



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & ODEK, J.J.A)

CIVIL APPLICATION NO. 348 OF 2018

BETWEEN

PRESIDENT DELIVERY UNIT.....1ST APPLICANT

ANDREW WAKAHU.....2ND APPLICANT

NZIOKA WAITA.....3RD APPLICANT

JOSEPH KINYUA.....4TH APPLICANT

AND

KATIBA INSTITUTERESPONDENT

(Being an application for Stay of Execution of the Judgment of the High Court at Nairobi (E.C Mwita, J) dated 8th November, 2017 in Petition No.468 of 2017)

RULING OF THE COURT

In an application under **Rule 5(2)(b)** of the Court of Appeal Rules, an applicant must demonstrate the existence of what has come to be known as the twin principles: that the appeal he has presented or intends to present raises arguable points and; that the appeal or the intended appeal would be nugatory if the interim orders were to be denied. In considering whether an appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. An arguable appeal, as the phrase suggests, is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Both principles must be satisfied in order to succeed. In the application of these principles, the Court exercises unfettered original and discretionary jurisdiction but bearing in mind that the Court must not make definitive or final findings of either fact or law. See: **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others**, Civil Application 31 of 2012.

To apply the principles to the facts of this case, the following brief background will be helpful.

On 17th August, 2017 the respondent, in exercise of its right of access to information, made a request to the 2nd applicant in his capacity as the Secretary of the 1st applicant to be supplied with information regarding advertisements associated with the 1st applicant concerning achievements of the Government of Kenya under the hashtag #GOKDelivers and #Jubileedelivers for the period commencing 28th May, 2017 and ending 17th August, 2017. The specific information sought included the number of advertisements carried, medium used, dates published and cost incurred. The respondent sought this information to establish the extent of violation of the electoral laws by the applicants during the 2017 campaign period.

Because this information was not forthcoming, the respondent petitioned the High Court alleging that the denial of information sought infringed its rights under **Articles 35(1)(a), 35(3) and 33** as well as **Articles 10, 81,86,88 and 249(1)(a) and (c)** of the Constitution. It sought declarations under **Article 35** of the Constitution and an order of mandamus to compel the 1st and 2nd applicants to provide the aforementioned information. In the interim, the respondent sought an order to stop the appellants or their agents from publishing any advertisements of achievements of the Government either in print media, electronic media, banners or hoarding in public places. This order was granted on 2nd October, 2017.

The applicants in resisting the petition stated that **Article 35** is only justiciable to natural persons as opposed to the respondent who was a

juristic person; that the petition was premature since the Access to Information Act confers oversight and enforcement power to the Commission on Administrative Justice; that the information sought was available at the office of the Auditor General as well as Parliament which are the constitutionally mandated bodies charged with overseeing public expenditure; and that the information sought was exempted under section **6(1)(a)** and **6(2)(j)** of the Act.

Mwita, J., in his ruling to be challenged in the intended appeal, was of the view that the Executive Director of the petitioner is a citizen hence a juristic person entitled to seek and have information under **Article 35** as a citizen; that the applicants had no basis for the contention that the information sought is limited by **section 6(1)(a)** and **6(2)(j)** of the Access to Information Act given the fact that **Article 35** has no limitation to this right; the applicants were under duty to demonstrate that the limitation was open and justifiable as prescribed under **Article 24(1)** of the Constitution, which duty they failed to discharge, as a result of which they violated the respondent's rights; and that the respondent therefore proved a violation therefore deserving the protection of the court. With that, the petition was allowed with declarations that failure by the 1st and 2nd applicants to provide information sought by the respondent was a violation of the right to access to information. The court also issued an order of mandamus to compel the 1st and 2nd applicants, at their own cost, to provide the information sought by the respondent.

Mr. Mutinda, learned Counsel for the applicants made reference to the draft memorandum of appeal in which 8 grounds are listed to demonstrate the intended appeal is arguable. Whether or not **Article 35(1)** of the Constitution is limited to natural persons; whether it was a misdirection for the learned Judge to grant orders whose effect was to draw into the dispute Jubilee Party which was not a party to the proceedings before the trial court; whether the request for information was defective and incapable of being acted upon; whether it was erroneous to order the applicants to avail information that was not within their possession, command or control, among others, are clearly not idle complaints. They are not frivolous but indeed arguable.

On the nugatory aspect of the appeal, it was submitted that the respondent on 26th February, 2018 filed an application in which it was sought that the applicants be asked to show cause why contempt proceedings should not be commenced against them. That application was scheduled for hearing on 6th December, 2018 (now passed). In the circumstances, the applicant is apprehensive that unless a stay of execution is granted, the respondent will proceed to execute the decree which in turn is likely to culminate in them being held in contempt. Should this happen, their intended appeal will be rendered nugatory. Where a person's personal freedom and liberty is threatened, as here, the Court will readily provide temporary protection by granting orders to stay or stop the threats pending the hearing on merit the appeal.

We have deliberately not said anything on the respondent's argument that there is no valid notice of appeal on record because we have seen a copy thereof. But the more fundamental reason for not considering those submissions is that the recourse for any such infraction in the notice of appeal is by applying **Rule 84** of the Court of Appeal Rules for the striking out and not through oral submissions.

Accordingly, we come to the conclusion that the applicants, having satisfied both limbs, are entitled to the protection of the law pending the lodging, hearing and determination of the appeal. In the result, the application succeeds and an order of stay of execution of the judgment and decree of 8th November, 2017 granted until the appeal is lodged and heard.

Costs will be in the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of May, 2019.

W. OUKO, (P)

JUDGE OF APPEAL

ASIKE – MAKHANDIA

JUDGE OF APPEAL

OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR