; stay of execution, stay of further proceedings and an order of injunction. In the exercise of this jurisdiction, the Court by dint of **rule 41** exercises an original, independent and discretion jurisdiction. That rule states that;

> **"41. The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court".** (Our emphasis).

This is as clear as it can be. The Court in **Equity Bank Limited V. West Link Mbo Limited,** (supra) explained the point as follows:

> **"[13] It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 C.P. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction (Githunguri Versus Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838).**
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> **[14] From the foregoing, it is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."** (*Per* Githinji, J.A)

This Court in applications brought under **Rule 5(2)(b)** exercises jurisdiction similar to that of a court of first instance. It can grant and has on many occasions granted an injunction pending the hearing and determination of an appeal or intended appeal primarily in order to preserve the subject matter of the intended appeal, or where it would facilitate a proportionate resolution of the dispute. Indeed for many applicants whose actions have been dismissed by the courts below, the refuge is to apply specially for an injunction under **Rule 5(2) (b)**.

We need only add that, whether the application is for stay of execution, injunction, or stay of further proceedings, the consideration and applicable principles are the same.

We have said earlier that to demonstrate the first of the two traditional tests, the applicant has urged us to accept that the intended appeal is not frivolous. We have set out elsewhere in this ruling the grounds in the draft memorandum of appeal. The central issue being whether the applicant was to blame for the collapse of the bridge. Put differently, whether the learned Judge was justified in not quashing the decision of the respondent to suspend the appellant. That issue is not idle. It is an arguable question and as such satisfies the first limb on the arguability of the intended appeal.

On the second limb, to demonstrate that the appeal will be rendered nugatory, if the orders sought are not granted, counsel submitted that the applicant will be denied livelihood in his practice as an engineer if the 2 year suspension is not lifted pending the determination of the intended appeal. With respect, we agree that the appellant will be exposed to incalculable suffering between now and the time when the intended appeal is likely to be set down for hearing. He is likely to serve the 2 year suspension or a substantial part of the suspension. To borrow from the passage cited above in **Equity Bank Limited V. West Link Mbo Limited**, an injunction under **Rule 5(2)(b)** is designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.

In the result, having satisfied the two principles, the application succeeds. There will be a temporary order of injunction in terms of prayer 4 of the motion dated 7th November, 2018, the effect of which is that, pending determination of the appeal, the suspension of the applicant's licence is temporarily stopped. The applicant will ensure that the appeal is lodged within 30 days from the date of this ruling.

Costs will be in the appeal.

Dated and delivered at Nairobi this 5th day of February, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR