



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI (PCA), OKWENGU & AZANGALALA, J.J.A

CIVIL APPLICATION NO. NAI 90 OF 2015

BETWEEN

AFRITRACK INVESTMENTS (E.A. LIMITED).....APPLICANT

AND

WAMBUA & MASENO ADVOCATES..... RESPONDENT

(An application under Rules 5(2)(b) and 42 of the Court of Appeal Rules for injunction pending hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Nyamweya J) dated 1st October 2014

in

MISC. APPLICATION NO. 91 OF 2013

RULING OF THE COURT

[1] This is an application under **Rule 5(2)(b)** of this Court's Rules for an order staying execution of the Order of **Nyamweya J**, of the Environment and Land Court made on 1st October, 2014 in Milimani ELC Miscellaneous Application Cause No. 91 of 2013, pending the hearing and determination of an intended appeal.

[2] A brief background to the application will put the matter in proper perspective.

The applicant, **Afritrack Investments (E.A.) Limited**, engaged the respondent, **Wambua & Maseno Advocate**, to handle certain matters on its behalf. Their relationship as client/advocate subsisted for sometime. A dispute subsequently arose between them leading to the respondent filing an advocate/client Bill of Costs against the applicant in High Court Misc. Cause No. 91 of 2013 in which the respondent claimed Kshs.5,014,245/= as legal fees and disbursements. When the Bill of Costs came up for taxation, the Deputy Registrar of the High Court taxed it at Kshs.4,697,835/= in a ruling delivered on 27th February, 2014.

[3] Before the Deputy Registrar, the applicant claimed that it had agreed with the respondent regarding the fees payable which was not the sum claimed by the respondent in its Bill of costs. It also exhibited some cheques purportedly issued to the respondent in part payment of its fees which it claimed was not

taken into account by the respondent. The respondent denied any such agreement and that any payment had been made towards the transactions in issue. The Deputy Registrar found no evidence of agreement regarding fees and held that if any payments had been made the same would be taken into account at the execution stage and not at the taxation.

[4] Aggrieved by that decision the applicant lodged a Notice of Motion dated 20th March, 2014 under paragraph 11(2) of the Advocates (Remuneration) Order, seeking principally a review or setting aside of the ruling of the Deputy Registrar pending the investigation by the police on a report the applicant had made under O.B. Number 37/15/03/14. It also sought an order remitting the respondent's Bill of Costs back to the Taxing Master for fresh taxation.

[5] In its application before the Court below, the applicant blamed its previous advocates for misleading the Deputy Registrar by submitting forged agreements for sale which formed the basis of the impugned taxation and which were the subject of police investigation. The applicant further argued that the respondent had acted for both, itself and other parties to the transactions, which fact was not disclosed to the Deputy Registrar when the taxation took place. That event, according to the applicant, led to improper taxation.

[6] The learned Judge, in her ruling delivered on 1st October, 2014 doubted the competence of the reference before her as, in her view, the procedure for objecting to taxation had not been followed by the applicant. Even if the applicant's reference were competent, the learned Judge determined that the applicant's complaints related to misconduct of its erstwhile advocates and to alleged fraud on the part of the respondent which complaints, according to the learned Judge, were not proper grounds for a reference from a taxing officer's decision as contemplated by paragraph 11 of the Advocates' Remuneration Order.

[7] The learned Judge in the end, determined that the Deputy Registrar did not err in principle in taxing the respondent's Bill of Costs. The learned Judge therefore declined to interfere with the taxation and dismissed the reference.

[8] Aggrieved by the decision of the learned Judge, the applicant intends to appeal to this Court against that decision and was granted leave by the Court below to appeal on 25th October, 2015. Against that background, the applicant brought the present application under our **Rule 5(2)(b)** of this Court's Rules seeking a stay of execution and consequential orders arising out of the impugned taxation pending the hearing and determination of their intended appeal.

[9] The grant or refusal of relief under **Rule 5(2)(b)** of the Rules of this Court is a matter of judicial discretion. In the decision of this Court in **Equity Bank Limited vs West Link Mbo Limited [Civil Application No. Nai 78 of 2011] UR, Githinji JA** stated as follows:

"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."

[10] The principles on which that discretion is to be exercised have been stated in many cases including, **Ishamael Kagunyi Thande vs Housing Finance of Kenya Ltd. [Civil Application No. Nai 157 of 2006] (UR), where we held:**

"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 must therefore determine whether the applicants have satisfied the above conditions.

[11] When the application come up before this Court for hearing on 29th February, 2016 the parties were represented by counsel. *Ms Wanja Wambugu* appeared for the applicant while *Ms Patricia Benbella* held brief for Mr. *Eric Mutua* for the respondents.

Ms Wambugu identified what she considered arguable grounds of the intended appeal and submitted that the intended appeal has high chances of success. Among the grounds canvassed by leaned counsel are her concerns that the learned Judge of the High Court failed to appreciate that the respondent acted for both parties to the transactions in issue which failure automatically operated unfairly against the applicant; that despite jurisdiction of the Taxing Officer being challenged, the same was neither considered by the Taxing Officer nor the High Court Judge; that part-payment of the respondent's fees had been made by the applicant but was not taken into account.

It was also learned counsel's submission that if the appeal eventually succeeds, the success will be rendered nugatory as the respondent has already taken steps towards execution for its costs which are the subject of the challenge in the intended appeal.

[12] Opposing the application, *Ms Benbella* learned counsel, who was instructed by the firm of *E.K. Mutua & Co. Advocates* for the respondent argued that the applicant's application is incompetent as the same was filed before leave to appeal had been obtained and before the Notice of Appeal had been lodged. Learned counsel submitted in the alternative that if the application is found to have merit, the same should be on terms that the entire taxed sum be deposited as security especially as the applicant's directors are foreigners.

[13] As we have already stated, the applicant is required to satisfy us that the intended appeal is arguable or it is an appeal that is not frivolous and which, if ultimately it succeeds, the success will be rendered nugatory unless the stay sought is granted. (See also *East African Power Management Ltd. vs The owners of the Vessel "Victoria Eight" [Nairobi Civil Application No. 245 of 2009] (UR)* and *Trust Bank Limited & Another vs Investment Bank Ltd & 3 Others [Civil Application No. Nai 258 of 1999] (UR)*).

[14] We have also held many times before that an applicant is obliged to satisfy both of these principles as satisfying only one principle will not suffice (See *Peter Mburu Ndururu vs James Macharia Njore [Civil Appeal No. 29 of 2009 (UR) 141 of 2009](UR)*). We also bear in mind that it will suffice if the applicant demonstrates a single bona fide arguable ground (see *Kenya Hotel Properties Ltd. vs Willisden Investments Ltd & Others [Civil Application No. Nai 24 of 2012](UR)*). It is also settled that an arguable appeal is one which should be argued fully before the court but not one which must necessarily succeed. (See *Joseph Gitahi Gachau & Another vs Pioneer Holdings Ltd. & 2 Others [Civil Appeal No. 124 of 2008] (UR)*).

[15] We have considered the application, the grounds in support thereof, the replying affidavit filed on behalf of the respondent, the rival submissions of learned counsel and the law. The primary objective of the discretion exercisable under **rule 5(2)(b)** of this Court's Rules, as we have already stated, is to preserve the subject matter of the intended appeal or the pending appeal in order to ensure the just and effective determination of the intended appeal or appeal if one has been filed. It is not in dispute that the applicant lodged a notice of appeal on 21st October, 2014 which document has demonstrated its intention to appeal against the High Court decision dated 1st October, 2014. This Notice of Motion was however, lodged on 1st April, 2015 whilst leave to appeal was obtained on 22nd June, 2015.

[16] We do not think much should turn on the fact that leave to appeal was obtained after the Notice of Appeal and Motion were filed as our jurisdiction was properly invoked when the Notice of Appeal was filed which Notice of Appeal has not been withdrawn or otherwise struck out. As we have stated before on several occasions, we cannot go behind the Notice of Appeal to see if the same is compliant with our Rules when considering an application under **Rule 5(2)(b)** of this Court's Rules. Of course, at an appropriate moment and when properly moved with an application to strike out the Notice of Appeal or Notice of Motion, we would fully consider the respondent's complaints. However, as we have a Notice of Appeal before us we shall consider the Notice of Motion under **Rule 5(2)(b)** on its merits.

[17] On whether the intended appeal is arguable, we have come to the conclusion that it is. The applicant has stated that, in its reference to the High Court from the taxation of the respondents costs, it challenged the jurisdiction of the Taxing Officer who allowed the bill at Kshs.4,697,835 and further that the taxation was based on agreements of sale some of which were fraudulent. It was also the applicant's further argument that as the respondent acted for both the applicant and the purchasers, its fees would not be the same as if it had only acted for the applicant. In our view, those issues deserve to be heard by this court. We reiterate that at this stage we are not dealing with the merits of the intended appeal and the applicant has no obligation to satisfy us that the intended appeal shall succeed. That is the function of the bench which will consider the intended appeal.

[18] Turning to whether the intended appeal, if ultimately successful, will be rendered nugatory if a stay of execution is not allowed, we have considered the sum involved, the respective positions of the parties and their antecedent relationship. We have further considered the respondent's offer to accept, as security for the sum taxed in its favour, a deposit of the same until the hearing and determination of the intended appeal. As we said in the case of **Reliance Bank Ltd. vs Norlake Investments Ltd [2002] 1 EA 227**, what may render a successful appeal nugatory must be considered within the circumstances of each particular case. Considerations such as the expense and length of time it may take to reverse or recover what has changed hands pending the intended appeal or appeal if one has been filed, are relevant considerations. In **The Standard Limited -v- G.N. Kagia T/A Kagia & Company Advocates [Civil Application No. Nai 193 of 2003] (UR)**, we stated:-

“If the applicant’s appeal ultimately succeeds either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money if paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interests of justice be taken into account.”

[19] In this case, we must balance competing rights: on the one hand the rights of the respondent which have accrued from the taxation and on the other, the applicant's undoubted right to appeal against the said taxation. As we have stated, our jurisdiction under **Rule 5(2)(b)** of our Rules must be exercised to do justice to the parties. We must therefore make orders on such terms as are just. Guided by these principles the order that commends itself to us to ensure that the interests of both parties are safeguarded is to grant a stay of execution, as we hereby do, but on terms that the applicant shall within thirty (30) days of today deposit the sum of Kshs.2,500,000/= in a financial institution in good standing in an interest bearing account in the joint names of the parties' advocates. Such financial institution to be agreed upon by counsel and in default of agreement the Court to appoint such financial institution.

In default of the deposit within the appointed time, the order of stay shall automatically stand vacated and be discharged.

[20] The costs of this application shall be in the intended appeal and if no appeal is filed, the applicant shall pay the respondent's costs of this application.

It is so ordered.

Dated and Delivered at Nairobi this 22nd day of April, 2016.

KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR