IN THE COURT OF APPEAL

AT NYERI (SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPLICATION NO. NAI. 204 OF 2015 (UR 167/2015)

BAHATI WOMEN COMPANY LIMITED.....APPLICANT

VERSUS

STEPHEN KARIMI MURUGA & 5 OTHERS.....RESPONDENT

AND

DAVID MUCHAI WANGANGA.....INTERESTED PARTY/APPLICANT

Being an application for stay of execution pending the hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nakuru (Omondi, J) dated 29th January, 2015

RULING OF THE COURT

Before the Court is a Notice of Motion dated the 16th day of February, 2015 and lodged in this Courts sub registry at Nakuru on the 16th day of June 2015. It is brought under rule **5(2)(b)** of the Court of Appeal Rules.

Its subject heading indicates explicitly thus:-

> "***Being an application for stay of execution from the ruling of Nakuru H.C.C.C No. 233 of 2014 pending the hearing and determination of an intended appeal against the whole of the ruling of Hon. Judge H. A. Omondi delivered on 29th day of January 2015 at Nairobi."***

Contrary to the substantive heading set out above, the substantive prayers of the application read as follows:-

> ***"2. That pending inter parties hearing here this Honourable Court be pleased to grant an order of interim stay of execution of the consent order and resultant decree issued on the 14th June, 2011 in Nakuru H.C.C.C 223 of 2004***
>
> ***3.That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to grant an order of stay of execution of the consent order dated 8th April, 2011 issued on the 14th June, 2011."***

The application is grounded on the grounds in its body and the content of the supporting affidavit. It has been opposed by a replying affidavit of Stephen Karimi Muruga deposed on the 8th day of April, 2016 and lodged in this courts' sub registry at Nakuru on the 11th day of April 2016. The applicant has urged the Court to grant the reliefs sought on the grounds that it has satisfied the twin Principles required to be satisfied under rule 5(2) (b) of the Rules of the Court before any relief can issue under the said rule namely:-

1. Whether the intended appeal is arguable, and

2. whether the appeal will be rendered nugatory if the orders sought are not granted. On the first principle, it is the applicants argument that this prerequisite has been satisfied because; the individuals who purported to instruct the firm of Kanyi Ngure and Company Advocates had no authority to act as Directors of the applicant as at 1st February 2011 when the purported meeting that led to the appointment of the said firm happened, to the 4th February, 2011 when there was filed a Notice of change to reflect the firm of Kanyi Ngure & Company Advocates as being on record; M. J. Anyara Emukule J. through a ruling delivered on the 20th May, 2011 in **JR case No. 58 of 2010** found that the registration of the purported Directors who had appointed the firm of Kanyi Ngure & Company Advocates to act for the applicant was illegal, unreasonable and utterly arbitrary and then quashed it thereby rendering any action undertaken while in office by the said individuals at that particular time illegal and void the ruling of **Musinga, J.** (as he then was) delivered on the 21st September, 2004 indicated that the sale of 120 acres of land hived out of L.R. 8669/1 and executed by **Alice Wairimu Kinyara (**The 3rd Respondent) as the Chair lady of the group and other officials was not only done by persons who were not registered owners of the property (L.R. 8669/1), but was also marred with irregularities and was therefore incapable of enforcement; since the Advocate who purportedly entered into a consent on behalf of the applicant had no mandate to do so, it is prudent to say that the resulting consent was also incompetent; the number L.R.8669/1 does not exist any more, the same having been subdivided and individual members issued with titles; the consent sought to be impugned extensively favours the position of the 3rd Respondent who was the chair Lady then, and Bahati Nyakinyua Gachembe group at the expense of the applicant; and the said consent also affects 3rd parties with title deeds emanating from L.R. 8669/1 being more than two hundred and fifty (250) titles.

Turning to the second ingredient, it was the applicant's argument that once the consent has been executed, then there will be nothing left to fight for.

To Buttres its argument the applicant relied on the case of ***Equity Bank Limited versus West Link/mbo Limited (2013) eKLR*** for the propositions inter alia that Rule 5(2) (b) of the Court of Appeal Rules is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure just and effective determination of appeals. The applicant also cited the case of **Abok James Odera T/A A.J. Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR** for the exposition of the overriding objective in the appellate Jurisdiction. The Principle confers on the Court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under (see **City Chemist (NBI) Mohamed Kasavuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited** Civil Application **No. NAI 302 of 2008 (UR 199/2008).** There is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportional and affordable resolution of appeals (**See Deepack Manlal Kamami and Another versus Kenya Anti-corruption and 3 Others Civil application No 152 of 2009);** and The Principle gives the Court greater latitude to overcome any past technicalities which might hinder attainment of the overriding objective (see the case of **Caltex Oil Limited versus Evanson Wanjihia Civil Application No Nai. 190 of 2009 CR).** Also cited is the case of **Aguthi enterprises Limited versus Hussein Ibrahim Muni (2015**) eKLR from which the learned counsel set out a litany of other relevant Principles.

Lastly the case of trustees of the **Kenya Assemblies of God versus Suresh Kumar sofat & 2 Others**

(2015) eKLR in which the Court approved the decision in the case of **Total Kenya Limited versus Kenya Revenue Authority Civil Application No. 135 of 2012** for the holding that;

> *"**Rules 5 (2) (b) emphasizes the centrarity of loss to the parties on both sides of the appeal. That is what the Court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory."***

In response to the applicants submissions Mr. Kanyi Ngure learned counsel for the 1st and 2nd respondents urged us to dismiss the application on the grounds, inter alia, that the application is not only misconceived and an abuse of the Court process, but it is also incompetent as it purports to seek a stay of the orders adopting a consent endorsed by the Court on the 13th day of May, 2011 resulting in the decree issued on the 14th June, 2011 against which no notice of appeal was filed. The only notice of appeal exhibited in support of the application under review is the notice of appeal dated the 6th th day of February, 2015 showing the applicant's intention to appeal against **H. A. Omondi, J**'s ruling of 29th day of January, 2015, in which the learned Judge dismissed the applicants application dated the 8th day of November, 2013 seeking to set aside the consent together with the resulting decree issued by the Court on the 14th day of June, 2011. Lastly that the ruling of 29th January, 2015 being a negative order dismissing the applicant's application, it left nothing positive capable of being executed for the Court to intervene.

To buttress his arguments Mr. Ngure cited the case of **Nairobi City Council versus Resley (2002) 2 EA 493** for the holding that **Rule 5(2) (b)** as read with **rule 74 (3) of the Court of Appeal Rules** leaves no doubt that any decision sought to be appealed against must be based on a Notice of Appeal filed against such a decision; and there is no provision for allowing a Notice of Appeal lodged on a later decision to be used in an application for a stay of execution of an earlier decision; and the Court has no jurisdiction to make a decision on an application not based on a Notice of Appeal.

Mr. Ngure also cited the case of Y**agnesh Devani and 4 others versus Joseph Ngindari & 3 others Nairobi Civil application no. Nai. 136 of 2004 (UR 72/2004**) for the holding inter alia that the Court has jurisdiction under **Rule 5(2)(b)** of the Court of Appeal Rules to grant three kinds of orders pending appeal, namely:- (i) a stay of execution of the decree or order appealed from; (ii) an order of injunction; (iii) an order of stay of any further proceedings. A dismissal order, he submitted, is not a positive order in favour of a party that is capable of execution.

In reply Mr. Langat reiterated his earlier submission that it is imperative for the applicant to get the reliefs sought as there is currently confusion on the ground as to who the correct directors of the applicant are; that it is one Wanganga who gave directions for the filing of the application; and that Mr. Wanganga is still a shareholder of the applicant.

The request for the Court to intervene in favour of the applicant has been invoked under rule **5 (2) (b) of the Court of Appeal Rules**.

The parameters for the exercise of this jurisdiction have now been clearly crystalised by numerous case law emanating from this very Court. We find it prudent to high light a few by way of illustration. The exercise of this jurisdiction is original, independent and discretionary (see **Githunguri versus Jimba Credit Corporation Ltd No (2) (1988) KLR (838)**. It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see **Equity Bank Ltd Versus West Link Mbo** (supra). It only arises where the applicant has lodged a notice of appeal (see **Safaricom Ltd versus Ocean View Beach Hotel & 2 Others Civil application No. 327 of 2009 UR**).

The perquisites to be met before a party can obtain a relief under rule **5 (2) (b)** have also been crystallize by case law. These are that the applicant has to demonstrate that the appeal is arguable on the one hand and on the other hand that if the stay sought is not granted the appeal/intended appeal as the case may be will be rendered nugatory (see **Githunguri case (Supra**). By arguable is not meant an appeal or an

intended appeal which must succeed but one which raises a bona fide issue worth of consideration by the Court (see **Kenya Tea Growers Association & Another versus Kenya Planters Agricultural Workers Union, Civil Application NO. Nai. 72 of 2011 UR).** An appeal need not raise a multiplicity or any number of such points. A single arguable point is sufficient to earn an applicant such a relief (see **Damji Praji Mandavia versus Sara Lee Household Body care (K) Ltd** Civil application No. Nai 345 of 2005 (UR). It is therefore trite that demonstration of one arguable point will suffice (see **Kenya Railways Corporation versus Ederman properties Ltd Civil Appeal No. Nai. 176 of 2012 and Alimohamed Musa Ismael verus Kimba Ole Ntamorua & 4 others Civil appeal no. Nai. 256 of 2013.**)

As for the second perquisite an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible (see the case of **Stanley Kangethe Kinyanjui versus Tony Keter & 5 others Civil appeal no. 31 of 2012**, where in the court held inter alia thus:-

> *"**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 damaged will reasonably compensate the party aggrieved"***

(see also T**rustees of the Kenya assemblies of God versus Suresh Kumar Sofat & 2 others (supra)** where in the Court approved the holding in the case of **Total Kenya Limited versus Kenya Revenue Authority (Supra**) for the holding that:-

> *"**Rule 5 :(2) (b) emphasizes the centrality of loss to the parties on both sides of the appeal. That is what the Court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory"***

Both limbs must be demonstrated before a party can obtain a relief under rule 5 (2) (b) (see **Republic versus Kenya Anti-corruption Commission & 2 others (2009) KLR 31**, and **Reliance Bank Ltd versus Norlake investments Ltd (2012) IEA 22)** and **Githunguri versus Jimba Credit corporation (supra).**

The content of Rule 5(2) (b) of the Rules of the Court set out above as well as case law assessed above are clear that jurisdiction vests in us to intervene on behalf of the applicant only where the application seeking such intervention is anchored on a Notice of Appeal demonstrating the applicant's intention to appeal against the orders sought to be stayed. It is common ground that the applicant filed a Notice of Appeal against the orders made on 29th January 2015 and not against the orders of 13th May 2011 as well as the resultant decree issued on the 14th June 2011, the orders in respect of which it seeks to stay.

In the case of **Owners of the Motor Vessel "Lillian S" v Calted Oil (Kenya) Ltd, (1989) KLR 1** the Court had this to say on lack of jurisdiction or otherwise;

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"***

In view of the above principle, the moment it dawns on us that we have no jurisdiction we have no otherwise but to down our tools which we hereby do by striking out the incompetent application with

costs to the respondent.

Dated and Delivered at Nakuru this 16th day of June, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O KIAGE

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JUDGE OF APPEAL