



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAL, J.J.A)

CIVIL APPLICATION NO NAI 43 OF 2019 (UR 49 OF 2019)

BETWEEN

CELESTINE MWENDE MUNENE.....APPLICANT

AND

HENRY ATHIMBA KURAUKA.....RESPONDENT

(Being an application for an order of stay pending appeal from the ruling of the Employment and Labour Relations Court at Nairobi (Radido, J.) dated the 1st February, 2019 in ELRC Misc. Appl .No. 153 of 2017)

RULING OF THE COURT

[1] A brief synopsis of this application is that before the relationship between *Celestine Mwendu Munene* (applicant) and *Henry Athimba Kurauka* (respondent) went awry, it was that of an advocate/client. That was when the respondent represented the applicant in a suit filed before the Employment and Labour Relations Court **Cause No. 2365 of 2013**. It seems that the respondent did not represent the applicant throughout the proceeding but the suit was eventually decided in favour of the applicant as she was awarded a total sum of Ksh 1,250,000 with interest and costs vide a judgment dated 5th August, 2018. This relationship seems to have broken down leading to the respondent withdrawing from acting for the applicant and the record shows that there was a flurry of actions. Among them was an advocate/client bill of costs filed by the respondent against the applicant which was taxed on 28th September, 2016 at Ksh.240,520. Following this award of costs the respondent filed a motion before the same court, seeking an order that judgment in his favour be entered for the said sum which had been awarded as costs.

[2] In the said ruling, the subject matter of an intended appeal and the instant application, the Judge allowed the motion and in doing so he posited as follows in a pertinent paragraph of the said ruling:-

“The respondent was fully aware of the applicant’s case against her did not present any plausible reason why she had failed to pay for the work done or why the court should not allow the application.

She did not dispute that she retained the applicant. She equally did not dispute that the applicant presented an advocate/client bill of costs for taxation and that the bill was taxed and a certificate issued by the Taxing Officer.

The application is allowed save that interest will be at 12% from date of taxation Applicant to have costs of the application”

[3] Dissatisfied with the above orders, the applicant filed a Notice of Appeal in this Court on 7th February, 2019 seeking to appeal against the ruling of 1st February, 2018 and the instant notice of motion seeking stay of execution pending hearing and determination of an intended appeal. For an applicant to succeed on an application for stay of execution under **Rule 5 (2) (b)** of this Court’s Rules, he or she must satisfy us;

(i) That the appeal is arguable and not frivolous and

(ii) That if the stay order sought is not granted the appeal will be rendered nugatory.

See the case of; - Ismael Kagunji Thande vs. Housing Finance Kenya Ltd -

Civil Application No. Nai 157 of 2006 (unreported) where the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (see also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [1988] KLR 838.)”

[4] The application is supported by the grounds on the body thereto which are elaborated further by the matters deposed to in her supporting affidavit sworn by the applicant on 8th February, 2019. According to the applicant, the respondent has threatened to execute the decree by issuing a notice to show cause and she therefore faced an imminent danger of execution. The applicant stated that the intended appeal is arguable because the Judge failed to take into account that there was no formal notice of appointment of an advocate and the applicant represented herself in three different applications filed by the respondent over the same issue of costs. Moreover, the respondent withdrew an application that was filed in **ELRC No. 2365 of 2013** and filed another as **MISC No. 153 of 2017** which was an abuse of the court process and was also prejudicial to the applicant; that the certificate of costs on which the judgment was entered was withdrawn. The applicant urged us to grant the orders.

[5] The respondent although served with the hearing notice did not attend court during the hearing. He however filed a replying affidavit which we have considered. The respondent has a dim view of this application which he terms incompetent as the ruling and order the applicant wishes to appeal against was issued on 9th March, 2018 and no notice of appeal was filed within the period provided in the Rules. The Notice of Appeal that was filed on 7th February, 2019 was against a ruling in **ELRC MISC APPL No 153 of 2017** delivered on the 1st February, 2018. Therefore, in his view, there is no competent notice against which an appeal can lie and where orders can issue. Also, the respondent has never challenged the order of taxation by filing a reference, therefore, there cannot be an arguable appeal. Moreover, the applicant was ordered to deposit the amount of fees but she has not done so but instead she sought another order of stay before this Court. On the appeal being rendered nugatory the respondent posited that he is an advocate of the High Court with over twenty (20) years standing and in the event the intended appeal were to succeed he is able and willing to refund the applicant the entire sum.

[6] As indicated above, the principles that govern the granting of orders of stay of execution are well established as restated. We also do not wish to delve into the merit of the appeal, that being the mandate of the Bench that will deal with it, save to say the gravamen of this application is a dispute over advocate/client fees which was taxed and the order of taxation was not challenged by way of a reference. Also, the order of taxation was adopted by the court which ruling is now the subject matter of a notice of appeal that has been filed and which we also need to mention appears to have been filed well out of time but that is also not for us at this moment.

[7] For the reason that no reference was filed to challenge the taxed costs, our provisional view is that we are sceptical about the arguability of the appeal. On the nugatory aspect of the appeal, the applicant was emphatic that if stay is not granted, execution will be undertaken as a notice to show cause has already been issued and certainly she will be prejudiced. On the other hand, the respondent states that the amount owing is legal fees as taxed, it is an amount if the applicant is successful in the intended appeal, he would be able to refund as an advocate of over 20 years in practice. This being a money decree, and considering the applicant was successful in the law suit where the legal services were rendered, we are not persuaded that the applicant would be prejudiced even if she paid the said sum.

[8] Taking into account our view on the twin issues of arguability and nugatory aspects arising from this matter, we are not convinced that the application deserves the exercise of this Court’s discretion in favour of the applicant. The upshot of the foregoing is that instant the application is dismissed. As there was no appearance by the respondent, we make no order as to costs.

Dated and delivered at Nairobi this 19th day of July, 2019.

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR