



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, MUSINGA & GATEMBU, J.J.A)**

**CIVIL APPLICATION NO. 220 OF 2018 (UR 175/2018)**

**BETWEEN**

**KSC INTERNATIONAL**

**LIMITED (UNDER RECEIVERSHIP).....1<sup>ST</sup> APPLICANT**

**KUNDAN SINGH UBHI.....2<sup>ND</sup> APPLICANT**

**OPKAR SINGH UBHI.....3<sup>RD</sup> APPLICANT**

**RIPTHUMAN SINGH UBHI.....4<sup>TH</sup> APPLICANT**

**AND**

**GICHUKI KING'ARA & CO. ADVOCATES.....RESPONDENT**

*(Being an application for stay of further proceedings pending the hearing and determination*

*of an intended Appeal from the ruling and order given by the High Court of Kenya*

*at Nairobi (Sewe, J.) on 12th June 2018*

*in*

***Misc. Application No. 294 of 2017)***

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**RULING OF THE COURT**

1. By a Notice of Motion dated 25th July 2018 brought under a certificate of urgency, the applicants moved the Court under **rule 5(2) (b)** and **42** of the Court of Appeal Rules seeking for orders that:

i) Pending the hearing and determination of the instant application, all further proceedings in Nairobi High Court (Commercial & Tax Division) Miscellaneous Application numbers 294, 295 and 297 of 2017 be stayed;

ii) All further proceedings in Nairobi High Court (Commercial & Tax Division) Miscellaneous Application numbers 294, 295 and 297 of 2017 be stayed pending the hearing and final determination of the applicants' appeal to the Court of Appeal against the ruling and order of the High Court delivered on 12th June 2018 in the aforementioned matters; and

iii) The costs of and occasioned by this application be made to abide the result of the applicant's said intended appeal.

2. The motion is premised on 23 grounds that are set out on the face of the motion and supported by an affidavit sworn by the 3rd applicant Opkar Singh Ubhi. The application is opposed by way of a replying affidavit deposited by the Mr. Gichuki King'ara, an advocate practicing in the name and style of the respondent advocate company.

3. In the ruling dated 12th June 2018 the High Court dismissed an application by the 1st applicant (KSC International Limited (Under Receviership) seeking to strike out various bill of costs dated 10th July 2017, that were filed by the respondent on 11th July 2017 in Nairobi High Court as Miscellaneous Application numbers 294, 295 and 297 of 2017. The said bill of costs arose from services rendered by the respondents in Civil Suit No. 446 of 2015 (hereinafter referred to as the “main suit”), and was filed against all the applicants individually.

4. In support of the motion the applicants contended that the respondent’s various bills of costs were duplicitous and an abuse of the court process; that the respondent was instructed by the 1st applicant to represent it and all the applicants in the main suit; and that at no given time did the 2nd, 3rd and 4th applicants ever separately or individually instruct the respondent to represent them in the said main suit.

5. The applicants further maintained that in the instruction letter dated 18th February 2016, the fees were capped at Kshs. 5 million inclusive of VAT; that the respondent accepted the first instalment from the 1st applicant; that it was clear that even though the respondent was to act on behalf of all the applicants, the only instructing client was the 1st applicant; and that the respondent was therefore not entitled to claim fees separately or individually against each applicant.

6. In the replying affidavit Mr. King’ara deponed that each of the applicants retained the respondent individually; that each had specific claims against the defendant in HCCC No 446 of 2015; that the deponent attended Court more than 32 times, argued the application and amended pleadings, raising the subject matter by Kshs. 40 billion; that each of the applicants subsequently individually terminated the retainers; that the respondent thereafter demanded his legal fees but the applicants refused to pay; and that the therefore filed the 4 bill of costs.

7. In the replying affidavit Mr. King’ara tabulated the numerous unsuccessful attempts made by the applicants in a bid to obstruct and halt the taxation of the Bill of costs. He explained that the bills had come up for taxation on 16th July 2018 and the taxing master had directed the parties to file written submissions, which the parties have done. Mr. King’ara maintained that the current motion was no more than another attempt by the applicants to delay and halt the taxation process; that in any case the application was premature as no bill of costs has been taxed and therefore execution is a remote possibility; that this Court lacks jurisdiction to stay proceedings before the Deputy Registrar

8. The hearing of the motion proceeded orally before us on 19th December 2018, with Mr. Sundeep Sarvia appearing for the applicants while Mr. Peter King’ara was present for the respondent.

9. In his submissions, Mr. Sarvia, in a bid to satisfy the requirement that their intended appeal is arguable, pointed out two issues that they intend to canvass. First is an issue arising from the finding by the learned judge that the written agreement was not enforceable and that the same was overtaken by events. It was Mr Sarvia’s submission that an analysis of the facts that were before the trial court will reveal that the learned Judge came to an erroneous conclusion as there was a clear agreement by the parties regarding costs agreed upon, which agreement was only varied and not overtaken by events.

10. Secondly Mr. Sarvia took issue with the finding of the trial court that each of the applicants individually instructed the respondent. He pointed out a letter from the record of appeal which, in his view, showed that the instructions for representation of all the applicants were given by the 1st applicant, and therefore it is only the 1st applicant who can be held liable. Counsel therefore urged that the applicants have an arguable appeal.

11. On the nugatory aspect, Mr. Sarvia argued that in considering whether to issue an order of stay of execution the Court should exercise its discretion in the interest of justice; that the finding of the trial court on the issues pointed out by Mr. Sarvia had prejudiced the applicants in their defence to the respondent’s claim of Kshs.19 billion in regard to the bill of costs; that the scale of the costs being claimed were such that it would negate the applicants’ claim that is still pending; and that it was therefore in the interest of justice that the taxation proceedings be stayed in order to facilitate a proportionate resolution of the dispute. The Court was also urged to consider the need for expeditious disposal and optimum use of judicial time.

12. Mr. King’ara, learned Counsel for the respondent, submitted that the applicants’ motion was an abuse of the court process as there is no arguable appeal; and that the applicants had no intention of filing an appeal but were merely stalling the taxation process. Counsel maintained that the letter of instructions was very clear that the respondent was to act for the 1st applicant; that the parties subsequently met and agreed on further terms, and that the learned Judge properly concluded that the terms of the initial agreement were varied.

13. Mr. King’ara argued that the amounts of Kshs.5 Million and the additional Kshs.15 million was not agreed as the final costs, but amounts payable prior to judgment, and the final payment was to come after taxation and therefore the taxation process should be allowed to go on. Finally, counsel submitted that taxation is a special procedure which should not be forestalled merely because of a pending appeal.; and that in any case the applicants will still have an opportunity at the appropriate time to appeal the result of the taxation if it is unfavorable to them.

14. The issue before the Court is whether the applicants have satisfied the conditions for granting an order of stay of proceedings pending appeal under rule 5(2)(b) of the Court Rules. In considering this matter we reiterate what this Court stated in **Bernard Gichobi Njira v Kanini Njira Kathendu & another [2016] eKLR;**

***“Our jurisdiction under Rule 5(2)(b) is not only discretionary, but also wide and unfettered. The interest of justice is the guiding principle. See Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR. The applicant must, however, satisfy the twin principles set by this Court in numerous decisions; that of arguability, even on a solitary bona fide issue which does not necessarily have to succeed, and secondly show that if application is not granted then the success of the appeal would not only be worthless, futile, invalid, but also irreversible; in sum nugatory. In deciding the nugatory aspect, each case must depend on its own facts and peculiar circumstances-See David Morton Silverstein v Atsango Chesoni [2002] eKLR.”***

15. Thus the first limb that we considered is whether the intended appeal against the ruling of 12th June 2018 is arguable. We are alive to the fact that “arguability” is not synonymous with success. This was well captured in **National Bank of Kenya Limited & Another v**

Geoffrey Wahome Muotia [2016] eKLR in which this Court stated that:

***“An arguable appeal is any appeal that raises at least one bonafide issue that deserves the consideration of this Court.”***

16. The applicants have identified two grounds that they contend raise arguable issues. We have considered these two issues and without making any definitive determination come to the conclusion that the issue whether the advocates’ retainer was to render services on behalf of each of the applicants individually; and the issue whether the original retainer agreement concerning the advocates fees was overtaken by events by the applicants agreeing to pay the respondent in cash and kind in excess of the retainer agreement are both arguable as they raise the issue whether the conclusions arrived at by the learned judge were supported by the law and facts before him. These are issues that require resolution through reconsideration, evaluation of the facts and application of the law.

17. The second limb that we consider is whether if the application for stay of proceedings is not granted then the success of the appeal would be rendered nugatory. It was not disputed that the amount of money at stake in regard to the bill of costs is Kshs.19 billion. Although the respondent stated that there is no execution process in place, taxation of a bill of costs is a step towards the execution process. Moreover, the amount in issue is such a colossal amount that it cannot be said that the applicants would not be prejudiced if the taxation process is allowed to continue, as the risk of execution thereafter is real. We have no doubt that such an execution would render otiose their intended appeal.

For these reasons we find that the applicant has satisfied the twin conditions for granting the order of stay of proceedings, and that it is fair and just to issue the orders. Accordingly, we make the follows orders:

i) That a stay of proceedings in Nairobi High Court (Commercial Tax Division) Miscellaneous Application numbers 294, 295 and 297 of 2017 shall issue pending the hearing and final determination of the applicants’ appeal to the Court of Appeal against the ruling and order of the High Court delivered on 12th June 2018.

ii) That the Deputy Registrar of the High Court shall ensure that appropriate proceedings are availed to the applicants to facilitate the filing of the appeal and that the appeal shall be filed within 60 days from today failing which the order of stay shall lapse unless otherwise extended by the Court.

iii) The costs of the application shall abide by the outcome of the intended appeal.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of June, 2019.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**