



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 56 OF 2017 (UR 45/17)

BETWEEN

THE HON. ATTORNEY GENERAL.....1ST APPLICANT

EVANS ACHOKI, COUNTY COMMISSIONER MOMBASA COUNTY.....2ND APPLICANT

AND

KENYA NATIONAL ASSURANCE CO (2001) LTD.....1ST RESPONDENT

KENCENT HOLDINGS LTD.....2ND RESPONDENT

SECRETARY TO THE COUNTY GOVERNMENT OF MOMBASA.....3RD RESPONDENT

MATI CHARO MATSERE & 33 OTHERS.....4TH RESPONDENT

(An application for stay of execution of the ruling of the Environment and Land Court at Mombasa (Omollo, J.) dated 17th October, 2017 in ELC No. 123 of 2009)

RULING OF THE COURT

1. Before us is an application anchored under **Rule 5(2)(b)** of the *Court of Appeal Rules* wherein the applicants seek-

Stay of execution of the ruling of Omollo, J. delivered on 17th October, 2017 in ELC No. 123 of 2009 pending the hearing and determination of the intended appeal of that decision.

2. The facts that gave rise to the ruling in question are that in line with an order of vacant possession of L.R No. 397/MN (Original numbers 181 and 187) CR. No. 1940 (suit property) issued in favour of the 1st and 2nd respondents the court directed the eviction of squatters thereon. In facilitating the enforcement of those orders Mukunya, J. on 4th March, 2014 issued further orders thus,

“That it is hereby decreed and ordered that the eviction orders issued on 12th October, 2011 granting vacant possession of Plot No. L.R No. 397/MN (Original numbers 181 and 187) CR. No. 1940 to the 1st and 2nd plaintiffs herein be enforced and supervised by the County Commissioner for Mombasa County, the Inspector General of Police and Secretary to the County Government of Mombasa County ...”

3. According to the 2nd respondent the state officers mentioned in the said order were reluctant if not defiant in complying with the orders despite numerous requests. The final nail on the coffin was when the then County Commissioner of the County of Mombasa vide a letter dated 1st July, 2015 indicated that it was practically impossible to implement the orders dated 4th March, 2014. The reason allegedly being that the order did not reflect the correct position on the ground. This to the 2nd respondent was total disregard of a court order hence with leave of the court it commenced contempt proceedings against all the state officers mentioned in the said order. It sought a variety of orders from committal to civil jail to payment of fines by the said officers.

4. Omollo, J. who was seized of that application in her ruling dated 17th October, 2017 found that contempt had only been established against

the 2nd applicant. In particular she stated,

“I say so because the 2nd respondent did not make any attempt at enforcing the order. He formed a mindset not to comply based on the sworn affidavit and correspondences exchanged between them and the applicant.”

In conclusion she issued the following orders: -

a. This Court does find that former County Commissioner of Mombasa, Mr. Evan Achoki is in contempt of the Court order dated 4th March, 2014.

b. The officer named above is punished for the contempt by being fined to pay Kshs.250,000 within 30 days. In default of payment thereof, their (sic) properties (movable and immovable) be attached and sold to satisfy the penalty for the contempt of Court.

It is that decision that the applicants intend to appeal against and seek to be stayed.

5. Going back to the application, it is premised on the grounds that firstly, the intended appeal is arguable to the extent that the orders dated 4th March, 2014 were not served upon the 2nd applicant but his predecessor; the 2nd applicant only took over the office of the County Commissioner in the year 2016 hence he should not have been cited for contempt. In any event, by the time he assumed office the security committee of the County of Mombasa had already met and deliberated on the implementation of the orders. The committee encountered challenges in the implementation of the order and had even escalated the matter to the Provincial Security Intelligence Committee and the National Security Council. The learned Judge erred in finding that the 2nd applicant had not filed a replying affidavit in response to the contempt proceedings while his reply was on record. The fine imposed against the 2nd applicant was contrary to the **Contempt of Court Act**. In addition, the learned Judge failed to appreciate that the 2nd applicant had immunity against such proceedings under the **National Government Co-ordination Act**. Secondly, that intended appeal would be rendered nugatory if the order sought was not granted because there is a real likelihood that the 2nd applicant may lose his property pursuant to the court order he deemed illegal.

6. In opposing the application, Francis Kamau Kahi, the 2nd respondent's director, deposed that the 2nd applicant was the officer in charge and responsible for among other duties coordinating national government functions at the county level, chairing security meetings and ensuring law and order is maintained within the County. As such, when he took over the office of the County Commissioner he had the responsibility of enforcing the orders dated 4th March, 2014 despite the same having been issued and served prior to him taking office. There was no evidence tendered to demonstrate that the Mombasa security committee under the leadership of the 2nd applicant had exhausted all means possible to enforce the said orders. The learned Judge was not wrong in finding that the 2nd applicant had the mindset of not complying with the orders. All in all, the 2nd applicant had confirmed he was aware of the orders which were also in the public domain. In his view, the intended appeal did not raise any arguable points because the **Contempt of Court Act** which the applicants rely on was not in force at the material time; the conduct of the 2nd applicant was not subject to the immunity granted under the **National Government Co-ordination Act**. Similarly, the intended appeal would not be rendered nugatory because the 2nd respondent is yet to commence execution of the contempt order thus the application was based on mere apprehension. Even if the fine of Kshs.250,000 was paid the applicants have not demonstrated that the same would not be reimbursed by the court in the unlikely event the appeal succeeds.

7. State counsel, Mr. Macharia, appearing for the applicants, added that the injury the 2nd applicant stood to suffer in terms of his health and career could not be compensated or reversed in the event the appeal succeeded. Therefore, it was in the interest of justice for stay to be granted. On her part, Ms. Mwaniki, learned counsel for the 1st respondent did not oppose the application.

8. Mr. Ayisi, learned counsel for the 2nd respondent while conceding that the intended appeal raises an arguable point argued that the applicants had failed to show that the intended appeal would be rendered nugatory if stay is not granted. He asked us to dismiss the application.

9. We have considered the application, submissions by counsel as well as the law. In determining an application under **Rule 5(2)(b)** we have to satisfy ourselves that the applicants have demonstrated that they have an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See **Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd. [2002] 1 EA 227**. The applicants are obliged to satisfy both of those principles; it is not enough to satisfy only one of them. See **Peter Paul Mburu Ndururi vs. James Macharia Njore [2009] eKLR**.

10. However, the applicants are not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. This much was appreciated by this Court in **Transouth Conveyors Ltd. vs. Kenya Revenue Authority & Another - Civil Application No. 37 of 2007 (unreported)**. Nor are they required to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if they can show that it has serious questions of law or a reasonable argument, deserving consideration by this Court. Taking caution not to make final determinations on issues subject of the intended appeal, we are persuaded that whether the 2nd applicant could be cited for contempt in light of the fact that he had not assumed office when the orders dated 4th March, 2014 were issued and served; whether the learned Judge considered the 2nd applicant's response, if any, to the contempt proceedings; whether the 2nd applicant had immunity from such contempt proceedings coupled with whether the fine imposed was legal are arguable points that merit consideration by this Court in the intended appeal.

11. On the nugatory aspect we are satisfied that there is a real likelihood that the 2nd applicant's property would be attached and sold to meet the penalty which is sought to be challenged as being illegal. Moreover, if such a penalty is paid the substratum of the appeal would be rendered academic because the 2nd applicant would have been punished for the contempt which he also intends to challenge.

12. The totality of the above is that we find that the applicants have satisfied the twin principles which justify the exercise of this Court's discretion under **Rule 5(2) (b)** of the Rules. Consequently, we issue an order of stay of execution against the ruling of Omollo, J. dated 17th October, 2017 pending the hearing and determination of the intended appeal. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 15th day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR