



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJA)**

**CIVIL APPLICATION NO. NYERI 42 OF 2017 (UR 28/2017)**

**IN THE MATTER OF THE ESTATE OF ALICE KAHARI NJOKA..(DECEASED**

**BETWEEN**

**JOHNSON KIBUNJA NJOKA.....1<sup>ST</sup> APPLICANT**

**CHRISTINE NYAGITHA NJOKA.....2<sup>ND</sup> APPLICANT**

**VS**

**JOSEPH NJUGUNA .....1<sup>ST</sup> RESPONDENT**

**LUCY WANJIRU.....2<sup>ND</sup> RESPONDENT**

**TERESIA NJERI.....3<sup>RD</sup> RESPONDENT**

**MARGARET DAMAT.....4<sup>TH</sup> RESPONDENT**

*(An application for a stay of execution pending lodging, hearing and determination of an intended appeal from the Ruling and Order of the High Court at Nakuru ( Ndung’u, J.) dated 12<sup>th</sup> April, 2017*

*in*

**NAKURU HIGH COURT SUCCESSION CAUSE No. 347 OF 2013**

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**RULING OF THE COURT**

The applicant **JOHN KIBUNJA NJOKA** and **CHRISTINE NYAGITHA NJOKA** have moved this court vide a Notice of Motion dated 28<sup>th</sup> April, 2017 brought pursuant to **Rules 5(2)(b), 42 & 43** of this court’s rules seeking an order inter alia, that:-

**“1. That there be a stay of execution of the order that the applicants do pay the 4<sup>th</sup> respondent Ksh.1,203,443/- pending the lodging, hearing and determination of the**

**applicant's intended appeal to the Court of Appeal against the said ruling of the High Court delivered on 12<sup>th</sup> April 2017."**

A brief background to the motion is that F. Munguongo, the taxing officer in a ruling of 7<sup>th</sup> December, 2015 taxed the bill of costs in the sum of Ksh. 1,089,065. The applicants were dissatisfied with the taxation and they lodged a reference vide a chamber summons dated 9<sup>th</sup> February, 2016 made pursuant to **Rule 11(2)** of the Advocates Remuneration Order. In the reference, the applicants sought the following orders:-

- "1. That this court be pleased to vary or set aside the decision of the Taxing Officer contained in her typed ruling made on 17<sup>th</sup> December, 2015.**
- 2. That the applicants be furnished with a ruling which gives the reasons for the award made on 17<sup>th</sup> December, 2015.**
- 3. That the costs of this application/reference be provided for."**

The motion was heard by Ndungu, J. who in a ruling dated 12<sup>th</sup> April, 2017 rendered himself as follows:-

**"I am not persuaded that there has been established any basis upon which I may interfere with the decision on quantum of the fees by the taxing officer. There is no error of principle and neither is the amount manifestly excessive.**

**For the above stated reasons, I find no merit in the reference dated 9<sup>th</sup> February, 2016."**

The appellants were once more dissatisfied with the outcome and duly filed a Notice of Appeal dated 21<sup>st</sup> April 2017. The application before us seeks an order of stay of the ruling of Ndungu, J. of 12<sup>th</sup> April, 2017 pending the hearing and determination of the intended appeal.

During the hearing before us Mr. Munyori learned counsel for the applicants submitted that the High Court failed to find that the applicants were denied a fair hearing as the taxing master read the last portion of her ruling; that the ruling was nebulous as the value of the subject matter of the suit was uncertain. Counsel relied on the authority of **OLE GANAI V. ARABO [1983] KLR 233** for the proposition that a judgment is null and void if it is uncertain and nebulous. On the nugatory aspect, counsel contended that the applicants are impecunious and have instead offered a security.

In opposing the motion, Mr. Ndolo for the respondents contended that the taxing officer's ruling was detailed and that the applicants' challenge was essentially on procedure. On the nugatory aspect, counsel contended that the respondent was a woman of means and capable of making a refund. Finally, counsel submitted that if the applicants' appeal was to succeed the only issue would be reduction of costs and not whether or not the applicants are liable to pay.

In a brief response Mr. Munyori contended that there was a breach of the rules of natural justice as the taxing master's ruling did not state the reasons for the decision contrary to **Rule 11** of the **Advocates Remuneration Order**.

We have considered the motion, the affidavits, the oral submissions, the authorities cited and the law. For an applicant to succeed in an application for stay under the provisions of **Rule 5(2) (b)** of this Court's Rules, he/she must demonstrate that he/she has an arguable appeal and that the appeal would be rendered nugatory unless an order of stay is granted. This court's decision in **STANLEY KANGETHE KINYANJUI VS TONY KETER & 5 OTHERS [2013] eKLR** gives an apt summary of the jurisprudence touching on applications premised on **Rule 5(2)(b)** of the rules, to wit:-

***i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See***

**RUBEN & 9 OTHERS V NDERITU & ANOTHER (1989) KLR 459.**

ii) *The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.*

iii) *The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. HALAI & ANOTHER V THORNTON & TURPIN (1963) LTD. (1990) KLR 365.*

iv) *In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. DAVID MORTON SILVERSTEIN V ATSANGO CHESONI, CIVIL APPLICATION NO. NAI 189 OF 2001.*

v) *An applicant must satisfy the court on both of the twin principles.*

vi) *On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. DAMJI PRAGJI MANDAVIA V SARA LEE HOUSEHOLD & BODY CARE (K) LTD, CIVIL APPLICATION NO. NAI 345 OF 2004.*

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. JOSEPH GITAHU GACHAU & ANOTHER V. PIONEER HOLDINGS (A) LTD. & 2 OTHERS, CIVIL APPLICATION NO. 124 OF 2008.*

viii) *In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. DAMJI PRAGJI (supra).*

ix) *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD [2002] 1 EA 227 AT PAGE 232.*

x) *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.*

xi) *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. INTERNATIONAL LABORATORY FOR RESEARCH ON ANIMAL DISEASES V KINYUA, [1990] KLR 403.*

Applying the above principles, we find that the applicant has not met the threshold of arguability and has not also established that the appeal would be rendered nugatory, unless stay is granted. Without us determining the appeal and although the taxing master only read the last portion of her decision, subsequently a typed and certified copy thereof was made available to the applicants upon an objection by their counsel on record. This ruling enabled the applicants to timeously file a reference in the High Court. It may therefore not be correct to state that the applicants did not get a fair hearing on the basis that the taxing master read only a portion of the ruling. Accordingly, we find that the 1<sup>st</sup> limb of an applicant establishing that he/she has an arguable appeal has not been established.

On the nugatory aspect, the applicants state that they are impecunious. That may well be the position but it is not the applicants circumstances that are to be considered under **Rule 5(2)(b)**. It would be different if it was the respondent who was said to be impecunious. On the contrary the respondent states that she is a woman of means and would be able to refund any sums paid to her. It is therefore our conclusion that the applicants have not established the twin principles to warrant us grant an order of stay under **Rule 5(2)(b)** of this Court's Rules.

For the foregoing reasons, we find no merit in the application dated 25<sup>th</sup> April, 2017. It is dismissed with costs.

Dated at Nakuru on this 27<sup>th</sup> day of September, 2017.

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**