



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM KARANJA, OKWENGU & G.B.M KARIUKI, JJA)

CIVIL APPLICATION NO. NAI 298 OF 2015 (UR 255/2015)

PETER ODIWUOR NGOGE T/A

O. P. NGOGE & ASSOCIATES.....1ST APPLICANT/1ST PETITIONER

DANIEL MAINGI MUCHIRI.....2ND APPLICANT/2ND PETITIONER

VERSUS

JUBILEE INSURANCE CO. OF KENYA LTD.....1ST RESPONDENT

MAJANJA LUSENO & CO. ADVOCATES.....2ND RESPONDENT

(An application for stay of execution and/or a petition for enforcement of Fundamental Human Rights under Articles 22 and 258 of the constitution arising from the ruling of the High Court of Kenya at Nairobi (Sergon, J) dated and delivered on 6th November 2015)

in

H.C.C.C 195 of 2014)

RULING OF THE COURT

1. This Ruling relates to the application by notice of motion dated 16th December, 2015 lodged in this Court on 17th December, 2015 by Peter Odiwuor Ngoge T/A O. P. Ngoge & Associates and Daniel Mwangi Muchiri, both of whom are hereinafter referred to as “the advocate” and “the applicant” respectively. The application also names Jubilee Insurance Co. of Kenya Ltd and Majanja Luseno & Company Advocates as the 1st and 2nd respondents respectively where they are hereinafter referred to as “the Insurer” and “the 2nd respondent” respectively. It shows that in October 2013, Daniel Maingi Muchiri (**the applicant**) sued Jubilee Insurance Company Ltd (**the insurer**) in the Chief Magistrate Court in Suit No. CMCC No.6553 of 2015 seeking an order that the insurer was liable to satisfy the judgment and decree of the Principal Magistrate court dated 23rd July, 2012 in Milimani CMCC No.369 of 2003 delivered in favour of the applicant against the two defendants therein named, to wit, Stephen Gichuru Njoroge and Julius Maina Warui for a total of Shs.802,233/= in respect of general and special damages awarded to the applicant for injuries sustained by the latter in a motor accident.

2. The applicant averred in the said suit (No. CMCC 6553 of 2015) that it was entitled to a declaratory order pursuant to section 10 of **The Insurance [Motor Vehicles Third Party Risks] Act**, Chapter 405 of the Laws of Kenya to the effect that the insurer was liable to pay and satisfy in full, the said judgment and decree in CMCC No. 369 of 2003.
3. The record before us shows that the judgment in favour of the applicant in Suit No. CMCC 369 of 2003 followed an application by the applicant to strike out the insurer's defence. The magistrate court found merit in the application and accordingly ordered the Insurer's defence to be struck out whereupon the latter lodged in the High Court Civil Appeal No. 195 of 2014 against that decision. The High Court (**Sergon, J**) found no merit in the appeal and in a judgment delivered on 17th July, 2010, upheld as correct the magistrate court's finding that the insurer's defence in Suit No.369 of 2003 raised neither triable issues nor disclosed a reasonable defence.
4. The insurer was not satisfied with that decision and proceeded to lodge on 12th August, 2015 a Notice of Appeal dated 10th August, 2015 manifesting its intention to appeal to this Court.
5. The insurer also applied to the High Court (in appeal No.195 of 2014) for stay of execution as warrants of attachment had been issued on 6th August, 2015 in the CMCC No.6553 of 2015. The High Court (Sergon, J) found the insurer's application to be well founded and ordered stay of execution. It also dismissed an application by the applicant seeking the lifting of interim orders of stay made on 12th August, 2015 by the High Court (Onyancha J). Following this decision, the applicant gave notice of appeal on 10th November, 2015 of his intention to appeal against the ruling of the High Court. The applicant had earlier on 25th June, 2014 also given a notice of appeal to appeal against the ex parte interim orders of stay given by the High Court (Onyancha J).
6. The Notice of Motion now before this court is by Peter Odiwour Ngoge T/A O. P. Ngoge & Associates who is named as the 1st applicant and Daniel Maingi Muchiri, the 2nd applicant, against the insurer and the latter's advocates, Messrs Majanja Luseno & Co. Advocates. The motion seeks orders that the aforesaid ruling delivered by the High Court (Sergon J) on 6th November, 2015 staying execution be declared unconstitutional and the same be stayed pending the determination of the applicant's intended appeal; that leave to proceed with execution be granted; that the firm of Majanja, Luseno & Co. Advocates be dissolved forthwith; that general and exemplary damages be assessed and awarded to the applicants together with costs of the application.
7. The applicants proffered as grounds for making the application the contention that the High Court ruling and orders of 6th November, 2015 do subvert Articles 10, 19 to 21, and 25, 27 to 29, 40 and 48 of the Constitution; that the High Court had no jurisdiction to stay execution because the respondent's Notice of Appeal was out of time and no leave was secured to file it out of time; that the order for stay of execution given by the High Court being in respect of execution in the magistrate court, the same was made without jurisdiction; and that the High Court acted in contravention of the Constitution.
8. When the application came up for hearing, Mr. O. P. Ngoge appeared for himself as the advocate named in the application and for the applicant and Mr. S. Luseno appeared for the respondent.
9. Mr. Ngoge told us that the application which is titled Notice of Motion was a petition! But was it? It is premised on sections 3, 3A and 3B of the Appellate Jurisdiction Act and rules 5(2)(b) of the Court of Appeal Rules and Articles 10, 19, 50, 15, and 27 to 29 and 40, 43, 48 and 258 of the Constitution of Kenya 2010. Counsel contended that the ruling by the High Court (Sergon J) is unconstitutional; that the court acted without jurisdiction; that the court was *functus officio*; that security was erroneously not ordered; that no appeal by the respondent lies as there is no notice of appeal; that the firm of Majanja, Luseno & Co. ought to have dissolved; and that execution should be allowed to proceed. Counsel proposed that security ought to be furnished by the respondents in the tune of Shs. 200 million. He gave no basis for the proposal.
10. On his part, Mr. Luseno submitted that his firm, Majanja Luseno & Co., acted for the 1st respondent in the High Court and prosecuted the appeal No.195 of 2014. The decretal dues, he said, was

Shs.800,000/= and the amount held pursuant to the warrant of attachment is Shs. 1.4 million. It was Mr. Luseno's submission that the insurer gave notice of appeal whose competence Mr. Ngoge wanted the High Court to rule on. However, the High Court declined to do so. Mr. Luseno contended that the jurisdiction this court has been asked to exercise is that conferred by rule 5(2)(b) of this Court's Rules.

11. We have perused the application by notice of motion dated 16th December 2015 and the authorities cited. Mr. Peter Odiwuor Ngoge of the firm of O. P. Ngoge & Associates Advocates has placed his name in the application as the first applicant and his client, the applicant, Daniel Maingi Muchiri, as the 2nd applicant. Neither Mr. Ngoge nor his firm is or ever was a party to the suit CMCC NO. 369 of 2003 (Daniel Maingi versus Julius Maina Warui and Stephen Gichuru Njoroge) or to Milimani Commercial Courts Civil Suit No.6553 of 2013 (Daniel Maingi Muchiri versus Jubilee Insurance Co. Ltd). Advocate Ngoge and his firm were not privy to the High Court Civil Appeal No.195 of 2014 filed by the insurer against the applicant.

12. The notice of appeal given by the applicant as an intended appellant, and manifesting the latter's intention to challenge the stay orders granted by Onyancha J does not show that Peter Odiwuor Ngoge or his firm are privy to the litigation. Apart from being the advocate for the applicant, Peter Odiwuor Ngoge T/A O. P. Ngoge & Associates is not entitled to plunge into the litigation as a party. What is more, the said advocate has named in this application as a party, the advocates for the insurer, Majanja Luseno & Company. No law allows an advocate on record as counsel in a suit to be made a party in such suit. The conduct of Advocate Ngoge in this matter to the extent to which he has plunged into the litigation by naming himself a party and also sought to drag the firm of Majanja, Luseno & Co. as a party is as bizarre as it is unprofessional. An advocate cannot be at the Bar and in the witness box at the same time in the same matter. It calls for a reprimand.

13. We deprecate Mr. Ngoge's conduct as misguided and as an attempt to embarrass and intimidate the respondent's advocates. We have no hesitation in exercising our inherent power under rule 1(2) of this Court's Rules to make, which we hereby do, orders to prevent abuse of the process of the court. Accordingly, we order that the name of Peter Odiwuor Ngoge T/A O.P. Ngoge & Associates as the 1st applicant and the names of Majanja Luseno & Co. Advocates named as the 2nd respondent in this application be and are hereby expunged from the proceedings.

14. The application before us is not a petition as contended by Mr. Ngoge. It is a Notice of Motion. It is clearly founded on rule 5 (2)(b) of this Court's Rules. It seeks stay of execution which also alleges breach of fundamental human rights under Articles 22 and 258 of the Constitution purportedly an account of the ruling delivered by the Hon. Mr. Justice Sergon on the 6th of November 2015 in High Court Civil Appeal No.195 of 2014. The invocation of fundamental rights does not change the character of the application which is made in the context of an appeal and seeks orders pending the determination of the appeal. To treat the application as a petition as Mr. Ngoge would have us do, would result in our interrogating matters that have not been heard or determined in the High Court. There is no basis. This Court's appellate jurisdiction is well spelt out in the Constitution and in **The Appellate Jurisdiction Act**. Its power to interrogate breach of fundamental rights is anchored in its appellate jurisdiction. The applicant's alleged breach of fundamental rights and the final orders sought are a matter for interrogation in the appeal. To that extent, the application is misconceived. We cannot interrogate the alleged breaches before the hearing of the appeal, even assuming that the issues arise from the impugned judgment/ruling.

15. As the impugned ruling by the High Court (Sergon, J) dated 6th November 2015 is the subject of the notice of appeal dated 10th November 2015 by the applicant and as the issues raised shall be interrogated during the hearing of the intended appeal, the prayer by the applicant for the court to make a determination on the soundness or otherwise of the constitutionality of the ruling at this interlocutory stage is premature. Clearly it is an attempt by the applicant to seek to address the merits of the appeal before the record is filed and is ripe for hearing.

16. We observe that the applicant's counsel has failed to address us on rule 5(2)(b) of this Court's Rules on which the application is predicated. He has failed to show that the orders sought are merited under rule 5(2)(b). He has also failed to address the issue whether the intended appeal is arguable and whether, if it

succeeds, it will be rendered nugatory unless the orders sought are granted. Clearly, the application is devoid of any merit. It is hereby dismissed with costs to be borne by the applicant.

Dated and delivered at Nairobi this 17th day of February, 2017

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR