IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, KOOME & KIAGE, JJA)

CIVIL APPLICATION NO. NYR. 63 OF 2015 (UR 37/15)

BETWEEN

KIGUMO SUB-COUNTY ALCOHOLIC

DRINKS CONTROL COMMITTEE.....APPLICANT

AND

KIBAO SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED & 6 OTHERS.....RESPONDENT

(An application for stay of execution from the orders of the High Court of Kenya

at Murang'a (Waweru, J.) dated 13th November, 2015

in

H. C. Misc. App. No. 63 of 2015)

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RULING OF THE COURT

1. The Notice of Motion dated 18th December 2015 seeks two substantive Orders under **Rule 5(2)(b)** of the **Court of Appeal Rules, 2010** (hereinafter, ***'the Rules'***), which orders are couched as follows:

> ***"(b) This honourable court order stay of execution of the order issued by Honourable Justice H. P. G. Waweru on..... (sic) in Murang'a High Court Judicial Review till the intended appeal is heard and determined.***
>
> ***(c) Than(sic) leave granted and ordered to operate as a stay be deemed not to operate as a stay till the intended appeal is heard and determined."***

At the hearing of the motion, however, learned counsel for the applicant applied to amend prayer (b) by

inserting the date "***13th November 2015***", and prayer (c) to state: ***"That the order granted for leave to operate as a stay be vacated"***. The amendments were granted without objections from the respondents.

2. The applicant is Kigumo Sub-County Alcoholic Drinks Control Committee **(the Committee).** It is a lawful creature of the **The Murang'a County Alcoholics Drinks Act** (the Act) which was enacted by the County Government in October 2014 and was Gazetted in December 2014 to provide for a structured manner of dealing with the alcohol menace in that county. Under **Section 9** of the Act, sub-county committees were formed to, *inter alia*, issue licences in accordance with the Act. The committee was represented before us by learned counsel, **Mr. Kimwere Josphat**.
3. The 1st respondent is a Sacco registered under the Co-operative Societies Act and its membership is a group of bar owners in Kigumo, while the other six respondents are individual liquor merchants trading in Kigumo. They were all represented before us by learned counsel **Mr. Kabugu Muguku** and we shall henceforth refer to them as **"the respondents".**
4. The decision sought to be challenged emanated from the High Court in Muranga **(Hatari Waweru J.)** sitting as a Judicial Review Court. The respondents sought leave in September 2015 to apply for an order of *certiorari* to quash a decision of the committee published that month which decision, they contended, rejected the renewal of their annual trade licences and ordered the closure of their businesses without according them an opportunity of being heard and without assigning any reasons for such rejection or orders. This was against the tenets of natural justice. They further contended, amongst other things, that the decision would destroy their heavy investments and curtail their constitutional right to earn a living and fend for their dependants.
5. The High Court was satisfied that there were good grounds for seeking leave and granted the application *ex parte*. Subsequently, the substantive Notice of Motion was filed, served and responded to, and is pending before the same court for hearing and determination. The committee does not challenge the grant of leave *per se*. They challenge the prayer made in the application for leave that the grant of leave shall operate as a stay of the orders issued by the committee until the hearing and determination of the main motion. That prayer was not granted *ex parte*, but the court, in exercise of abundant caution, invited all parties to argue the application on merits and a Ruling was delivered on 20th November 2015, granting the order in the following terms:

   > ***"10. In these circumstances, I hold that the dictates of justice demand that the status quo be maintained pending the hearing and determination of the substantive motion. That status quo is that the ex pate applicants shall continue to trade pending hearing and determination of the substantive motion. I will therefore grant prayer 2 of the application. The leave granted on 29/09/2015 to apply for judicial review (to seek an order of certiorari) shall operate as a stay of the challenged decisions. However, and for the avoidance of doubt, it is hereby declared that nothing in this order authorizes the ex parte applicants to sell in their premises any illicit liquor however described. This clarification shall be part of the order of stay now granted. It is so ordered. Costs shall be in the substantive motion."***

6. That finding is the basis of the intended appeal and the reason for the motion before us. Mr. Kimwere submitted that the intended appeal was arguable because, by granting a stay of the committees' decision, the High Court purported to validate trade licences beyond their annual expiry date of 31st December set under **Section 16(3)(b)** of the Act. Counsel further urged , as he did before the High Court, that the overwhelming need to do something about the rampant abuse of alcohol, particularly by the youth and the need to curb the obvious danger posed to society by illegal sale and consumption of dangerous illicit brews, was a public interest that outweighed any private interests the respondents might show in the end. At all events, such private rights were compensable in damages. According to counsel, the law was followed by the committee in rejecting applications which did not comply with the Act and there was no reason to interfere. He also contended that the 1st respondent had no *locus standi* in the matter since licences were applied for and issued to individuals and not societies.
7. As for the nugatory aspect, Mr. Kimwere submitted that if the stay was not granted or the order granting leave to operate as stay was not vacated, the respondents will continue to operate their

businesses with impunity and the Act will be rendered inoperational. He disclosed that some of the respondents had refused to apply for new annual licences citing protection by the High Court order.

8. In response to the application, Mr. Muguku argued that the intended appeal was not arguable since there is no automatic right of appeal from an *ex parte* grant of leave to seek judicial review orders. It was purely a discretionary exercise by the trial court and there was no reason to disturb it. As for the nugatory aspect, counsel submitted that the orders granted by the court were not a hindrance to the operations of the County because the county was at liberty to invite the business owners to apply for new licences at the end of the year. The court orders were merely protective of the businesses until new licences were issued in accordance with the Act. He added that the challenge by the respondents was in regard to the process followed but not the final decision of the committee. Addressing the contrast between public interest and private rights, counsel submitted that it was in the public interest that a body exercising quasi-judicial powers should follow the law and fair administrative action. Finally, he contended that the 1st respondent was not a busybody but a co-operative society which had bar owners in Kigumo, and therefore had a stake in the outcome of the litigation.
9. We have considered the application and the incisive submissions of counsel on both sides. At the end of the day however, the application must be decided in accordance with precedent, first, as to whether the applicant has presented an arguable appeal, and second, whether the success of the intended appeal would be rendered nugatory if these interim orders were denied. This court's decision in ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*** summarized in a neat manner the common vein running through previous decisions on **Rule 5(2)(b)** and the jurisprudence thereunder, and we adopt it as follows:-

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

10. In line with those principles, we have examined the draft memorandum of the intended appeal listing 7 grounds which were summarized by the applicant's counsel and we are unable to say at this stage that none of them is arguable. They all raise *prima facie* issues of law and address the final question as to whether the discretion of the trial judge was exercised in a judicious manner. It is the appellate court which will apply the tests laid out in the case of ***Mbogo vs. Shah*** *[1968] EA 93* which Mr. Muguku alluded to in argument. Whether or not the intended appeal would serve any useful purpose now that the licenses the subject matter of the dispute have expired, is not for us to say. Suffice it to say that the intended appeal is not frivolous and the applicants have surmounted the first hurdle.
11. Will the success of the intended appeal be rendered nugatory if we do not grant the orders sought? We have anxiously considered this aspect, particularly in view of the undeniable fact that there is an annual cycle of trade licences which fall for renewal at the beginning of every year. As stated above, the High Court order merely maintained the *status quo* which it defined as *"continuation of trade pending the hearing of the substantive motion"*. That was in November 2015 and the licenses would, under the Act, continue to be valid until the end of that year. It would be an unreasonable interpretation of the order to state that it extended beyond the validity of the licences that were in issue in that case. It would be tantamount to saying that the court issued the respondents with trade licences for the year 2016 when it is obvious that courts are not in the business of issuing trade licences. As correctly submitted by Mr. Muguku, it is upon the committee to follow the law and procedure as regards 2016 trade licences, otherwise the status quo would continue. The lawful functions of the committee were not stopped by the court. If the law is followed and lawful decisions are made rejecting or accepting applications made for the licences, we cannot see how the success of the intended appeal would be rendered nugatory. Furthermore, granting prayer (c) in the manner sought would amount to deciding the intended appeal before it is even filed and heard. In our view, the more useful pursuit on both sides would be the hearing of the substantive motion before the High Court to determine whether there was any breach of the rules of natural justice or the right to fair administrative action. Such decision would, in addressing the past also inform the future. But that is a decision the parties themselves have to make. For purposes of the motion before us, we find and hold that the applicant has not satisfied the second requirement of the twin principles. Both principles have to be satisfied for the application to succeed.
12. The upshot is that the application fails, and we order that it shall be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 6th day of April, 2016

P. N. WAKI

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JUDGE OF APPEAL

M. K. KOOME

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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