



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & SICHALE, J.J.A)

CIVIL APPEAL NO. 149 OF 2018

BETWEEN

JOHN MUTHEE NGUNJIRI

PETER OTIENO OKETCH

CHARLES MAINA WANDAKA

EVANS EKALICHE ATTANANSI

SILAS RICHARD MUKOLWE (Duly Registered Trustees of Kenya African

National Union Nakuru Branch).....APPELLANTS

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (F. Tuiyott, J) dated 17<sup>th</sup> November, 2016*

*in*

*H. C. C. No. 14 of 2004)*

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**RULING OF THE COURT**

The application before us was filed on 24<sup>th</sup> May, 2018 seeking the main order under **Rule 5 (2) (b)** of the Court of Appeal Rules (**the Rules**) for stay of execution of the orders issued by the High Court (**Tuiyott, J.**) on 17<sup>th</sup> November, 2016. On that day, the High Court dismissed an appeal filed by the applicants who were challenging the decision earlier made by the Deputy Registrar (**DR**) rejecting their objections against execution of a decree obtained by the respondents.

To put the matter in context, briefly: On 7<sup>th</sup> August, 2009, the respondent obtained a decree against the 'Grand Old Party' of Kenya, KANU (**the party**), for unpaid power supply in the sum of Sh.355,200,295 together with interest thereon at 12% p.a, until payment in full. In execution of the decree, they obtained an order of attachment of **LR Nakuru Municipality/ Block 9/31 (the property)** and a prohibitory order was issued against the property in readiness for sale. But the applicants filed an objection contending that the property did not belong to the party but to the Nakuru branch of the party (**the branch**). The five applicants, it was contended, were the registered trustees of the party's branch in Nakuru, who bought and were registered as the owners of the property. If the property was intended for the party, the trustees of the party would have been registered as the owners but they were not. The DR rejected the objection on 28<sup>th</sup> July, 2014 and made a finding that the property of the branch belonged to the party and was therefore amenable to attachment.

The applicants were aggrieved by that finding and appealed to the High Court which posed the singular issue whether a branch to a duly registered political party is a distinct and separate legal entity from the party itself. It answered that question in the negative on 17<sup>th</sup> November, 2016. The determination opened up the decree for execution but the applicants filed a notice of appeal on 25<sup>th</sup> November, 2016

on which they anchored the motion now before us.

As always, the applicants may only succeed in the application if they lay a firm basis for the exercise of our discretion, which is wide and unfettered. And the trodden path in that regard is to satisfy us on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. See the applicable principles in the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR***.

Is the intended appeal arguable? A single *bona fide* ground of appeal will suffice if it is shown to exist. It does not have to succeed ultimately, but it has certainly to be capable of full argument before the court. Put differently, it should not be frivolous.

In urging the first limb, learned counsel for the applicants **Mr. L. Mwangi**, instructed by Lawrence Mwangi & Mwangi, Advocates, referred us to the affidavit in support of the motion and to the record of the main appeal which was filed on 8<sup>th</sup> May, 2018. In both, it is contended that the High Court misconstrued the **Political Parties Act, 2011**, which transited political parties, hitherto existing as 'Societies' into 'body corporates' and vested all the *'funds, assets and other property, moveable and immoveable, held by the original party'*, to the body corporate. It was erroneous, urged counsel, for the court to ignore the Constitution, 2010 which guarantees the right to property, and the **Land Registration Act, 2012** which protects the sanctity of registered title to land. In counsel's view, there was an issue of conflict of laws to be resolved. There were also weighty issues regarding the lifting of attachments and objections which exist in commonwealth jurisdictions but which the High Court ignored.

On the nugatory aspect, Mr. Mwangi submitted that the appeal would be rendered useless once the property is sold. According to him, it was a unique property which was irreplaceable.

Opposing the motion, learned Senior Counsel, **Mr. Kenneth Fraser**, instructed by M/s Hamilton Harrison & Mathews, Advocates, commenced by drawing our attention to the record of the main appeal which he contended was incompetent. It was so because it was filed out of time. As such, it cannot be said that there was any arguable appeal. Indeed, counsel pointed out, the respondent had filed an application on 8<sup>th</sup> June, 2018 to have it struck out for that very reason. As a result of the delay in filing the appeal, interim orders for stay had expired and the respondent had proceeded to reinstruct auctioneers to sell the property. Huge expenses have been incurred in that process and, in counsel's view, it would be inequitable to aid a party who simply sits back and does nothing to protect its interests. Counsel further submitted that, coupled with the delay was a deliberate omission by the applicants to serve the judgment debtor which is a necessary party in the case.

On the nugatory aspect, counsel drew our attention to the decretal amount which has now escalated to more than Sh.730 million, and auctioneers charges also running into millions of shillings. Further delay, he submitted, continues to be prejudicial to the respondents while execution of the decree would not render the appeal nugatory.

We have considered the matter fully.

To start with, we have noted the application made on behalf of the respondent to have the main appeal struck out, but it is not before us for hearing. The applicants do not appear to have had time to respond to it, and it will be heard and determined at its own time. Suffice it to say that our jurisdiction to hear and determine the motion before us was precipitated by the filing of the notice of appeal and not the main appeal, whether competent or not. As this Court stated in the case of ***Halai & Another vs Thornton & Turpin (1963) Ltd. (1990) KLR 365***:

***"The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75".***

The main issue intended to be raised by the applicants on appeal was answered by parliament in the Political Parties Act, the provisions of which the High Court articulated at length. We are doubtful about the likelihood of success of the appeal but that is not the test to apply. The final decision lies with the full court seized of the matter. Suffice it to say that the issue raised is not frivolous even if it does not succeed in arguments, and we give the benefit of doubt to the applicants. The first of the twin principles is thus satisfied.

As for the nugatory aspect, there is nothing in the applicants' affidavit to show, as orally contended by counsel, that the property is unique and irreplaceable. Its open market value has been given for auction purposes and so it must have a value, which is not contested. There is no averment that the respondents are incapable of compensating the applicants in the event of their appeal succeeding. As stated in the ***Stanley Kang'ethe Kinyanjui case (supra)***:

***"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".***

We are not satisfied that the applicants have discharged the onus of satisfying us on this aspect of the application. In the event, the entire application fails and we order that it be and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of October, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**