



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: VISRAM, SICHALE & J. MOHAMMED, JJ.A.**

**CIVIL APPLICATION NO. NAI 171 OF 2015 (UR 138/2015)**

**BETWEEN**

**EVANS THIGA GATURU**

**CAROLYNE WANJIHIA ..... APPLICANTS**

**AND**

**NAIPOSHA COMPANY LIMITED**

**FUBECO CHINA FUSHUN**

**MILESTONE COMPANY LIMITED**

**STEPHEN SIMIYU T/A DESIGN ARCHITECTS & INTERIOR DESIGNERS**

**PINNACLE PROJECT LIMITED**

**NUKSTIBE ESTATE & CONSTRUCTION LTD**

**CATHERINE NGUGI NJERI**

**HIGH FLYERS SISTERS INVESTMENTS**

**JOYCE MURUGI MUIGA**

**THIRIKA TEA FARM LTD**

**NELLIE GECAU**

**RUTH WAMUCA NJUGUNA**

**JOHN NDEITHI GATHERU**

**MARGARITA VILLAS ..... RESPONDENTS**

**(An application for injunction pending the hearing & determination of an intended appeal arising from the ruling & orders of the High Court at Nairobi (Gikonyo, J) delivered on 10<sup>th</sup> June, 2015**

in

H.C. MISC APPLN. NO. 222 OF 2012)

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**RULING OF THE COURT**

1. The notice of motion before this Court is an application for an injunction pending the hearing & determination of an intended appeal brought under **Rule 5(2)(b) of the Court of Appeal Rules, S.1(2) of the Appellate Jurisdiction Act and Article 159 of the Constitution** by way of notice of motion dated 19<sup>th</sup> June 2015 by **EVANS THIGA GATURU and CAROLYNE WANJHIA** [the applicants] against **NAIPOSHA COMPANY LIMITED, FUBECO CHINA FUSHUN, MILESTONE COMPANY LIMITED, STEPHEN SIMIYU T/A DESIGN ARCHITECTS & INTERIOR DESIGNERS, PINNACLE PROJECT LIMITED, NUKSTIBE ESTATE & CONSTRUCTION LTD, CATHERINE NGUGI NJERI, HIGH FLYERS SISTERS INVESTMENTS, JOYCE MURUGI MUIGA, THIRIKA TEA FARM LTD, NELLIE GECAU, RUTH WAMUCA NJUGUNA, JOHN NDEITHI GATHER and MARGARITA VILLAS** [the respondents]. The applicants seek the following orders:

1. *That this Hon. Court be pleased to order a stay of mention/and or proceedings scheduled for 24<sup>th</sup> June 2015; and/or further mention of proceedings in HCCC Misc Application 222 of 2012, pending the hearing and determination of the intended appeal by the applicant against the ruling and orders of the High Court made on 10<sup>th</sup> June 2015.*
2. ...
3. *That the costs of this application be borne by the respondents.*
4. *The application is supported by the affidavit of Evans Thiga Gaturu sworn on 19<sup>th</sup> June 2015 and Caroline Wairimu Wanjihia sworn 5<sup>th</sup> October 2015.*

2. This application is based on the grounds *inter alia* that:

- a. *The learned Judge made adverse orders on a matter of professional undertaking without according the applicants an opportunity to be heard.*
- b. *The learned Judge accepted “unsubstantiated evidence” from people not on record who alleged that they were owed money when they were not.*
- c. *The learned Judge condemned the applicants unheard when they were not served with the application that resulted in the impugned orders made on 10<sup>th</sup> June 2015. Further, that the application was filed by an advocate who was acting against the „interests? of his „client? for whom he had no instructions to act.*
- d. *The learned Judge was in breach of the provisions of Chapter 4 of the Constitution on the Bill of Rights, specifically Article 50(1) and Article 159 by condemning the two parties unheard and not affording them the opportunity to bring to account the monies held under the undertaking.*

3. In support of the foregoing, the applicants both swore detailed affidavits outlining the facts leading to the filing of this application. The genesis of the matter can be traced to the ruling of Gikonyo, J dated and delivered on 10<sup>th</sup> June, 2015. When the matter came up for mention on 1<sup>st</sup> July, 2015, to ensure compliance with his orders of 10<sup>th</sup> June, 2015, the learned Judge issued warrants of arrest against the applicants for contempt of court for failing to deposit part of the sale proceeds in court. The applicants have called these warrants into question arguing that they were issued without following due process. The 1<sup>st</sup> applicant in his further supporting affidavit filed on 2<sup>nd</sup> July, 2015 depones that since the warrants

flow from the High Court orders of 10<sup>th</sup> June, 2015, the subject of the intended appeal, the applicants also seek stay of execution of the arrest warrants under **Rule 5(2)(b) of the Court of Appeal Rules**.

### **Submissions by Learned Counsel**

4. When the application came before the Court for hearing, the parties were represented by learned counsel as follows: Mr P. Muite, Senior Counsel together with Mr Gershom Otachi represented the applicants; Mr Mbichire and Mr Kounah represented the 1<sup>st</sup> respondent; Ms Nerea Shitobi was holding brief for Mr N Havi representing the 7<sup>th</sup> to 12<sup>th</sup> respondents; Mr J. Mburu represented the 13<sup>th</sup> and 14<sup>th</sup> the respondents; while Mr Njenga held brief for Mr. Kimani Kahiro, learned counsel for Superiorfone Communications Ltd [the Purchaser].

5. In giving a brief history of the matter, Mr Muite submitted that the 2<sup>nd</sup> applicant was, at a time, the majority shareholder of the 1<sup>st</sup> respondent which was incorporated for purposes of buying land in Naivasha, being LR No. 398/15 [the suit property] and constructing thereon holiday homes, with the intention of selling the same at a profit. The 1<sup>st</sup> respondent contracted the 2<sup>nd</sup> respondent to construct the homes and in the course of construction, the shareholders and directors were unable to raise the full amount required to complete construction. The resulting dispute was settled by way of arbitration in respect of which the arbitral tribunal made an award in favour of the 2<sup>nd</sup> respondent. The arbitral award was registered in the High Court. An issue arose on the recovery of the judgment debt and since the 1<sup>st</sup> respondent did not have the money to settle the judgment debt, the 2<sup>nd</sup> applicant as the majority shareholder identified a purchaser for the project [*the Purchaser*] who would purchase the same as a going concern. A professional undertaking was exchanged between the firms of CW Wanjihia & Co Advocates and Kimani Kahiro & Co Advocates dated 31<sup>st</sup> March, 2015 in respect of the sale transaction.

6. Counsel further submitted that under **Order 52 of the Civil Procedure Rules**, in order to enforce a professional undertaking, a party must do so by way of Originating Summons and the suit heard by way of summary procedure in observance of due procedure; that the 1<sup>st</sup> applicant was in the High Court on 9<sup>th</sup> June 2015 attending to unrelated matters, when **H.C. MISC APPLN. NO. 222 OF 2012** was mentioned; that neither the 1<sup>st</sup> applicant nor the 2<sup>nd</sup> applicant had been served with any application or notice of hearing or mention; that the learned judge directed the 1<sup>st</sup> applicant to appear before him on 10<sup>th</sup> June, 2015 to account for the disbursement of the sale proceeds in respect of the suit property; that on 10<sup>th</sup> June, 2015, the 1<sup>st</sup> applicant explained to the court how the sale proceeds had been disbursed; that the learned judge declined to hear the 2<sup>nd</sup> applicant and ordered that the monies relating to payments in dispute be deposited in court within 7 days and that the matter be mentioned before him on 24<sup>th</sup> June, 2015 to confirm compliance and for further orders; that the Court erred in basing its decision on oral submissions since no evidence or affidavits were presented before the Court on 10<sup>th</sup> June, 2015; that despite the fact that on 30<sup>th</sup> June, 2015, the learned Judge was informed that the 2<sup>nd</sup> applicant had been hospitalised, he cited the applicants for contempt of court and issued warrants of arrest against them. Counsel contended that the stay orders sought are in respect of all proceedings including mentions as both applicants are in danger of being arrested pending the hearing and determination of the intended appeal. Counsel submitted that the irregular warrants flowed from the learned judge's orders of 10<sup>th</sup> June, 2015.

7. Counsel raised several issues which he contended were arguable:

*whether an application can be made in a suit that has been concluded; whether an advocate can act against the interests of his client without instructions; whether a professional undertaking can be enforced in any other way apart from pursuant to Order 52.* Counsel urged us to allow the application.

8. Mr J. Mburu, learned counsel for the 13<sup>th</sup> and 14<sup>th</sup> respondents contended that the application before the Court had been overtaken by events as warrants of arrest had already been issued. Counsel argued that due process had been followed in issuing the warrants of arrest and that the Court invoked the provisions of **S. 55 of the Advocates Act**. Counsel urged the Court to dismiss the application arguing that any

application made to set aside the warrants of arrest should have been made at the High Court.

9. Mr Mbichire, learned counsel for the 1<sup>st</sup> respondent opposed the application and argued that he is on record for representing the 1<sup>st</sup> respondent who seek to ensure that all outstanding payments in respect of this matter are made.

10. Mr Njenga, holding brief for Mr Kimani Kahiro, learned counsel for the Purchaser submitted that the 1<sup>st</sup> applicant's firm held an undertaking for disbursement of monies and was to hold the balance of KShs.58,842,596/= as stakeholder pending an agreement between the shareholders which agreement the 1<sup>st</sup> applicant had defied.

11. Ms Shitobi holding brief for Mr Havi, counsel for the 7<sup>th</sup> to 12<sup>th</sup> respondents, associated herself with the submissions of Mr Mbichire and Mr Njenga. Counsel opposed the application and claimed that a sum of KShs.15,576,800 was owed to her clients.

12. In reply, Mr Muite reiterated that the Purchaser has no further interest in the matter as it was paid in full and title issued; that both Mr Mburu and Mr Mbichire had confirmed that arrest warrants were issued thereby confirming the second limb that should the Court fail to grant a stay, the applicants will be arrested thereby rendering the intended appeal nugatory.

### **Determination**

13. We have considered the notice of motion, the affidavits, the record before us, the ruling of the learned Judge and the law. The principles for the determination of applications under **Rule 5 (2) (b)** of the Court of Appeal Rules are now well settled, as was observed by this Court in **ISHMAEL KAGUNYI THANDE V HOUSING FINANCE OF KENYA LTD, CIVIL APPLN NO. NAI 157 OF 2006** (unreported) in these terms:

***“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 that 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 that appeal will be rendered nugatory.”*** {See Githunguri v Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd v Kenya Commercial Bank Ltd, (1982-88)}.”

14. What this court is called to determine is whether the applicants have demonstrated that the intended appeal is arguable and whether the intended appeal, if successful will be rendered nugatory if orders sought are not granted. See **JOSEPH GITAHU & ANOTHER V PIONEER HOLDINGS LIMITED & 2 OTHERS, CA NO. 124 OF 2008.**

15. The applicants have raised several grounds of appeal including the constitutionality of the impugned ruling as the applicants claim to have been condemned unheard since the application that resulted in the impugned orders of 10<sup>th</sup> June, 2015 was heard without their being served. Further, the applicants also argue that the appeal is arguable in that the proper procedure for enforcing an undertaking stipulated under **Order 52 of the Civil Procedure Rules** was not followed. It is established that even a single arguable point is sufficient for the grant of orders under **Rule 5 (2) (b)**. See **STANLEY KANGETHE KINYANJUI V TONY KETTER & 5 OTHERS, [2013] eKLR.** It is also established that an arguable appeal is not one that must necessarily succeed, it is essentially one that is deserving of the court's consideration. See **DENNIS MOGAMBI MONGARE V ATTORNEY GENERAL & 3 OTHERS, CIVIL APPLN NO. NAI 265 OF 2011.** We cannot go into the merits of the appeal at this stage but what emerges is that the appeal is not frivolous. We are, therefore, satisfied that there is an arguable appeal.

16. On the nugatory aspect, it is trite law that this Court must weigh and balance the competing interests of all parties and that each case must all be determined on its own peculiar facts. We take the cue from the case of STANISLUS NYAGAKA ONDIMU V KALYASOI FARMERS CO-OPERATIVE SOCIETY & OTHERS, CIVIL APPLICATION NO. NAI 337 OF 2005 (unreported) where this Court stated:

***“In view of what this Court has said in its two previous decisions in Mwangi Wangonde vs. Nairobi City Commission – Civil Appeal No. 95 of 1988 and P.R. Kotecha and another vs. N.R. Pav and another – Civil Application No. Nai. 63 of 2003 (unreported) 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.*”**

See also: JACKSON KIPKEMBOI KOSKEY & 7 OTHERS V SAMUEL MURIITHI NJOGU & 4 OTHERS, [2007] eKLR; and SAMSON GETANGITA NKWEGE & 2 OTHERS V ANISON NYAHIRI MUHINDI, [2008] eKLR.

17. From the record, warrants of appeal have been issued against the applicants, who are both advocates and therefore, officers of the court. To refuse the application would render the intended appeal nugatory as the applicants may be arrested pending the hearing and determination of the intended appeal.

18. in the circumstances of this application, we find that the success of the intended appeal, if it does succeed, will be rendered nugatory should we reject this application as the effect of our rejecting the same is that the applicants will be arrested.

19. The applicants have satisfied both limbs of **Rule 5 (2) (b) of this Court’ rules** and demonstrated that the intended appeal is arguable and if successful, will be rendered nugatory should we dismiss this application.

20. Accordingly, on the basis of the foregoing and the material on record, we allow the application and order that the orders for warrants of arrest for alleged contempt of court by the High Court (*Gikonyo J*) dated 10<sup>th</sup> June, 2015, and orders arising therefrom dated 1<sup>st</sup> July, 2015, be and are hereby stayed pending the hearing and determination of the intended appeal. Costs of the application shall abide by the outcome of the appeal.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May, 2016.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**