



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, WARSAME & G.B.M. KARIUKI, JJ.A)**

**CIVIL APPLICATION NO NAI 283 OF 2015 (UR 241/2015)**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> APPLICANT**

**JOSEPH M. GIKONYO**

**T/A GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> APPLICANT**

**AND**

**GEOFFREY WAHOME MUOTIA.....RESPONDENT**

***(an application for stay of proceedings and stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Amin, J.) dated 11<sup>th</sup> November 2015***

***in***

***H.C.C.C No 23 of 2015)***

**\*\*\*\*\***

**RULING OF THE COURT**

By way of a first legal charge dated 22<sup>nd</sup> April 2014, the respondent charged the property known as LR. No 209/12544 in favour of the 1<sup>st</sup> applicant to secure a facility in the sum of Kshs 281,000,000.00. The respondent failed to service the facility which led the 1<sup>st</sup> applicant to exercise its statutory power of sale. To this end, the 1<sup>st</sup> applicant instructed the 2<sup>nd</sup> applicant to realize its security by way of sale of the property by public auction. Pursuant to these instructions, the 2<sup>nd</sup> applicant served on the respondent a redemption notice and a notification of sale to the effect that unless the outstanding debt owed to the 1<sup>st</sup> applicant was paid, the property would be sold in a public auction on 10<sup>th</sup> February 2015.

On 23<sup>rd</sup> January 2015, the respondent filed suit in the High Court contesting the sale. In addition, he filed an application seeking an interlocutory order of injunction to restrain the 1<sup>st</sup> applicant from disposing or interfering with the charged property in any way pending the hearing and determination of the application. On the same date, the application was placed before Amin, J. who allowed the application for temporary injunction *ex parte*.

Meanwhile, on the afternoon of 23<sup>rd</sup> January 2015, the 2<sup>nd</sup> applicant booked advertising space with the Nation Media Group for advertisement of the intended public auction of the property, an advertisement which was to appear in the Daily Nation newspaper of Monday, 26<sup>th</sup> January 2015. Later that evening, at around 6:00pm, copies of the order of injunction as well as the plaint and the summons to enter appearance in the suit were served on a gateman at the entrance head office of the 1<sup>st</sup> applicant. These documents were contained in an envelope addressed to the company secretary of the 1<sup>st</sup> applicant. The next day, copies of these documents were served upon a secretary at the office of the 2<sup>nd</sup> applicant. On Monday 26<sup>th</sup> January 2015, at about 4:25pm, the order of injunction as well as the plaint and the summons to enter appearance were served again on the company secretary of the 1<sup>st</sup> applicant.

Since the advertisement for auction appeared in the Daily Nation of Monday 26<sup>th</sup> January 2015, the respondent filed an application in the High Court seeking to join the 2<sup>nd</sup> applicant as a contemnor in its suit against the 1<sup>st</sup> applicant. He also sought orders citing the applicants for contempt of the *ex parte* court orders granted on 23<sup>rd</sup> January 2015, on the basis that the said order had been served upon them but had not been obeyed. These applications were heard together by Amin . She delivered a ruling on 11<sup>th</sup> November 2015 allowing the applications and finding the applicants guilty of contempt of court, holding that the applicants had knowledge of the court order in sufficient time for them to act in accordance with it.

Aggrieved with the ruling and finding of the learned judge, the applicants herein have filed a notice of appeal evincing their intention to seek a reversal of those orders. In addition, they have brought the present motion under rule 5(2)(b) of the rules of this Court in which they seek a stay of execution of the orders of Amin J., as well as a stay of further proceedings before the High Court in so far as relates to the application for contempt of Court.

The jurisdiction of this Court under rule 5(2)(b) of the rules follows a well beaten path. It is original and discretionary, and empowers the Court, in any civil proceedings where a notice of appeal has been lodged, to order a stay of execution, an injunction or stay of any further proceedings on such terms as the court may deem just. See the dictum of Githinji JA in *Equity Bank Limited v West Link MBO Limited* [2013] eKLR (Civil Application No. Nai 78 of 2011) wherein he stated that:

***“It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. ...***

***It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”***

In addition, it is settled law that before this Court can exercise its jurisdiction under rule 5(2)(b), there are two principles that must be present. In the words of this Court in *Githinji v Amrit & Another* [2004] eKLR -

***“The principles applicable in an application under rule 5(2)(b) of the Court of Appeal Rules are now well settled. The applicant must [first] demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would be rendered nugatory if the application for stay was refused.”***

These principles have been reiterated in innumerable decisions of this Court in the line of *Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd* [2006] eKLR (Civil Application No. NAI 157 of 2006) where this Court stated that:

***“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is***

***arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***

We have carefully considered the application, the affidavits in support of and in opposition thereto, as well as the rival submissions that counsel for the parties made before us. Before we embark on determining whether or not the applicant has made out a case for the grant of orders of stay, we must first consider an argument raised by the respondent, which was to the effect that this Court does not have jurisdiction to grant the orders sought because there are no positive orders capable of being stayed arising from the ruling of 11<sup>th</sup> November 2015. In the respondent's view, this application is incompetent and materially defective as it does not meet the threshold set out in rule 5(2)(b) of this Court's rules.

Having read the impugned ruling of the High Court, and bearing in mind the manner in which the applicants have couched their prayer, we have no doubt that this Court has the jurisdiction to grant an injunction pending the hearing and determination of an appeal in order to preserve the subject matter of the intended appeal, or where it would facilitate a proportionate resolution of the dispute before us as was the case in ***Mbaabu Mbui & Another v Langata Gardens Limited [2011] eKLR (Civil Application Nai 73 Of 2011 (UR 49/2011))***. This Court, in granting such an application will of course consider if there will be substantial loss, harm or damage that may be suffered by the applicants should the orders of stay be refused. See ***Lake Tanners Limited & 2 others v Oriental Commercial Bank Limited [2010] eKLR (Civil Application No. 64 Of 2010)*** where the Court stated that this consideration will apply to an application for an order of injunction, or stay of execution, as the case may be, pending appeal because the purpose of that order will be to preserve the status quo pending appeal.

For the proposition that the intended appeal is arguable, the applicants state that the learned judge lacked objectivity and impartiality when she made her ruling, a fact that can be gleaned from the fact that she raised and pronounced herself on issues that had not been raised before her. The applicants further contend that the learned judge failed to appreciate that the proceedings before her were of a criminal nature, and that in finding knowledge of the court order, failed to address her mind as to whether or not the knowledge of a court order by an agent can be imputed to be knowledge by the principal. Moreover, the applicants argued that the learned judge misdirected herself when she found that the applicants were in contempt on the basis of knowledge of the court order, while in the application, the respondent sought the contempt orders on the basis of service of the order. Related to this, the applicants submitted that service of the court order was done after 5:00pm on a Friday, thus the learned judge failed to appreciate that it was unacceptable and in conflict with the provisions of Order 50 rule 9 of the Civil Procedure Rules.

The respondent on the other hand refute the applicants' position that the appeal is arguable. First, he contended no appeal lies as of right from the decision of the High Court in line with section 75 of the Civil Procedure Act. The respondent further argues that the applicants ought not to be granted audience by this Court until they have purged their contempt before the High Court. As we have stated above, the purpose of orders of stay of execution, and a stay of further proceedings, will be to maintain the status quo and to ensure that there is a proportionate resolution of the appeal.

Looking at the draft memorandum of appeal annexed in support of the application before us. It is clear that substratum of the appeal regards the question of service of a court order. The respondent concedes that by the time the order in question was extracted and delivered to the 1<sup>st</sup> applicant, it was past working hours and thus the 1<sup>st</sup> applicant had closed its offices. However, the process server placed a copy of the order in an envelope and instructed the gate man to deliver the envelope to the company secretary of the 1<sup>st</sup> applicant. The respondent further submitted that on the 26<sup>th</sup> January 2016, when the process server visited the offices of the 1<sup>st</sup> applicant, the company secretary acknowledged service and indicated that he knew of the court order served on 23<sup>rd</sup> January by writing on the order ***“received under protest, gateman not authorized recipient of service.”*** The respondent further depones that after the advertisement, he, through his lawyer asked the 1<sup>st</sup> applicant to cancel the advertisement for sale, but they did not other, which prompted him to move the court and cite the applicants for contempt of court.

An arguable appeal is any appeal that raises at least one bona fide issue that deserves the consideration of this Court. This was the holding of the Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR (Civil Application 31 of 2012) where it rendered itself in the following manner:

***“vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal 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...;”***

In our view, the intended appeal is arguable. It is arguable whether in view of the time that service on the gate keeper of the 1<sup>st</sup> applicant was done, it could be said that the applicants were aware of the order, and if by failing to cancel the advertisement, they acted in contempt of that order. Disobedience of a court order is a grave offence; it is contemptuous of the court and undermines the dignity and authority of the court. A party will normally not be entertained in any way until he has purged this contempt. However, where the alleged contemnor intends to appeal against an order and has raised issues that deserve the input of this Court, then it would be just to grant a stay of the order of contempt, as well as any proceedings that may be taken to effectuate that order pending a full determination of the intended appeal. In this respect, we borrow the words of this Court in in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR (Civil Application No. Nyr. 8 Of 2014 (UR 6/2014)) wherein it was stated that:

***“The power of guarding and protecting the authority and dignity of court orders, although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case. The applicants intend to appeal against the order finding them in contempt of a court order and hence this application. This application raised two issues regarding non service and competency of the order. These issues are central to the intended appeal, going by the draft memorandum of appeal that was attached to this application. For the foregoing reasons we do not wish to explore and express ourselves on those issues at this interlocutory stage as we do not wish to prejudice the intended appeal, suffice it to state the appeal cannot be said to be frivolous.”***

Similarly, we therefore find and hold that the applicants have demonstrated the first limb for the grant of orders of stay of proceedings.

We turn now to consider if the applicants have satisfied the second limb, which is whether or not they have demonstrated that if the orders sought herein are not granted, the intended appeal will be rendered nugatory. As the applicants have stated, it is likely that they will be sentenced. The sentence for contempt of court may involve loss of liberty or committal to civil jail of the principal officers of the applicant companies. In determining whether an appeal would be rendered nugatory, we remind ourselves that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See *Reliance Bank Ltd v Norlake Investments Limited* (2000) 1 EA 227.

If we do not grant the orders of stay of proceedings sought herein, it is very likely that the proceedings in the High Court will continue, with the result that some officers of the applicant company may be sentenced, which sentence may entail a loss of liberty. In that event, any intended appeal from the impugned ruling will therefore have been rendered nugatory. Similar circumstances were obtaining in *Rev. Jackson Kipkemboi Koskey & 7 Others V Rev. Samuel Muriithi Njogu & 4 others* [2007] eKLR (Civil Application No 311 of 2006) wherein the Court adopted with approval the sentiments expressed in *Stanislaus Nyagaka Ondimu v Kalyaso Farmers Co-Operative Society & Others Civil Application No. Nai. 337 Of 2005 (unreported)* where this Court stated that:

***“...we are of the view that this is a proper case in which we should exercise our discretion in favour of the applicant. It cannot be denied that to refuse the application would render the intended appeal nugatory since the applicant is likely to have served the six months jail sentence***

*by the time his appeal comes up for hearing.”*

We find therefore that the applicants have demonstrated the second limb, and have satisfied us that if we do not allow this application, the intended appeal, if it is successful, will be rendered nugatory. We therefore find that the application has merit and we allow it as prayed. The costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of April, 2016**

**M. KOOME**

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**JUDGE OF APPEAL**

**M. WARSAME**

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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**