



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & MOHAMMED J.J.A)

CIVIL APPLICATION NO 331 OF 2018

BETWEEN

THE HON. ATTORNEY GENERAL.....APPLICANT

AND

OKIYA OMTATAH OKOITI.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

(Application brought under Article 156(4), (6), 159 (2), 164(3) of the Constitution of Kenya; Section 3A and 3B

of the Appellate Jurisdiction Act, Rules 5(2)(b) and 47 of the Court of Appeal Rules, 2010 seeking stay of

further proceedings of the High Court of Kenya at Nairobi (Okwany, J.) dated 22nd October, 2018

in

H.C. Petition No. 327 of 2018

RULING OF THE COURT

The applicant, the *Hon. Attorney General* filed a motion dated 13th November, 2018. In the motion *Okiya Omtatah Okiiti* and the *National Assembly* were named as the 1st and 2nd respondents respectively. The applicant's motion was predicated on Articles 156(4) & (6), 159 (2) and 164 (3) of the Constitution of Kenya, Sections 3A and 3B of the Appellate Jurisdiction Act, and Rules 5(2) and 47 of the Court of Appeal Rules, 2010.

In the motion, the applicant sought the following orders:

“1. Spent.

2. Spent.

3. Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to grant a stay of further proceedings in or arising from Nairobi HC Pet. No. 327/2018, *Okiya Omtatah Okiiti versus the Hon. Attorney General & Another.*

4. There be no order as to costs.”

The applicant's motion was supported by the affidavit of *Charles Mutinda*, the Deputy Chief State Counsel sworn on 13th November, 2018 in which he deponed that the 1st respondent filed Nairobi High Court Petition No. 327 of 2018 dated 21st September 2018 (hereinafter *the petition*) seeking a number of reliefs; that the petition raised substantial questions of law following which the applicant filed an application dated 1st October 2018 and sought inter alia an order that:-

“This honourable court do certify the instant petition as raising substantial questions of law and that the same be referred to the honourable Chief Justice to empanel a bench comprising of an uneven number of judges being not less than three in accordance with the provisions of Article 165(4) of the Constitution.

It was the deponent’s further deposition that the 2nd respondent supported the applicant’s motion; that the said motion was heard on merits and dismissed in a ruling delivered on 22nd October 2018; that the applicant was dissatisfied with the outcome of the ruling and filed a Notice of Appeal dated 13th November 2018 and finally, that the applicant has an arguable appeal which will be rendered nugatory should the petition pending at the High Court be heard and determined.

On 29th November, 2018 the motion came before us for plenary hearing. Learned Senior Counsel, **Mr. Oraro** together with learned counsel, **Mr. Ogosso** and **Mr. Rubut** appeared for the applicant whilst Mr. **Omtatah** appeared in person.

In urging the motion, **Mr. Oraro** highlighted the applicant’s submissions dated 24th November, 2018. He relied on two lists of authorities filed on 20th November 2018 and on 29th November 2018. Counsel contended that it was arguable whether the High Court could exercise its discretionary jurisdiction and decline an application seeking certification under Article 165(4) of the Constitution; that the learned Judge (**Okwany, J.**) exercised her discretion capriciously and whimsically in refusing to certify that the petition raises substantial questions of law thus calling for an enlarged panel of more than 3 judges, and finally, that the issues raised at the High Court in the application for certification “... **are not only cognizable but also very weighty touching on the correct interpretation of inter- alia, Articles 10, 93, 94, 95, 96 and 115 of the Constitution**”; It was counsel’s view that a challenge to the constitutionality of the Finance Act 2018 raises matters of general public importance given the fact that the Finance Act 2018 governs all the operations of the 3 arms of Government.

On the nugatory aspect, counsel contended that absent an order of stay, the proceedings at the High Court will proceed to conclusion before a single judge thus rendering the applicant’s intended appeal pyrrhic.

Ms Thanji for the 2nd respondent supported the motion.

In opposing the motion, **Mr. Omtatah** (who had not filed a replying affidavit in opposition to the motion) sought to rely on his replying affidavit sworn on 9th October, 2018 and filed at the High Court in opposition to the applicant’s motion dated 1st October, 2018 as well as his submissions filed therein dated 11th October, 2018. In the said affidavit the 1st respondent deponed that the applicant’s motion of 1st October, 2018 was meant to delay the conclusion of the petition filed by him; that he abandoned his application seeking “... **conservatory orders staying and prohibiting the implementation of the Finance Act, 2018...**” pending the hearing and determination of the petition so as to fast track the hearing of the petition. Finally, it was **Mr. Omtatah**’s submission that the applicant’s motion was tantamount to forum shopping.

We have carefully considered the motion and the supporting affidavit, the 1st respondent’s affidavit dated 9th October 2018 filed in opposition to the motion of 1st October 2018, the submissions on behalf of the applicant dated 20th November 2018, the 1st respondent’s submissions dated 11th October 2018, the fact that the 2nd respondent is not opposed to the motion, the authorities cited and the law.

The applicant’s motion is brought under **Rule 5(2)(b)** of this Court’s Rules. **Rule 5(2) (b)** of this Court’s Rules provide as follows:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:

(a)...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the decision of **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR** wherein it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] 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.

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

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii *In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*

viii. *An applicant must satisfy the Court on both the twin principles.*

ix. *On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*

x. *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.*

xi. *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.*

xii. *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

xiii. *Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”*

Further, in *Gitirau Peter Munya vs. Dickson Mwenda Kithiji & 2 Others [2014] eKLR* (a decision cited by the applicant), the Supreme Court of Kenya added a third consideration, this being whether it is in the public interest that the order of stay be granted. In considering whether the applicant has established that it has an arguable appeal, we remind ourselves that an arguable appeal is not necessarily one that will succeed, but suffice to state that one that is not frivolous. The applicant’s assertion is that the petition at the High Court raises weighty issues that call for an enlarged bench. In *Okiya Omtatah Okoiti & Another vs Anne Waiguru, The Cabinet Secretary, Devolution and Planning & 3 Others [2015] eKLR* this Court considered a near similar application made under *Rule 5(2) (b)*. The Court stated:

“Mr. Omtatah is of the view that the petition before the Court raises issues of such great importance; that these are anchored on constitutional provisions and as such the petition ought to have been referred back to the Chief Justice for the purpose of empaneling a bench of Judges of uneven number. He based this argument on Article 165(4) of the Constitution which provides as follows:

‘Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.’

By Article 165 (4) of the Constitution, the High Court can certify a matter as one that raises a substantial question of law if there is a question as to “whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened” or where it involves a question regarding “the interpretation of this Constitution including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution...”

Article 165(4) of the Constitution states:-

“(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

The High Court, *Okwany, J.* failed to certify the petition as one that raises substantial issues of law. It is this failure by the learned Judge to certify the petition as raising substantial questions of law that the applicant intends to challenge on appeal. Whereas the Constitution does not define what constitutes *“a substantial question of law,”* in the persuasive authority of the Supreme Court of India in *Chunilal Mehta vs Century Spinning and Manufacturing Co. AIR. 1962 SC 1314* the court held that:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law”.

The applicant contends that the petition raises substantial issues of law that call for an enlarged bench of more than 3 judges. In *Okiya Omtata Okoiti & Another vs. Anne Waiguru* (supra), this court stated:

“The question therefore arises as to whether the jurisprudence arising from a determination of a question of law by a court comprising three or more judges would be of equal weight as a question of law that is determined by a court comprising of just one judge.

Our preliminary view in answer to this question is that while both the courts envisaged would be exercising the same jurisdiction, the decision of three or more judges would have more jurisprudential weight than the decision of a single judge. To our minds, the inclusion of Article 165(4) of the Constitution, requiring that a matter of substantial importance be heard by a bench of more than three judges, infers that a substantial question will yield a substantial decision, and as such that decision would bear more weight.”

In our view, the applicant's intended appeal is not frivolous. However we do not want to make further comments lest we embarrass the bench that will be seized of the main appeal.

On the nugatory aspect, it is not disputed that unless an order of stay is granted, the petition at the High Court will be heard and determined and the applicant's appeal will be rendered nugatory. It is in view of the above that we have come to the conclusion that the applicant has established the twin principles for consideration in an application under Rule 5(2) (b) and deem it fit to grant an order of stay of further proceedings in Nairobi H.C. Petition No. 327 of 2018 pending the hearing of the intended appeal. Costs of this motion shall be in the intended appeal.

Dated and delivered at Nairobi this 10th of May, 2019

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR