



IN THE COURT OF APPEAL

AT KISUMU

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

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 82 OF 2017 (UR 53/2017)

BETWEEN

MIGORI COUNTY GOVERNMENT.....1ST APPLICANT

MOSES CHAMWADA.....2ND APPLICANT

AND

MIGORI COUNTY TRANSPORT SACCO.....RESPONDENT

(Being an application for an injunction and a stay of execution of the Judgment and

Decree of the High Court of Kenya at Migori, (A. C Mrima, J.)

dated 28th March, 2017 in **Petition No. 3 Of 2016**)

RULING OF THE COURT

Background

[1] This is an application by way of Notice of Motion dated 28th September, 2017 brought under Rule 5 (2) (b) of the **Court of Appeal Rules** seeking an injunction and stay of execution of the judgment and decree of the High Court dated 28th March, 2017.

[2] The background of the application is that **Migori County Transport Sacco** (the respondent), filed Petition No. 3 of 2016, (the Petition) on 13th May, 2016, in the High Court against **Migori County Government** (the 1st applicant), and **Moses Chamwada** (the 2nd applicant), who is the Cabinet Secretary for the Ministry of Transport in Migori County. The respondent contended that it had operated from a popular destination within Migori town known as Posta Bus Park; that the applicants unilaterally closed the respondent's operational base at Posta Bus Park from where the respondent had been operating for a long time; that the applicants had declined to allocate the respondent any alternative operational base; that instead the applicants directed the respondent to operate from any of the bus parks within the town without any regulation, order, or guidance; and as a consequence the respondents had suffered financial loss. The respondents maintained that by unilaterally closing Posta Bus Park the applicants did not discharge their duties and responsibilities towards the respondent as envisaged in the Constitution; that the applicants have frustrated the operations of the respondent by failing to provide it with crucial documents to facilitate its licensing including the Certificate of Picking and Dropping (the Certificate); and that the Certificate was one of the documents required by the National Transport and Safety Authority (the Authority) to enable the respondent to be fully licensed in compliance with the law.

[3] The applicants opposed the Petition and filed a joint replying Affidavit sworn on 13th December, 2016 by **Christopher Odhiambo Rusana**, the 1st applicant's County Secretary who swore that the respondent did not apply for the Certificate of Picking and Dropping; that the applicants were therefore not in a position to issue such Certificate to the respondent that the 1st applicant issued a Trade Licence to the respondent which enabled the respondent to carry out its work within the entire Migori County, on condition that the respondent operates from any of the designated bus parks across the County; that the respondent was permitted to freely and lawfully pick and drop passengers at any of the designated bus parks across the County and that the respondent's claim that its operations were hampered by the lack of the

Certificate was erroneous and misleading.

[4] The Petition was heard by the High Court (Mrima, J.) who found that the 1st applicant erred in failing to involve the respondent in the decision to close the Posta Bus Park and to relocate the respondent; that the respondent suffered losses as a result of the action taken by the 1st applicant and was therefore entitled to an award of damages. The learned Judge made the following orders:

a. A declaration be and is hereby issued that the unilateral decision taken by the respondents to ‘permanently’ close the Posta Bus park without giving the Petitioner an opportunity to be heard and failure by the Respondents to justly (sic) relocate the Petitioner to another operational base prior to closing the Posta Bus park is unconstitutional, null and void ab initio;

b. The Petitioner and its members shall, in the meantime, continue to operate from their traditional bay at the former Posta bus park pending any possible relocation to a designated bus park by the County Government of Migori;

c. The County Government of Migori shall in coming up with the decision to possibly relocate the Petitioner and its members adhere to the Constitution of Kenya and to any other attendant law;

d. The County Government of Migori shall accordingly compensate the Petitioner in the sum of Kshs. 2,000,000/= (Read: Kenya Shillings Two Million only);

e. The County Government of Migori shall bear the costs of the Petition.

[5] Aggrieved by that decision, the applicants filed an application in the High Court for stay of execution. By a ruling dated 31st July, 2017, the application was dismissed with costs.

[6] Aggrieved by that decision, the applicants filed this application seeking the following orders:-

1. There be a stay of execution of the Judgment and Decree of the High Court, (Mrima, J), dated and delivered on the 28th March, 2017 in Migori Petition No. 3 of 2016, pending the hearing and determination of the intended appeal Civil Appeal No. 110 of 2017.

2. Pending the hearing and determination of the intended appeal, the Respondent by itself, directors, owners and officials be restrained by an order of injunction from carrying out public transport business by picking and dropping of passengers in Migori Town from everywhere and anywhere else except from Designated Bus Parks in Migori County.

3. Costs.

Submissions by Counsel

[7] When the application came up for hearing, learned counsel, **Mr Odera**, represented the applicants while **Mr Peter Njaga** a member and official of the respondent represented the respondent. **Mr Odera**, relied on the grounds on the face of the motion as supported by two affidavits sworn by the applicant’s County Secretary. Counsel confirmed that the applicants have filed **Civil Appeal No. 110 of 2017**.

[8] Counsel relied on the applicant’s Memorandum of Appeal dated 25th September, 2017 and submitted that the appeal is arguable for the reasons, *inter alia*, that the learned Judge awarded Kshs.2,000,000 to the respondent as damages without proof and or basis which amount was manifestly excessive in the circumstances; that the learned Judge failed to appreciate that the applicants have a duty to ensure the proper regulation of the public service transport in Migori County; that it was therefore the applicants’ duty to ensure that transport in Migori County was conducted in an orderly and safe manner; that the respondent like all other public transport operators in the County of Migori have a duty under the law to operate their business and to ply their trade from the designated bus parks or from a private property and that the respondent shall suffer no prejudice to all as it can operate, like all other public service vehicle operators from the designated bus parks throughout the County of Migori.

Mr Njaga opposed the application and relied on the respondent’s replying affidavit dated 23rd October, 2017. He submitted that the respondent is greatly prejudiced by the lack of allocation of a parking bay and its members have incurred losses arising from the failure by the applicants to allocate them a specific parking bay from which to operate in the County of Migori.

Determination

[9] We have considered the application, the affidavits, the submission made before us, the authorities cited and the law. The jurisdiction of this Court in applications under rule 5(2)(b) of the Court of Appeal Rules is original and discretionary. In the case of **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others**, Civil Application No. Nai 31/2012, this Court stated *inter alia*;

“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

See Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & Another [2015], eKLR.

[10] 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.

[11] In considering this application, we shall bear in mind these principles. On the issue of arguability, the applicant has set out in its Draft Memorandum of Appeal dated 25th September, 2017, several grounds under this limb including whether the quantum of damages awarded to the respondent was manifestly excessive and without proper basis and whether in regulating the bus parks the applicant was lawfully carrying out its mandate to ensure the proper regulation of the transport industry in Migori County.

[12] This Court is minded to avoid delving into the merits of the appeal which has been filed as this will be the preserve of the bench that will hear and determine the intended appeal. Suffice to state that the applicant has demonstrated that it has an arguable appeal, with regard to the issues whether the amount of damages awarded to the respondent was in the circumstances manifestly excessive and without proper basis; and whether the 1st applicant lawfully carried out its mandate of ensuring that the proper regulation of the public transport in Migori County was carried out in an orderly and safe manner by ensuring that the respondent like other public transport operators in Migori County operate from designated bus parks.

[13] On the nugatory aspect, as this Court stated in Reliance Bank Ltd vs. Norlake Investments Ltd (supra), the factors which could render an appeal nugatory have 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."

[14] In the instant application, it is the applicant's claim that the respondent financial means are unknown; that the 1st applicant is a public body funded by public funds which funds should be prudently used; and that the respondent may not be in a position to refund the amount paid thus rendering the appeal nugatory. It is the applicants' further claim that the respondent will not suffer any prejudice if it operates, from designated bus parks in the County of Migori.

[15] We are guided by the decision of this Court in the case of National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike and Lantech Ltd where it was stated as follows:-

"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya."

[16] The same principle was applied by this Court in the case of Africa Eco-Camps Limited V Exclusive African Treasurers Limited [2014] eKLR.

[17] In the instant case, the respondent has not submitted any proof of its ability to repay the decretal sum of Kshs.2, 000,000/= should the appeal succeed. Once the applicants raised fears regarding the respondent's ability to repay the Kshs.2, 000,000/=, it was incumbent upon the respondent to rebut the fear and assert its means and capacity to repay. We are satisfied that the respondent has not demonstrated that it will be in a position to refund the amount paid should we decline to grant the orders of stay sought and the appeal succeeds. The respondent has not proved that it will suffer prejudice by operating like all other public transport operators from designated bus parks. We are satisfied that the respondent will not suffer prejudice by operating from designated bus parks, like all other public transport operators pending the hearing and determination of the appeal. Therefore the nugatory aspect has been satisfied.

In the circumstances of this case, and balancing the interests of both parties, we are satisfied that the applicants have satisfied both limbs as required by **Rule 5(2)(b)** of this Courts Rules as relates to the money decree.

[18] By an order of this Court issued on 4th December, 2017, pending the delivery of the ruling, the execution of the money decree was stayed, pending the delivery of this ruling.

[19] The upshot is that we allow the applicants' Notice of Motion dated 28th September, 2017 in part as follows:-

(a) In terms of prayer 1 we grant stay of execution of the decree relating to the payment of Kshs.2,000,000/= pending the hearing and determination of Civil Appeal No. 110 of 2017.

(b) We decline to grant prayer 2 in the Notice of Motion dated 28th September, 2017 which seeks to restrain by way of injunction the respondent, by itself, directors, owners and officials from carrying out public transport business by picking and dropping of passengers in Migori Town from everywhere and anywhere else except from designated bus parks in Migori County pending the hearing and determination of Civil Appeal No 110 of 2017.

(c) The costs of this application to abide by the outcome of the appeal.

Dated and delivered at Kisumu this 18th day of October, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR