



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), GITHINJI & ODEK, J.J.A)**

**CIVIL APPLICATION NO. NAI. 207 OF 2015**

**BETWEEN**

**KAMAL BHUSAN JOSHI.....1<sup>ST</sup> APPLICANT**

**KAMAL JOSHI INVESTMENTS LIMITED.....2<sup>ND</sup> APPLICANT**

**KENYA KNITTING AND WEAVING MILLS.....3<sup>RD</sup> APPLICANT**

**MOTEX KNITWEAR MILLS LIMITED.....4<sup>TH</sup> APPLICANT**

**AND**

**WAMBUGU, MOTENDE & COMPANY ADVOCATES.....RESPONDENT**

*(An application for stay of execution of the judgment of the High Court of Kenya at Nairobi (Gikonyo, J.) dated 9<sup>th</sup> July, 2015*

*in*

***H. C. MISC. APPLN. No. 23 of 2012)***

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**RULING OF THE COURT**

1. On or about the 15<sup>th</sup> December 2008, Kamal Bhusan Joshi, the first applicant herein, instructed his advocates, M/s Wambugu, Motende & Co. Advocates, the respondent, to perform several conveyancing transactions on behalf of all the applicants. The first applicant contends that he had already paid the respondent the sum of Kshs. 1,500,000.00 in relation to the transactions, and therefore did not owe the respondent any money. On the other hand, the respondent contends that its legal fees remained unpaid, which prompted it to move to court and file a bill of costs for taxation. That bill was taxed in the total sum of Kshs. 6,543,345.40. Being aggrieved with the taxed costs, the first applicant filed a reference in the High Court challenging the decision of the taxing master's decision.

2. That reference was dismissed by Gikonyo, J. on the 9<sup>th</sup> July 2015, and the applicants, being aggrieved with that decision, intend to appeal against it. They have therefore brought this present application, by way of Notice of Motion on dated the 30<sup>th</sup> July 2015, in which they seek an order that:

***“... this Court be pleased to stay the execution of the High Court ruling delivered on 9<sup>th</sup> July 2015....”***

3. The grounds upon which the application is based are set out in the supporting affidavit sworn by the first applicant on the 30<sup>th</sup> July 2015. The applicants contend that their intended appeal has a good probability of success; in their opinion, the taxing master failed to take into account that the respondent had already been paid for the services rendered, and that the respondent used an erroneous valuation report as the basis of the instruction fees raised. The applicants also contend that if this Court does not grant them the orders they seek, then the intended appeal will be rendered nugatory because they will be forced to pay the taxed costs to the applicants, causing them great hardship, and further that there are no assurances that the respondent will be in a position to repay the money should the intended appeal be successful.

4. The application is opposed by way of a replying affidavit sworn by John Wacira Wambugu, the Managing Partner of the respondent herein. The respondent’s position is that the Taxing Master correctly assessed the instruction fees, a fact that was raised and properly considered by the High Court. He further contended that the intended appeal by the applicants is not arguable, and that the applicants herein were simply misleading the court with a view to avoiding their responsibility to pay for legal work that had already been done by the respondent.

5. In order to benefit from the discretion of this Court under rule 5(2)(b) of this Court’s rules, an applicant is required to demonstrate that his intended appeal is arguable and further, that unless the order of stay of execution is granted, then his intended appeal, if successful, would be rendered nugatory.

6. As has been stated by this Court, an arguable appeal is not necessarily one that will succeed. An arguable appeal is one that raises an issue that merits the consideration of the Court. In ***Kenya Export Floriculture, Horticulture & Allied Workers Union (KEPHAU) v Kenya Plantation & Agricultural Workers Union & Another*** [2015] eKLR (Civil Application No. Nai 187 of 2014 (UR.146/2014)) this Court rendered itself on this point in the following manner:

***“By arguable, is not meant an appeal or intended appeal which must succeed but one which raises a bonafide issue worth of consideration by the Court.”***

7. In determining whether the applicants’ appeal is arguable, we will not go into the merits of the intended appeal, as that may prejudice the appeal or embarrass the Court that eventually hears the appeal. Having perused the draft memorandum of appeal annexed to the application, we have noted the issues the applicant shall be calling the Court to consider concern the matters to be taken into account when taxing an advocate’s bill of costs. We are prepared on the basis of the submissions in that behalf to find that the intended appeal is arguable.

8. The applicants contend that if we do not allow this application, they will be forced to pay the respondent the decretal sum which would cause them great hardship. In addition, they have expressed reservations about the ability of the respondent to refund the money should the intended appeal be successful. The general rule concerning the stay of execution of money decrees is that:

***“The success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”. See *Kenya Hotel Properties Limited v Willesden Properties Limited* [2007] eKLR (Civil Application Nai. No. 322 of 2006 (UR 178/06))***

9. In ***Standard Bank Limited v G.N. Kagia T/A Kagia & Company Advocates*** Civil Application No. Nai 193 of 2003 (unreported), this Court stated that:

***“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 it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”***

10. In seeking to balance the interests of the respective parties, we must ensure that the applicants are not denied an opportunity to challenge the decision of the High Court while at the same time, ensuring that the respondent is not denied the fruit of judgment in its favour and that its rights are safeguarded. Having carefully considered the rival submissions of learned counsel, we find that the balance of convenience in this application tilts in favour of the applicants. In the premises we will allow the application and make orders as follows:

- a. The application dated the 30<sup>th</sup> July 2015 be and is hereby allowed in terms of prayer number 2 thereof subject to the following conditions:
  - i. The applicants shall deposit the decretal amount, being the sum of Kshs. 6,543,345.40 as awarded by the taxing master and affirmed by the High Court into an interest earning account with a reputable bank in good standing in the joint names of the respective parties’ advocates on record within thirty (30) days of the date of this ruling;
  - ii. Should the applicants default for any reason whatsoever in the deposit of the decretal sum in terms of order (i) hereinabove, then the applicants shall deposit the said sum in court within ten (10) days of such default;

The costs of the application shall abide the outcome of the intended appeal.

- b. Failure to comply with this order in terms of (a) above shall render the application herein dismissed with costs to the respondent.

11. Orders accordingly.

**Dated at Nairobi this 24<sup>th</sup> day of June, 2016.**

**P. KIHARA KARIUKI, (PCA)**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**