IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE, KIAGE, JJ.A)

CIVIL APPLICATION NO. NYR. 24 OF 2015 (UR 16/2015)

BETWEEN

BERNARD GICHOBI NJIRA…..……..…. APPLICANT

AND

KANINI NJIRA KATHENDU.....…….....1ST RESPONDENT

HOSEA K. WENDOT.....2ND RESPONDENT

(Being an application for stay of execution of the Order/Ruling of the High Court of Kenya at Kerugoya (Limo, J.) dated 9th June, 2015 as well as stay of any further proceedings and/or Taxation of party & party bill of costs

in

H.C. Misc./Reference Application No. 4 of 2015)

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RULING OF THE COURT

1. The motion before us dated 29th June 2015 is taken out under **Rule 5(2)(b)** of the Court of Appeal Rules, 2010 **(the Rules)** and seeks one substantive omnibus order, couched as follows:

> ***"2. THAT, this Hon. Court be pleased to order a stay of execution of the Order/Ruling by the Hon. Mr. Justice R. K. Limo dated 9th June, 2015 in Kerugoya Misc/Reference Application No. 4 of 2015 and/or stay of any further proceedings and/or intended taxation therein as well as stay of TAXATION of the Bill of Costs filed by the respondents in WANG'URU PMCC No. 87 of 2014 pending the hearing and determination of the intended appeal to be filed herein.***
>
> ***3. THAT, the costs of this application abide the results of the intended appeal."***

2. As we understand the prayer, the applicant wants firstly an order for stay of execution of the Order of Limo J. made on 9th June 2015. That order has neither been extracted nor made part of the

record but in the Ruling of Limo J. made on that date, the applicant's application dated 11th March 2015 was found to have no merit and was dismissed with costs. Logically therefore, there cannot be a stay of execution of a negative dismissal order as this Court has stated on many occasions. See ***Western College of Arts & Applied Sciences v. Oranga & Others (1976) KLR 63*** *and* ***Exclusive Estates Ltd v. Kenya Posts and Telecommunications Corporation & Another (2005) 1 EA 53***. We suspect that is the reason the applicant went further to seek a second order for stay of further proceedings before the High Court. But there is no mention of the nature of such further proceedings. Thirdly an order is sought for stay of any intended taxation of the costs ensuing from the dismissed application; and finally an order is sought for issuance directly to the subordinate court to stay the taxation of a bill of costs pending before it. In passing, we think the omnibus manner of pleading one prayer does nothing but obfuscate the issue at hand and we must discourage it. Clarity is a drafting virtue.

3. The jurisdiction of this Court as spelt out in the **Appellate Jurisdiction Act** is, of course, to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law. As regards interlocutory matters under **Rule 5(2)(b),** the jurisdiction is to grant stay of execution, an injunction or stay of any further proceedings pending the hearing of those appeals. It is doubtful therefore that the Court will have the jurisdiction to grant orders under the Rule, directed at subordinate courts.
4. What is the background to the application? The history is as simple as it is interesting. The tussle between the parties is over determination of costs which the applicant was ordered by the Wanguru Principal Magistrate to pay after losing the case. He does not contest the loss of the case or the order for payment of costs. He says he will pay them but only when they are determined in a manner known to the law. That is why he filed a Preliminary Objection (PO) before the Principal Magistrate's Court after the respondents filed a 'Bill of Costs' for taxation by the Resident Magistrate (RM). The objection was that the subordinate court had no jurisdiction to assess or tax costs payable in that court. But the RM rejected the PO and struck it out. That is when the applicant went to the High Court leaving the costs undetermined.
5. In proceeding to the High Court, the applicant chose to proceed by way of a **"Reference"** under **paragraph 11** of the **Advocates Act** which presupposes that taxation has taken place but there were specific items which were objectionable. It states as follows:

> ***"Should any party object to the decision of the taxing officer, he may within 14 days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects."*** (Emphasis added)

6. The procedural propriety for challenging the decision of the RM as well as the propriety of the decision itself became the two main issues before the High Court. In his Ruling made on 9th June 2015, Limo J. found that the assertion by the applicant that the subordinate court has jurisdiction to assess costs of litigation but not to tax them to be a matter of semantics, since 'the dictionary meaning of "Taxation" and "assessment" is the same. Referring to the **Civil Procedure Act, 2010 (CPA)** and the **Advocates Remuneration Order (ARO)** which give the power to a Magistrate's Court to assess costs under **Schedule VII**, he held as follows:

> ***"A Magistrate is allowed and/or mandated by law to assess or tax costs payable in a given case. The words or terminology used whether "assess" or "tax" is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a magistrate has taxed or used the terminology "taxation" to asses or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of Schedule VII of the Advocates Remuneration Order. To make a different finding in my view would be unconstitutional in view of Article 159 (2) (d) of the Constitution. The objection that the applicant raised at the subordinate court was based on form rather than substance and the learned trial magistrate's decision on the preliminary objection cannot be faulted because it is hinged on the Constitution in so far as substantial justice is concerned. The learned magistrate had not taxed the Bill of Costs and the applicant herein did not demonstrate what prejudice if any he was likely***

to suffer if the subordinate court had proceeded to tax/assess the costs payable. I do not find the submissions by the applicant that he is willing to pay costs to be made in good faith because surely a willing party to pay costs does not engage in preliminary objections and references which results in more costs and eating of precious judicial time as he submitted, he should be engaging the other parties on the amount of costs to be paid in the spirit of Alternative Disputes Resolutions if he really accepted the Court's verdict on the payment of costs."

7. As regards the procedural propriety, the learned Judge held that the applicant should have appealed against the decision of the trial magistrate because the operation of **paragraph 11** of the **ARO** can only be invoked after taxation or assessment of costs.

It is the intention of the applicant to challenge those findings and he has filed the requisite notice of appeal.

8. In his endeavor to satisfy the first of the twin principles necessary to establish under **Rule 5(2)(b),** of the Rules of this Court, learned counsel for the applicant **Mr. Wambugu Kariuki** contended that the issue of jurisdiction and taxation of Bills of Costs is a substantive one and not a technicality as misconceived by the High Court, since jurisdiction is everything in litigation. In his view, although **Section 27** of the **CPA** gives the general power to courts to determine costs, it is **paragraph 10** of the **ARO** which confers the jurisdiction to determine those costs. Under that paragraph, only a taxing officer can do so and such officer is defined as *"the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint."* He pointed out that there was no Deputy Registrar (DR) in Wanguru Principal Magistrates Court and the Resident Magistrate **(D. Nyamboke)** who was purporting to tax the bill had no express authority from the Chief Justice to do so. A Magistrate may only assess costs, which is different from taxation, and counsel referred to some circulars issued by two former Chief Justices decrying the abuse of assessment of costs by magistrates across the country. The intended appeal was therefore not frivolous and was arguable, he asserted.
9. On the second principle, counsel submitted that if the stay order sought is not granted, the costs before the High Court and the Magistrates Court would be taxed, a process which cannot be reversed if the appeal succeeded, thus rendering it nugatory. He cited several decided cases to buttress his submissions, including:

"***(a) Peter Njuguna Njoroge vs. Julius Naraniklak Ologolimot [2010] KLR***

(b) Dalmas Okach Randa vs. Peter Lolwe Ombo [2013] KLR

(c) Margaret Kivutha Mwilu vs. Kioko Harrison & another [2015] KLR

(d) Joreth Limited vs. Kigano & Associates Advocates – Civil Appeal No. 66 of 1999

(e) Safaricom Ltd vs. ocean View Beach Hotel Ltd & 2 others – Civil Application No. 327 of 2009 (UR 255/2009)"

10. In response, learned counsel for the 1st respondent **Mr. Kinyua Kiama**, submitted that the intended appeal was not arguable. That is because the applicant relies on procedural provisions under **paragraph 10**, **ARO** when the substantive power to determine costs is given under **Section 27** of the **CPA**. In his view, the **ARO** merely gives figures for assessing costs and that is why the two former Chief Justices issued circulars to urge Magistrates' courts to follow **Schedule VII** of the **ARO** in assessing costs. As for the nugatory aspect, counsel submitted that the costs can always be paid back if the appeal succeeded.
11. For his part, learned counsel for the 2nd respondent, **Mr. Lee Maina** contended that the appeal had no chance of success particularly on the procedural issue since the matter was taken to the

High Court by way of a reference when no Bill of costs had been taxed or assessed. There was not even a draft memorandum of appeal before this Court to show the intended grounds of appeal. Furthermore, he pointed out, the High Court decision was only a dismissal order and therefore the application can only relate to costs which are far from being taxed, let alone being executed for, and therefore the application was premature. Finally, he contended that this Court cannot issue orders against the subordinate court.

12. We have considered the application and the submissions of counsel. Our jurisdiction under **Rule 5(2)(b**) is not only discretionary, but also wide and unfettered. The interest of justice is the guiding principle. See **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR.** The applicant must, however, satisfy the twin principles set by this Court in numerous decisions; that of arguability, even on a solitary *bona fide* issue which does not necessarily have to succeed, and secondly show that if the application is not granted then the success of the appeal would not only be worthless, futile, invalid, but also irreversible; in sum nugatory. In deciding the nugatory aspect, each case must depend on its own facts and peculiar circumstances-See **David Morton Silverstein v Atsango Chesoni [2002] eKLR .**
13. Assuming, without deciding, that the procedure for filing the matter before the High Court through a reference, rather than an appeal, was proper, it seems to us that the applicant needed leave of the High Court to appeal to this Court by dint of **paragraph 11(4)** of the **ARO**. Nevertheless, a notice of appeal which grounds our jurisdiction was filed under **Rule 75** of the Rules and **Rule 75(4)** allows us to entertain the application, the want of leave notwithstanding. We have already expressed our misgivings about granting orders for stay of the High Court's dismissal order which is negative; stay of further proceedings in the High Court which are not disclosed; and stay orders against the subordinate court which militates against the Appellate Jurisdiction Act. Having said that, on perusal of the various decisions by courts in respect of taxation or assessment of bills of costs before subordinate courts, we find no clarity, and indeed considerable misunderstanding of the applicable procedure and it would be desirable if the issues were finally settled by this Court. It is our finding therefore that the issues in the intended appeal are not frivolous and we would agree with the applicant on the first limb on arguability.
14. As to whether the success of the appeal would be rendered nugatory, we find no support for the argument. Nothing is irreversible here including payment of any costs as these are repayable by refund. Indeed, no allegation has been made that the respondents are incapable of making such refund. The application in any event was premature as no bill of costs had been submitted before the High Court for taxation and execution was a distant possibility.
15. It follows, in view of our finding, that the entire application is not for grant and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 3rd day of February, 2016.

P.N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR