IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. 139 OF 2019

BETWEEN

JOHN OKAL OGWAYO.....1ST APPLICANT

RUTH REBECCA AUMA.....2ND APPLICANT

AND

MUGAMBI & COMPANY ADVOCATES.....RESPONDENT

*(Application for stay of proceedings following the ruling of the High Court of Kenya at Nairobi (**Thuranira J)** dated **8th April, 2019***

in

MISC. APPLICATION NO. 447 OF 2010)

****

RULING OF THE COURT

The applicants **John Okal Ogwayo** and **Ruth Rebecca Auma,** who are a couple, by the motion dated 6th May, 2019 under **Rule 5(2)(b)** of the **Court of Appeal Rules 2010** seek in

the main, an order that;

> ***"(c) This Honourable Court be pleased to stay any further proceedings in Misc. Application No. 447 of 2010 as Mugambi & Company Advocates -vs- John Okal & Another pending the hearing and determination of the intended appeal."***

That order is sought as against Mugambi & Company Advocates who were the applicants' advocates before they fell out. The motion is premised on grounds appearing on its face. Those grounds run into a whopping nineteen paragraphs and cover four typed pages. We do not see how and why any applicant would engage in such prolixity considering that on an application of this kind one needs satisfy but only two limbs or grounds. The narrative contained in those so called grounds properly belongs, if at all, in affidavits and there is indeed a supporting affidavit of John Okal Ogwayo sworn on 6th May, 2019 which reproduces that material.

The applicants' case is that they had instructed the respondent to file suit for the recovery of general and special damages against some two doctors and Karen Hospital for negligence that resulted in the death of their son **Nevil Sira Okal**. The respondent filed for letters of administration *ad litem* as well as a suit on behalf of the applicants as the administrators of their child's estate.

The relationship between the applicants and the respondent thereafter terminated whereupon the latter filed an Advocate-Client Bill of Costs seeking some Kshs.367,657.00 costs. The applicants view was that such costs did not lie as there had been a retainer agreement between them and the respondent. The costs could only be taxed at the conclusion of the case, at any rate. The bill of costs was first rejected by L. W. Gichaba the Principal Deputy Registrar on 29th March, 2011 but the respondent filed a reference which was allowed by H. P. G. Waweru J. He allowed a re-taxation of the bill and it was eventually taxed at Kshs.714,502 by the taxing officer Hon. Wangila, for which the respondent sought judgment.

The applicants sought to set aside that decision but their application was dismissed by Thuranira Jaden J provoking a notice of appeal and the current application.

The motion and affidavit were relied upon by the applicants' learned counsel Ms Waweru when she appeared before us. She urged that the applicants have an arguable appeal as can be gleaned from the grounds of appeal in the affidavit of support. The said appeal would be rendered nugatory were the respondent to go ahead and execute against the applicants personally, for costs incurred for the estate of the deceased minor. They would thus be highly prejudiced.

In both a replying affidavit and submissions before us, Mr. Mugambi of the respondent questioned our jurisdiction to hear the instant application, contending that the applicants had not appealed against some two previous rulings including one in which the issue of retainer had been dealt with by Waweru J. He further contended that the twin principles on which this Court grants relief under **Rule 5(c)(b)** had not been satisfied. He maintained that whether or not there is a retainer agreement, an advocate should not be kept away from his fees pending the conclusion of a suit he was no longer acting in, and about which he had no interest. He also questioned the applicants' claims that they could not pay the costs of Kshs.714,000 stating that no evidence of their inability had been availed.

We have given due consideration to the application, the affidavits in support and in opposition thereto, as well as the rival submissions made before us. What we are called upon to exercise is our discretion which is free and unfettered but exercisable on well settled principles which it behoves an applicant to satisfy. The first is that the intended appeal is arguable, by which is meant one that raises even a single bona fide issue worthy of the respondent's being called to answer, and of this Court's consideration, although it need not be one that must necessarily succeed. In the case of ***Dennis Mugambi Mangare -vs- Attorney General & 3 others, Civil Application No. Nai 265 of 2011 (UR 175/2011)*** it was stated that:

> ***"An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the courts consideration."***

The second is that relief will only be granted if it is shown that unless the orders sought are granted, the appeal would be rendered nugatory. The other expression for this are that the appeal would be rendered trifling, illusory or merely academic by reason of the apprehended harm having occurred in the intervening period, so that success in the appeal becomes a merely phyric or empty victory. The consideration is to spare the appellant undue havoc or as was stated in ***Reliance Bank Limited -vs- Norlake Investments Limited [2002] EA 227***;

> ***"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined."***

Similarly in the case of ***Mukuma v Abunga [1988] KLR 645,*** this Court stated, *inter alia;*

> ***"The discretion of the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be presented by preserving the status quo because such loss would render it nugatory."***

Having looked at the grounds intended to be raised on appeal, it seems quite plain to us that the intended appeal is eminently arguable. There is room for this Court to pronounce itself on whether it is proper for an advocate who had entered into a retainer agreement such as happened herein to nonetheless resile therefrom and tax a bill of costs against his erstwhile client before the conclusion of the claim in relation to which the retainer agreement was entered. Concomitantly with that is whether, where there is a change of advocates every advocate is at liberty to tax his bill or whether he should wait for one bill to be taxed by the advocate who finally concludes the matter. Those are arguable points.

On the nugatory aspect, we note the peculiar circumstances of the applicants. They came to the respondent and entered into a retainer agreement because they had no money for legal fees. This they have sworn without serious controvert. Moreover, they argue that execution is intended to proceed against them personally yet they were all along acting as administrators of the estate of their deceased child from which payment, if any should be claimed by the respondent. Their argument that they stand to suffer greatly the money claimed not being insubstantial, and are likely to be caused great prejudice appears to us to be quite valid and persuasive. It may be that what is involved is money, but we must bear in mind that great prejudice beyond mere inconvenience does qualify as rendering an appeal or intended appeal nugatory.

In the result, we conclude it to be in the interests of justice that a stay of proceedings do issue and we accordingly allow the application in terms of **prayer (c)** thereof.

The costs shall be in the intended appeal.

DATED and delivered at Nairobi this 8th day of November, 2019

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR