



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 48 OF 2018 (UR 29/2018)

BETWEEN

DR. KITHURE KINDIKI & OMWANZA OMBATI T/A

KITHURE KINDIKI ADVOCATESAPPLICANTS

AND

MANSON OYONGO NYAMWEYA.....RESPONDENT

(Being an Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Kisii, (Okwany, J.) dated 28th day of February, 2018 in **H.C.C. NO. 132 OF 2011**)

RULING OF THE COURT

[1] This is an application under **Rule 5 (2) (b)** of the **Court of Appeal Rules (Rules)** for an order that the execution of the ruling and order of the High Court at Kisii, (**W.A. Okwany, J.**) dated 28th February, 2018 be stayed pending the hearing and determination of the intended appeal or until further orders of the Court.

[2] The applicants are advocates of the High Court trading as **Kithure Kindiki & Associates** who successfully represented the respondent in **Kisii Election Petition No. 3 of 2008 – Manson Oyongo Nyamweya & 2 others [2009] eKLR**. Upon allowing the petition, the Election Court ordered the **Returning Officer** and the **Interim Independent Electoral Commission of Kenya (Electoral Commission)**, the 2nd and 3rd respondents in the petition to pay the petitioners and the 1st respondent costs and certified costs for two counsel in respect of the petitioner.

Subsequently, the party and party costs were taxed at Shs. 7,554,331/= and the client's advocates costs at Shs. 4,155, 596/=. The whole of those costs were allegedly paid to the applicants. The respondent claimed Shs. 3, 398, 335/= from the applicants being the difference between the two figures. In reply, the applicants referred to pending matters and informed the applicants that they were unable to release any amount on account of Kshs. 7,554, 331/= as the same is being held in lien.

[3] Consequently, the respondent filed **Civil Suit No. 130 of 2011** at the High Court in Kisii against the applicants claiming the sum of Shs.3, 398, 735/= with costs and interest.

The applicants filed a defence and counter-claim in which they averred, *inter alia*, that:

- i. Out of Shs. 7,555,331/= party to party costs the Electoral Commission as agent of the Kenya Revenue Authority withheld Shs. 377, 715.50/= as income tax and Shs. 1,041,967.45/= as VAT and remitted Shs. 6,134,638.05/= to the applicants.
- ii. Shs. 1,250,000/= was paid to Justus Onchari Otiso, an assisting counsel in the election petition engaged by the applicants on the instructions of the respondent.
- iii. That after deducting Shs. 4, 155, 596/= from Shs. 6,134,638.05/= remitted by Electoral Commission, the applicants continue to hold in lien Shs. 1,979,042.05/=. Further after discounting Shs. 1,250,000/= paid to Justus Onchari Otiso, the applicants hold Shs.

729,042/= in lien.

iv. There was unsettled fees by the respondent in four other matters where the applicants have filed applications claiming Shs. 8,154,048/=; 8,709,855/=; 3,582,097/=; 2,727,084/= respectively. That if Shs. 1,250,000/= paid to Justus Onchari Otiso is added to the claim in the four applications, the respondent owes the applicants a total of Shs. 24,423,084/=.

By the counter-claim, the applicants claimed the sum of Shs. 24,423,084/= or alternatively judgment for that sum less Shs. 729,042/= held in lien.

[4] By an application dated 21st July, 2011, the applicants applied for directions in the suit as to whether the bill of costs filed by the applicants in the four matters should be taxed before the suit is heard and whether the suit and the applications should be transferred to the High Court, in Nairobi for hearing.

By a ruling dated 31st July, 2015, **Sitati, J.** dismissed the application holding in part that the bills of costs, the subject matter of the applications have no relation to the respondent's suit.

[5] The applicants' advocates did not attend the hearing of the respondent's suit on 12th October, 2016 although they were served with the hearing notice.

Being satisfied that the applicants' advocates were served with the hearing notice, the High Court (*Okwany, J.*) heard the suit *ex parte* and by a judgment delivered on 6th December, 2016, allowed the respondent's claim and entered judgment for the respondent for Shs 3,398,735/= with interest and costs.

[6] That judgment was on 28th February, 2018 set aside on the application of the applicants herein on condition that the applicants deposit the entire decretal amount in court within 30 days and in default the respondent be at liberty to execute the judgment of the court delivered on 6th December, 2016.

The applicants have filed a notice of appeal indicating that they are dissatisfied with the decision and intend to appeal against the whole of the decision.

[7] The present application is supported by the affidavit of **Omwanza Ombati**. The applicants have also filed written submissions in support of the application.

The application is opposed on the grounds in the supporting affidavit of the respondent. The respondent's counsel has also filed written submissions urging the Court to dismiss the application.

[8] The applicant is required to demonstrate, *inter alia*, that, the intended appeal is arguable and that unless the execution of the judgment is stayed, the intended appeal would be rendered nugatory.

The applicants contend that the learned judge capriciously exercised her discretion, that the learned judge imposed unreasonable and punitive measures and that the learned judge did not consider the applicants' right to a lien and also ignored the counter-claim.

On the other hand the respondent contends that the intended appeal is frivolous since the application to set aside the judgment was allowed; that the court had ruled that the pending bills of costs the subject of the counter-claim were not related to the suit which ruling had not been appealed against; that the judge exercised her discretion judicially and that the appeal would not be rendered nugatory as the respondent has means to refund the decretal sum.

[9] The intended appeal is against the exercise of judicial discretion. The applicants denied that they owed the respondent Shs. 3,398, 335/= claimed and averred that the respondent was only entitled to Shs. 729,042/= which they held in lien.

Further, the applicants claimed that the respondent owed them fees in respect of four other matters which were pending taxation. At the hearing of the application for setting aside the *ex parte* judgment, the applicants claimed that some of the bills of costs had already been taxed.

[10] It is true that *Sitati, J.* ruled that the pending bills of costs the subject of the counter-claim were not related to the respondent's claim.

However, the learned judge did not strike out the counter-claim so that by the time the application for setting aside the *ex parte* judgment was heard, the counter-claim was still on record. The applicants' counsel, citing **County Government of Kilifi v. Mombasa Cement Limited [2017] eKLR**, submitted that a defendant is permitted to raise a counter-claim even when the subject matter of the counter-claim may be different from the original suit.

[11] Considering that the quantum of the respondent's claim was contested, that, in addition, the applicants claim that the respondent owed them more money in unpaid bills than the sum claimed by the respondent, that the applicants have a claim of lien and that it was not claimed that the applicants had no means to pay the respondent's claim, it is arguable whether requiring the applicants to deposit the whole of the disputed amount as a condition for setting aside the *ex parte* judgment was a proper exercise of judicial discretion.

[12] Whether or not an intended appeal or appeal would be rendered nugatory if stay of execution is not granted depends on the

circumstances of each case.

The applicants claim that if the sum is paid as ordered by the court, their claim to lien will be defeated and that they will lose interest on the amount to be deposited in court. The condition for depositing the decretal sum in court can only be reversed by the Court at the hearing of the appeal.

If the decretal sum is not deposited in court the judgment would take effect and execution would ensue thereby denying the applicants an opportunity to defend the suit.

On the other hand, if the decretal amount is deposited in court, the applicants would lose interest income thereby suffering substantial loss pending the hearing of the appeal.

In that scenario, the applicants have in our view, demonstrated that the appeal would be rendered nugatory unless stay of execution of the ruling is granted.

[13] For the above reasons, the application is allowed. The execution of the ruling and order of the High Court dated 28th February, 2018 is stayed pending the hearing and determination of the appeal.

Costs in the appeal.

DATED and Delivered at Kisumu this 25th day of October, 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 is a true copy of the original

DEPUTY REGISTRAR