THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & M'INOTI, JJ.A)

CIVIL APPLICATION NO. NAI 260 OF 2017 (UR 201/2017)

BETWEEN

KENYA POWER AND LIGHTING CO. LIMITED ……..APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI ……..…1ST RESPONDENT

HON. ATTORNEY GENERAL ……..……2ND RESPONDENT

(Being an application for injunction/conservatory relief pending the hearing and determination of an intended appeal against the decision of the High Court of Kenya at Nairobi (Mativo, J.) made on 3rd November, 2017

in

Constitutional Petition No. 91 of 2017)

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RULING OF THE COURT

This is a Notice of Motion application dated 10th November, 2017 brought under the provisions of **Section 1A** and **1B** of the **Appellate Jurisdiction Act** and **Rule 5(2) (b)** of the rules of this Court. The application has been brought by the intended appellant, **KENYA POWER AND LIGHTING CO. LTD** (the applicant) against the **COUNTY GOVERNMENT OF NAIROBI** (the respondent) and **THE ATTORNEY GENERAL**. The application seeks to restrain the respondent from demanding or seeking to enforce any sums on account of poles and way leaves charges from the applicant pending the hearing and determination of the intended appeal. The application also seeks to restrain the respondent from trespassing or interfering with the applicant's quiet possession of all its premises within the County of Nairobi. The application is premised on four grounds set out on the face of the application. It is also supported by the affidavit of **Awuor Awiti**, the Manager Legal Services of the applicant.

A brief background of the facts leading up to the application before us are that vide **Legal Notice No. 8494 of 2001** the **City Council of Nairobi** who is the predecessor of the respondent, revised house rents, fees and other charges.

Of concern to the applicant is what was termed in the said Notice as annual rent for wayleave space on road reserve. The applicant being aggrieved by the imposition of this new levy filed a constitutional petition in the High Court alleging infringement of several of its rights under the Constitution and seeking a declaration that the legal notice was *ultra vires* ***Section 148 of the Local Government Act*** *(repealed)*. The High Court (**Mativo, J**) upon hearing the petition dismissed it on the grounds that the applicant had failed to demonstrate that the Legal Notice violated Section 148 or any provisions of the Constitution. Being dissatisfied by that decision of the Superior Court before the applicant filed a Notice of Appeal against the entire decision of the Superior Court and also filed the application now before us.

At the hearing, **Mr. Amoko,** learned counsel appeared for the applicant. On whether the intended appeal is arguable, counsel submitted that the respondent was using garbage trucks to barricade the premises of the applicant. Counsel further submitted that the Gazette Notice that published the new charges was *ultra vires* the ***Local Government Act*** and that the Central Government had expressly stated that it would take up the responsibility and pay for the charges that were being incurred by the 1st respondent; and that the applicant had a legitimate expectation that the amount would be paid. Counsel argued that if the applicant is forced to pay, it would pass over the costs to the consumers of electricity. On the nugatory aspect, counsel submitted that if the application is not allowed and the applicant is forced to pay the annual rent for wayleave, it would face immediate adverse financial repercussions and possible insolvency.

In response, **Mr. Kiplagat**, learned counsel who appeared for the 1st respondent submitted that the intended appeal was not arguable. Counsel argued that the petition was predicated on the Gazette Notice being *ultra vires* and the court, therefore, had to look at the procedure followed in coming up with the annual rent for way leave. Counsel contended that the respondent needed ministerial approval and that the validity of the notice on whether an approval was granted was not challenged. Counsel submitted that there was no evidence that the 1st respondent barricaded the premises of the applicant and that the applicant was approbating and reprobating by saying that the Central Government was to pay the said amount. On the nugatory aspect, counsel stated that the dispute in question involves money and that the applicant generates income from the wayleaves by leasing to telecommunications companies. Counsel contended that an injunction should not be granted where the result will lead greater hardship. Learned Counsel further contended that there was no positive order emanating from the decision, the subject of appeal, capable of staying. He argued that the order was negative and that an injunction should not be granted. In the event of success of the intended appeal, counsel submitted that damages would be sufficient remedy.

We have considered the application, the submissions by learned counsel as well as the authorities cited. As rightly noted and argued by both counsel, it is now well settled on how this Court exercises its jurisdiction under **Rule 5(2)(b)** of this Court's rules. As we always do in the circumstances, we follow the two laid down principles. Firstly, the applicant must show that it has an arguable appeal that merits to be heard (see ***Githunguri v Jimba Corporation Limited (1988) KLR 838***); and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. See ***Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd. Civil Application Number NAI. 93/02 (UR)***. Lastly, both limbs must be demonstrated to exist before one can obtain relief under **Rule 5(2) (b)**. (See ***Republic vs. Kenya Anti-Corruption Commission & 2 others [2009] KLR***.

We have applied the principles to the present circumstances. In ***Stanley Kengethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR*** it was held that an arguable appeal is any appeal that raises at least one bona fide issue that deserves the consideration of this Court. The Court rendered itself in the following manner;

> ***"vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground is raised...;***
>
> ***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…;"***

Looking at the application, the affidavit in support thereof, the arguments by the applicant as well as the annexed draft memorandum of appeal, we are of the view that the applicant has demonstrated several arguable points that warrant consideration. First is the question whether the impugned Gazette Notice is *ultra vires* the Local Government Act, and second is whether the learned judge failed to give effect to the principle of legality expected in decisions made by the public bodies. There is also the issue of the Central Government having made an undertaking to pay the amount in full.

On the nugatory aspect, the applicant contends that if the orders it seeks are not granted it would be exposed to a tune of Kshs. 47,000,000,000 because there is a chance that all the other 46 county governments will also charge it wayleave charges. The applicants argued that if this were to happen, it would be faced with two choices; either to transfer the charges to the consumer or be rendered insolvent. We note that the 1st respondent has not disputed and/or challenged the figure of Kshs. 47,000,000,000 as contended by the applicant. The 1st respondent stated that the dispute involves money and as such damages would suffice, if the applicant is successful. However, we do not agree with the 1st respondent. The amount of Kshs. 47,000,000,000 is by all means a colossal amount and if the applicant is forced to pay, it may very well be rendered insolvent. The alternative, that is passing the costs to the common mwananchi, would have even more devastating effect because it may result in electricity being hiked beyond the reach of many Kenyans. Further, if the appeal is successful and the applicant had already passed the costs to Kenyans it would be difficult to recover the extra costs of electricity imposed on the ordinary and overburdened Kenyan consumers.

For the foregoing reasons, we find that the application dated 10th November, 2017 is merited and we accordingly allow it. Costs of this application to abide the outcome of the intended appeal.

Dated and Delivered at Nairobi this 9th day of November, 2018.

W. OUKO (P).

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is the

*True copy of the original***.**

DEPUTY REGISTRAR