



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. 59 OF 2015

BETWEEN

PATRICK MUKIRI KABUNDU.....APPLICANT

AND

THE EXECUTIVE, TOURISM DEVELOPMENT

& CULTURE, MOMBASA COUNTY.....1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

MOMBASA COUNTY DIRECTORATE,

LIQUOR CONTROL.....3RD RESPONDENT

DIRECTOR OF PUBLIC

PROSECUTIONS & 19 OTHERS.....INTERESTED PARTIES

(Application for stay of execution pending the hearing and determination of an intended appeal against the Judgment and Decree of the High Court of Kenya at Mombasa, (Emukule, J.) dated 13th October 2015

in

Misc. App. No. 27 of 2015

Consolidated with

Petition No. 18 of 2015)

RULING OF THE COURT

The Motion on Notice before us dated 26th October 2015 is expressed to be taken out under **rules 5 (2) (b) and 42 (1)** of the **Court of Appeal Rules**. In it the applicant, **Patrick Mukiri Kabundu**, who appears in

person, seeks reliefs worded as follows:

- “1. That a stay of execution of the Mombasa County Liquor Licensing Act, 2014 pending the intended appeal;**
- 2. That a stay of execution of the judgment and order of Justice Anyara Emukule dated 13th October 2015 pending the intended appeal;**
- 3. That in the alternative and without prejudice to the above the order dated 30th July 2015 by Justice Anyara Emukule be reinstated pending the intended appeal;**
- 4. That in the alternative and without prejudice all prosecutions carried out by county prosecutor in Mombasa County be stayed pending intended appeal.”**

The Motion is supported by the applicant’s affidavit sworn on 26th October 2015, which sets out the background to this application and the grounds and reasons upon which the application is based.

It cannot be gainsaid that of the above reliefs that the applicant has sought, the only one that we can properly grant under rule 5(2) (b) of the Court of Appeal Rules, is an order of stay of execution of the judgment of **Emukule, J.** dated 30th July 2015. If at all he is entitled to the other reliefs, the applicant would have to invoke a different jurisdiction of this Court other than rule 5(2)(b), which is confined to the reliefs of stay of execution, stay of proceedings and an order of injunction.

Before we consider the grounds, which the applicant contends constitute an arguable intended appeal, and the manner in which it will be rendered nugatory if we do not grant the relief sought, it is apposite to set out briefly the background to the application.

On 25th March 2015 five petitioners filed in the **High Court at Mombasa Petition No. 18 of 2015** on behalf of themselves and members of a group known as **Mombasa County Bars, Hotels, Restaurants & Guest Houses Welfare Group (welfare group)**. The applicant is a member of that group. In the petition they prayed, as against the **County Government of Mombasa (2nd respondent)** and the **Director of Public Prosecutions, (DPP)** for various orders, among them an order quashing the **Mombasa County Liquor Licensing Act, 2014 (the Act)**; in the alternative an order quashing **sections 4, 19, 40** and the **3rd Schedule** of the said Act; stay of implementation of the Act until the relevant committees under it were set up; a declaration that the 2nd respondent had no prosecutorial powers, and lastly an order quashing four ongoing criminal prosecutions involving members of the group, namely **CR. C. No. 712 of 2015, Republic v. Patrick Mukiri Kabundu; CR. C. No. 1133 of 2015, Republic v. Collins Maritine & Another; CR. C. No. 1140 of 2015, Republic v. Josephine Karemi & Others; and CR. C. No. 1057 of 2015, Republic v. Ruth Musudi & Another.**

The grounds upon which the above reliefs were sought were that members of the welfare group were being subjected to double taxation; that the licensing regime under the Act was unfair because it was uniform irrespective of the size of the establishment; that the license levy under the Act was exorbitant; that the Act contravened the national **Alcoholic Drinks Control Act, 2010** regarding the prescribed fines; that the interests of members of small and medium establishments were not catered for because they were excluded from representation in the **Liquor Control Directorate** and the **Liquor Licensing Review Committee**; that the 2nd respondent was illegally enforcing the Act before the relevant committees required by the Act were established; that 2nd respondent was arresting and charging members of the welfare group under the Act while it did not have prosecutorial powers which under the Constitution are exclusively vested in the DPP; and that their right to fair administrative action under Article 47 of the Constitution was being violated.

The 2nd respondent contested the petition and the application arguing that none of the fundamental rights of the members of the welfare group had been violated, and that before the enactment of the Act, they had

adequately participated in the deliberations and had submitted views and memoranda which were duly considered by the 2nd respondent. It was further contended that there was no conflict between the Act and its national equivalent because under the Constitution liquor licensing was a function of the County Government. As regards representation of the members of the welfare group in the committees set up under the Act, it was contended that they were indeed represented under the private sector cluster or the business community cluster. The 2nd respondent further averred that the DPP had delegated prosecutorial powers to its prosecutors which delegation was duly gazetted and saved by the transitional provisions of the County Government Act. It was lastly contended that the Act was not unconstitutional and that the prosecutions founded on its violation were lawful.

During the pendency of the petition, the applicant filed High Court ***Miscellaneous Application No. 27 of 2015*** raising, among others, issues similar to those raised in the petition regarding the legality of the Act and of his criminal prosecution based on alleged violation of the Act. As drafted the application is rather tortuous and convoluted, but is otherwise clear enough that the applicant was seeking, in the main, an order of certiorari to quash the Act, and an order of prohibition to stop his prosecution.

The miscellaneous application was consolidated with the petition and heard by Emukule, J. as aforesaid. On 30th July 2015, the learned judge issued a temporary order of stay pending delivery of the judgment, which he discharged upon dismissal of the petition. On 22nd October 2015, the applicant filed a notice of appeal and followed it up with the application now before us.

By consent of the parties, this application was canvassed through written submissions and limited oral summation. To demonstrate an arguable appeal, the applicant relied on his draft memorandum of appeal, which raises some 14 grounds of appeal. He contended that the High Court erred by upholding the validity of the Act whilst there was no public participation before its enactment as required by Article 10 of the Constitution. The documentary evidence relied upon by the court to hold that there was public participation, it was submitted, was inauthentic and lacking probative value because among other things, it was not signed. Secondly the applicant contended that his prosecution by the 2nd respondent had no basis and was in violation of Article 157 of the Constitution, which vests prosecutorial powers exclusively in the DPP. It was further argued that under Schedule 4 of the Constitution the function of running courts belongs to the national rather than the county Government. Lastly, the applicant urged that his prosecution was additionally unconstitutional because the effective date of the Act was backdated, meaning that he was being prosecuted for conduct, which was not an offence when it was committed.

As regards whether the intended appeal would be rendered nugatory if it succeeded in the absence of the orders sought, it was submitted that it would, because the applicant risked conviction and sentence to imprisonment or to hefty fine. Because possible loss of liberty was involved, we were urged to grant the orders prayed for to forestall that eventuality.

Mr. Kabebe, learned counsel for the Interested Parties Nos. 15, 16, 17, 18, 19 and 20 did not file any submissions but adopted those of the applicant and added that the Act was illegal null and void as it was in conflict with the national Alcoholic Drinks Control Act.

Mr. Wachenje, learned counsel for the 1st and 3rd respondents opposed the appeal relying on a replying affidavit sworn on 25th November 2015 by Mr. **Jimmy Waliaula**, the 2nd respondent's director of legal services. Counsel submitted that the order of Emukule, J., which the applicant sought to stay was a negative order that merely dismissed the petition and did not order the parties to do anything capable of being stayed. He relied on the ruling in **Nairobi Metropolitan PSV Sacco Union Ltd & 25 Others v. County of Nairobi Government & 3 Others, CA No NAI 16 of 2014 (UR 11/2014)**.

Regarding the alternative prayer for reinstatement of the order of the High Court dated 30th July 2015, it was argued that there was no basis for the prayer because the order of the High Court was interim and was duly spent and discharged after the delivery of the judgment. On the prayer relating to stay of prosecution, counsel submitted that the applicant was seeking stoppage of **all prosecutions** by Mombasa County without establishing any basis for such a blanket order.

Next Mr. Wachenje submitted that the High Court had found that the Act was constitutional and that the presumption of constitutionality and due enactment of legislation precluded this Court from stopping implementation of the Act.

On whether the intended appeal would be rendered nugatory, learned counsel totally got lost in a legal maze as he invoked and relied on principles of stay of execution under **Order 42** of the **Civil Procedure Rules**. The only relevant point he made however was that the Act had been in operation for more than 9 months and staying its implementation would adversely affect the 2nd respondent in the discharge of its constitutional mandate and negatively impact on its collection of revenue and ability to render services to the people of the County.

Mr. Obinju for the 2nd respondent associated himself with the submissions by the other respondents and relied on the replying affidavit sworn on 24th November 2015 by **Mr. Israel Ruhu**, the legal counsel, County Assembly of Mombasa. He further relied on **Kanwal Sarjit Singh Dhiman v. Keshavji Jivji Shah, CA No. Nai 320 of 2006** to emphasize that this Court will not issue an order of stay of execution of a negative order, which is incapable of execution. As regards stay of implementation of the Act, counsel urged that the High Court had found that it was constitutional. Coupled with the presumption of constitutionality, which the applicant had not displaced, counsel submitted, stay of implementation of the Act can only arise if after hearing the appeal, this Court confirmed that the Act was unconstitutional. Counsel concluded by submitting that taking into account the respective hardship of the parties, the balance of convenience tilted in favour of denying the application.

The other interested parties did not file any documents in support of or in opposition to the application and did not take part in the hearing.

We have duly considered the application, the affidavits in support and in opposition, the submissions of the respective parties and the authorities they relied upon. As has been said time without number, in an application like this, the Court is not called upon to determine the merit or otherwise of the intended appeal because that is the proper province of the Court when it finally hears the appeal. (**Royal Media Services v. Attorney General & 2 Others, CA No. Nai. 44 of 2013**). What the Court is called upon to do at this stage is to satisfy itself that *prima facie* the intended appeal raises at least one *bona fide* arguable point worth of full consideration at the hearing of the appeal. The applicant does not have to establish a multiplicity of arguable grounds; one will suffice. (**Damji Pragji Mandavia v. Sara Lee Household & Body Care (K) Ltd, CA. No. Nai. 345 of 2004**). In addition an arguable appeal is not necessarily one, which must succeed when the appeal is heard. It is merely an appeal that is not frivolous; one that raises an issue deserving consideration at the hearing of the appeal. (**Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 Others, Civil A No. 124 of 2008**).

To be entitled to a relief under rule 5(2) (b), the applicant must satisfy the Court that the appeal is arguable and unless the relief sought is granted, the appeal will be rendered nugatory if it is ultimately successful. An applicant will not be entitled to the relief if he or she satisfies only one of those requirements; both must be satisfied. (**Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd CA No 314 of 2007**).

Authorities abound that under rule 5 (2) (b) this Court will not stay negative orders which do not require the applicant to do or abstain from doing anything. Such negative orders arise where all that the court appealed from has done is merely to dismiss a suit or an application. Thus for example in **Exclusive Estates Ltd v. Kenya Posts and Telecommunications Corporation & Another (2005) 1 EA 53** this Court stated:

“The stay of execution envisaged by rule 5(2) (b) of the rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act:

“means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order.”

The order which dismissed the suit was a negative order which is not capable of being executed.”

In addition to the decisions cited by the respondents may be added other decisions such as ***FRS v. JDS, CA. No. Nai. 114 of 2012 (UR 89/2012)***, ***Devani & 4 Others v. Joseph Ngindari & 3 Others, CA No. Nai 136 of 2004, F & S. Scientific Ltd. v. Kenya Revenue Authority & Another, CA No. 260 of 2012*** and ***Republic v. Kenya Anti-Corruption Commission & 2 Others, CA No 51 of 2008.***

In ***Njuguna S. Ndung’u v. Ethics & Anti Corruption Commission & 3 Others, CA No. Nai 304 of 2014 (UR 227/2014)*** this Court stated that in an appropriate case, and we would add, where the appropriate jurisdiction of the Court is invoked, the Court may order maintenance of status quo or such orders as would meet the cause of justice. As we have stated, the applicant has been happy to invoke only rule 5(2) (b).

We would agree too with the respondents that there is no basis for the prayer that we reinstate the order made by the High Court, which was limited in operation to the duration between the hearing of the petition and the delivery of the judgment. As has been said time and again, the jurisdiction of this Court under Rule 5(2)(b) is original and discretionary and that its exercise does not constitute an appeal from exercise of discretion by the High Court. To that extent, an order of this Court under rule 5(2) has no connection with and is not dependent on any order issued or denied by the High Court. (***See Reuben & 9 Others v. Nderitu & Another (1989) KLR 459.***)

The applicant contends that the Act under which he is being prosecuted is unconstitutional because it was enacted without participation of the people as required by the Constitution and that the offence he is charged with under the Act was not an offence when it was committed because the Act had not come into operation. He also questions whether the County Government can validly prosecute him, though on the face of it the Constitution allows powers of the DPP to be exercised in person or by subordinate officers acting under general or special instructions and allows Parliament to confer powers of prosecution on authorities other than the DPP. We are satisfied that the issues that the appellant intends to canvass or appeal are not frivolous and are indeed arguable.

On the second consideration, what may render an intended nugatory appeal will depend on the circumstances of each case (***See David Morton Silverstein v Atsango Chesoni, CA No. Nai. 189 of 2001.***) Whether an appeal will be rendered nugatory depends on whether what the applicant seeks to stay, if allowed to pass, is reversible or if it is not reversible, whether damages will reasonably compensate the aggrieved party. (***See Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others, CA No 31 Of 2012.***)

The applicant contends that if the orders sought are not granted, his prosecution will continue and he may be convicted and jailed or fined heavily. The respondents on the other hand argue that conviction and imposition of a fine cannot render the appeal nugatory because a full refund is guaranteed if the appeal succeeds. As regards imprisonment, we may add that it is not obvious that conviction for an offence must automatically result in a sentence of imprisonment. (See ***section 26, Penal Code.***) The respondents’ main contention however, is that the Act had been in force for quite sometime now, it has been implemented and observed by the bulk of the members of the County and that any stay of its implementation will have adverse effects on the operations of the County Government and its ability to render services to the people of the County.

In applications like the present one, this Court stated in ***Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd CA No. NAI 358 of 1999 (UR 149/99)*** that it must consider the respective inconvenience and hardship that each party stands to suffer. (See also ***County Executive of Kisumu & 2 Others v. Kisumu County Assembly Service Board & Others, CA Nos. 4 & 5 of 2015 (Consolidated).***) The critical importance of the newly adopted devolved system of government in our constitutional system impels us to conclude that all things being equal, its working should not be *unduly* obstructed or impeded, particularly in cases where an aggrieved party may be adequately compensated by award of damages for any loss or damage that he may suffer. In the circumstances of this application we are satisfied that even if the applicant had properly invoked the jurisdiction of this Court, granting the orders sought would occasion more harm to the 2nd respondent and the people of the County of Mombasa than to the

applicant. Accordingly the application is hereby dismissed.

Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 22nd day of April,2016

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR