



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU, J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 21 OF 2017

BETWEEN

SULEIMAN ABDALLA EWATON.....APPLICANT

VERSUS

TRUSTEES MUSLIM ASSOCIATION

JAMIA MOSQUE COMMITTEE.....1ST RESPONDENT

ABDULAI JAMA.....2ND RESPONDENT

ABDI OMAR.....3RD RESPONDENT

IDRIS KAITTANY.....4TH RESPONDENT

(Being an application for stay of execution and proceedings Rule 5 (2) (b) of the Court of Appeal Rules, 201, pending the hearing and determination of an intended appeal from the Ruling and/or Order of the High Court of Kenya, Eldoret, (Cecilia Githua. J.) delivered on 9th February 2017

in

(Eldoret High Court Civil Appeal. No. 149 of 2016)

RULING OF THE COURT

Background

1. The application before the court is brought pursuant to Rule 5(2) (b) of the Court of Appeal Rules. **Suleiman Abdalla Ewaton**, the applicant herein seeks an order of stay of execution and proceedings of the decision of the High court pending the filing, hearing and determination of the intended appeal. The High Court delivered Judgment on 9th February, 2017 in favour of **Trustees Muslim Association, Jamia Mosque Committee, Abdullai Jama, Abdi Omar** and **Idris Kaittany**, the respondents herein.
2. The application is founded on the grounds set out on the face of the motion and also on the averments deponed in the applicant's supporting affidavit.
3. A brief background of the dispute as can be gleaned from the originating summons filed on 16th September, 2015 is that the applicant sought *inter alia* the following orders against the respondents:-

a) That the respondents, their agents, servants and representatives be compelled and/ or restrained by this honourable Court to abstain from doing any particular act particularly summoning, holding or organizing any meeting of the executive committee or any other committee of the 1st respondent pending the hearing and determination of this application inter partes in their character as administrators or trustees and/or officials of the 1st respondent until elections are held and/ or conducted.

b) The executive committee of the 1st respondent and /or officials be declared suspended through a special general meeting and formal elections conducted for office bearers herein to manage the affairs of the 1st respondent.

4. On 19th January, 2016, the applicant filed another application vide a Notice of Motion seeking *inter alia* the following orders;

a) The respondents be restrained by way of a temporary injunction from interfering with the status quo herein by dealing with disposing, alienating, wasting and in any other manner appropriating the assets of the Muslim Association Jamia Mosque Committee, Eldoret and particularly disposing of motor vehicle registration number KAM 931E Nissan van pending the hearing and determination of this application interpartes.

b) This Court be pleased to order and/ or direct that a special general meeting be held to elect an interim steering committee to manage the affairs of the Muslim Association Jamia Mosque Committee, Eldoret.

5. When the application dated 16th January, 2016 came up for hearing, **G.K. Kimondo, J** who was handling the matter gave orders that the matter be transferred to the Chief Magistrate's Court at Eldoret for hearing of both the Originating Summons and the Notice of motion as the cause of action fell within the jurisdiction of the subordinate Court. The matter was transferred to the subordinate Court and the application dated 19th January, 2016 was heard. The Court on 19th May, 2016 gave the following orders;

“a) The defendants/ respondents are restrained from interfering with dealing with, disposing, alienating, wasting and in any other manner appropriating the assets of The Muslim Association Jamia Mosque Committee, Eldoret and particularly disposing off motor vehicle registration number KAM 931E Nissan Van pending the determination of the suit.

b) A special general meeting be held to elect an Interim Steering Committee to manage the affairs of The Muslim Association Jamia Mosque Committee, Eldoret. This to be done within twenty one days.”

6. After the above ruling was delivered, the respondents who were the defendants in the subordinate Court were aggrieved with the orders issued therein and filed an application dated 3rd June, 2016 seeking stay of execution of the orders issued on 19th May, 2016 pending the hearing and determination of their filed appeal and also an order that the Court extends the time for elections by 60 days to enable the parties complete the fasting month of *Ramadhan*. The Court upon hearing their application granted them stay orders on even date pending the hearing of their application and also extended the time for elections by 60 days. However, on 21st July, 2016, the Court granted an order vacating the orders granted on 3rd June, 2016.

7. On the 27th July, 2016, the respondents filed a Notice of Motion dated 27th July, 2016 seeking orders that the Court stays further proceedings in the matter pending the hearing and determination of their application and that the Court does review the orders issued on 21st July, 2016 and reinstate the orders dated 3rd June, 2016 which the Court had vacated. The application was premised on grounds that there was discovery of new evidence which was not within the knowledge of the respondents when the Orders were made on 21st July, 2016. This evidence as presented in the supporting affidavit sworn by the 2nd respondent on behalf of the respondents was that upon further investigations being carried out by the D.C.I.O Eldoret Central Police Station, it emerged that no elections were carried out as was directed by the Court. The Court then heard the application and on 24th October, 2016, dismissed it for lack of merit. The Court held that the letter produced by the defendants stated that investigations were still ongoing and not conclusive, and thus, the letter could not be said to be new and important evidence that could justify review orders.

8. Aggrieved by that decision, the respondents preferred an appeal in the High Court. The respondents also filed an application for stay of execution of the Orders dated 24th October, 2016 and also a stay of all subsequent proceedings in Eldoret CMCC 252 of 2016 pending the hearing and determination of their appeal. The application was argued and on 9th February, 2017 the ruling was delivered. The Court, in exercising its judicial discretion, observed that there were conflicting reports on whether or not the elections were ever held, and that if it declined to grant the orders sought, it would render the filed appeal nugatory. The Court granted the orders sought for stay of execution of the orders dated 24th October, 2016 pending the determination of the appeal and also stayed the proceedings in Eldoret CMCC 252 of 2016. It is against this ruling that the applicant filed an appeal, and also filed the instant application seeking stay of execution of those orders.

Submissions By Counsel

9. At the hearing of the application, parties were represented by counsel who relied on their filed written submissions and also made brief oral submissions. Mr. Kigamwa appeared for the Applicant while Mr. Tororei appeared for the respondents.

10. In his submissions, the applicant sought to demonstrate to the Court that he had satisfied the principles upon which the Court of Appeal exercises its jurisdiction to grant stay. The applicant submitted that the intended appeal is arguable; that the issues raised in his appeal were that the learned Judge erred in granting orders of stay of execution of the orders made on 21st July, 2016 whereas the respondents had not formally prayed for those Orders; that the learned judge erred in law in entertaining an application for stay of execution by the respondents in respect of a negative order which dismissed the respondent's application for review; that no orders of stay of execution can be made in respect of a negative order; that the learned Judge failed to order security as required by the provisions of Order 42 rule 6; that the learned judge erred in granting a stay order in respect of the orders made on 21st July, 2016 whereas there was no appeal pending against the decision; that the learned judge erred in failing to find that the affidavit in support of the respondents application for stay was a nullity as the 1st, 2nd and 4th respondents did not give the 2nd respondent authorization to have the application lodged as required by Order 1 Rule, 13 of the Civil Procedure Rules.

11. On whether the intended appeal would be rendered nugatory, counsel submitted that since the 2nd, 3rd and 4th respondents are not

officials of the Muslim Association Mosque Committee, Eldoret, shall be at liberty to commit acts of waste by sale of its assets, misuse of its finances and general acts of mismanagement without any means of accountability to the association; that it would thus be difficult for the 2nd, 3rd and 4th respondents to reconstitute the proceeds of any unaccounted funds and losses as no security was ordered by the High Court. Counsel for the applicant concluded by urging the Court that he had filed his application without undue delay and urged the Court to allow his application.

12. **Mr. Tororei** counsel for the respondents opposed the application. Counsel submitted that the intended appeal by the applicant was not arguable, the respondents argued that the applicant had not raised any issue to show that his appeal was arguable and not frivolous.

13. On whether the appeal would be rendered nugatory if the grant of stay is denied and the appeal succeeds, respondents submitted that the constitution governing the 1st respondent has provided sufficient safeguards to ensure that its assets are not sold or wasted, and that the speculation by the applicant was not supported by any evidence to show that the 2nd, 3rd and 4th respondents would in any way, waste the assets of the 1st respondent. The respondents further argued that they were apprehensive that if the applicant's motion to temporarily stay the orders by the High Court was allowed, the applicant would ascend to power in an organization wherein he was not a member and had no interests whatsoever. The respondents thus concluded by urging the Court that the applicant had failed to prove that his intended appeal was arguable and would be rendered nugatory if his application was not allowed.

Determination

14. We have considered the application, submissions by counsel, the authorities cited and the law. It is trite law that before the Court can grant any orders sought under Rule 5(2)(b) of the Court of Appeal Rules, the applicant must satisfy the Court that the appeal is not only arguable but that should it succeed it would be rendered nugatory if the orders sought are not granted. This Court in **Stanley Kang'ethe Kinyanjui Vs Tony Ketter & 5 Others [2013] eKLR** summarized as follows, the jurisprudence underlying the long line of cases decided by this Court on 5(2)(b) applications:

- “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercises does not constitute an appeal from the trial judge’s discretion to this Court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.***
- ii) The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
- iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.***
- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.***
- v) An applicant must satisfy the court on both of the twin principles.***
- vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.***
- vii) 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. Joseph Gitahi Gachau & Another v. Pioneer Holdings (a) Ltd & 2 Others, Civil Application No. 124 of 2008.***
- viii) 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. Damji Pragji (supra).***
- ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.***
- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.***
- xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunty, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.”***

15. The first issue for our consideration is whether the intended appeal is arguable. This Court has stated on numerous occasions that; an arguable appeal is not one which must succeed but which is not frivolous and that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

16. In considering this application, we shall bear in mind these principles. On the issue of arguability, the applicant has set out in his draft Memorandum of Appeal, several grounds under this limb including whether the learned Judge erred in granting orders of stay of execution that had not been formally sought by the respondents and whether the learned Judge erred in entertaining an application for stay of execution made by the respondents in respect of a negative order dismissing an application made on 24th October, 2016.

17. We are satisfied that the applicant has an arguable appeal, one of the issues arising being whether the learned Judge erred in granting

orders of stay of execution that had not been formally sought.

18. On the nugatory aspect, as this Court stated in **Reliance Bank Ltd vs Norlake Investments Ltd [200] 1 EA 227**, the factors which could render an appeal nugatory has to be considered within the circumstances of each particular case, and in doing so, the court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the court stated:

“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.”

19. In the instant motion, the applicant depones that the intended appeal will be rendered nugatory as the 2nd, 3rd and 4th respondents are not officials of the Muslim Association Mosque Committee, Eldoret and shall be at liberty to commit acts of waste by sale of its assets, misuse of its finances and general acts of mismanagement without any means of accountability to the members of the association.

20. Counsel for the respondents submitted, inter alia, that the 2nd, 3rd and 4th respondents were cited in the Originating Summons dated 16th September, 2015 on the basis that they are officials of the 1st respondent; and that the 1st respondent’s constitution has sufficient safeguards to ensure that its assets are not sold or wasted as alleged or at all. In the circumstances it is our finding that the appeal would not be rendered nugatory if the appeal succeeds.

21. From the circumstances of the application before us, the applicant has demonstrated that the intended appeal is arguable but has failed to demonstrate the existence of both limbs as required by **Rule 5(2)(b)** of this Court’s Rules.

22. The upshot is that we decline to grant stay of execution and proceedings pending the hearing and determination of the intended appeal. The application is accordingly dismissed. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Kisumu this 15th day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this a true

copy of the original.

DEPUTY REGISTRAR