



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MWILU, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. 27 OF 2016 (UR NO. 13/2016)

BETWEEN

THE EXECUTIVE COMMITTEE, KISII COUNTY.....1ST APPLICANT

THE GOVERNOR, KISII COUNTY.....2ND APPLICANT

THE COUNTY GOVERNMENT OF KISII.....3RD APPLICANT

AND

MASOSA CONSTRUCTION COMPANY LTD.....1ST RESPONDENT

THE TRANSITION AUTHORITY.....2ND RESPONDENT

(An Application for stay of execution pending the hearing and determination of an intended Appeal from a Ruling of the High Court of Kenya at Kisii, (Karanja, J.) dated 5th April, 2016

in

MISC. CIVIL APPLICATION NO. 72 OF 2015)

RULING OF THE COURT

1. In their application dated 8th April 2016 presented to this Court under Rule 5(2)(b) of the Rules of the Court, the applicants seek an order to stay execution of a ruling and order of the High Court of Kenya at Kisii (J. R. Karanja, J.) delivered on 5th April 2016 in Miscellaneous Civil Application No. 72 of 2015. In that ruling, the High Court allowed an application by the respondent under Section 5 of the Judicature Act by which the respondent applied to have the applicants cited and punished for contempt of court for failing to make payment to the respondent in terms of an order of the court issued on 10th December 2014 in Kisii Misc. Application No. 14 of 2013.

2. Allowing that application, the High Court ordered that the applicants “are hereby cited for contempt of court and are given a period of seven (7) days from this date hereof (sic) to expunge the contempt and in default a warrant for the arrest of 2nd [applicant] as the chief executive officer of the first and third [applicants] be issued for his production in court to show cause why he should not be committed to jail

for contempt of court.”

3. Intending to appeal that decision, the applicants filed a notice of appeal on 8th April 2016. They say that unless we stay that decision, the intended appeal, which in their view has high chances of success, will be rendered nugatory.

Background

4. On 23rd March 2010, the 1st respondent obtained judgment against the then Kisii Municipal Council for Kshs. 15,556,986.70 from the High Court at Kisii on the basis of a claim premised on contracts for widening, grading, gravelling and culverting of roads within Kisii Municipality. That judgment remained unsatisfied for sometime. The 1st respondent then obtained leave of the High Court to seek an order of mandamus against the clerk, Municipal Council of Kisii and against Municipal Council of Kisii. Thereafter on 9th December 2014 the High Court issued an order of mandamus against the clerk, Municipal Council of Kisii and against Municipal Council of Kisii in High Court Misc. Civil Application No. 10 of 2011.

5. Part of the judgment debt was satisfied leaving an amount of Kshs. 8,464,699.05 outstanding. Meanwhile and subsequent to the coming into force of the Constitution of Kenya, 2010, local authorities including Municipal Council of Kisii ceased to exist. The 1st respondent then instituted judicial review proceedings in the High Court at Kisii against the applicants in Kisii Misc. Application No. 10 of 2011 and obtained an order of mandamus on 9th December 2014 (the extracted order refers to 10th December 2014 instead of 9th December 2014) compelling the applicants to satisfy the decree in favour of the 1st respondent and directed them to pay to the 1st respondent the said amount of Kshs. 8,464,699.05.

6. On 16th September 2015, the 1st respondent filed an application seeking leave to take out contempt proceedings against the applicants as well as against the Transitional Authority. Leave was granted on 2nd October 2015. On 17th November 2015 the 1st respondent then applied to the High Court in High Court Misc. Civil Application No. 72 of 2015 to cite and punish the applicants for contempt for breaching the order of mandamus given on 10th December 2014. The applicants opposed that application asserting that they had not breached the court order; that they did not have the mandate to pay debts of the defunct local authority; that they had not been served with the order given on 10th December 2014; that the process of allocation of liabilities of defunct local authorities between county governments and the national governments was under way; and that approval of the controller of budget was required in connection with the county budget.

7. That application resulted in the ruling delivered on 5th April 2016 intended to be appealed from and which the applicants seek to stay pending the hearing and determination of that appeal.

Submissions by counsel

8. During the hearing of the application before us, Mr. P. M. Wanyama learned counsel for the applicants referred to the affidavit sworn by James Ongwae, the holder of the office of the 2nd applicant and submitted that the intended appeal is arguable; that in granting the impugned orders, the learned Judge of the High Court failed to consider the governing statutory regime pertinent to the question whether the applicants are liable to meet the adjudged liability to the 1st respondent or whether it would be for the national government of Kenya to do so; that the learned Judge also failed to properly direct himself on the question of service of the order the applicants are said to have been in contempt of; that the learned Judge found that the 1st and 2nd respondent should not have been sued, yet ironically went ahead to find them liable for contempt.

9. According to counsel for the applicants, these are weighty matters for canvassing during the hearing of the intended appeal and unless the orders of the High Court are stayed, the intended appeal will be rendered nugatory.

10. Opposing the application, learned counsel for the 1st respondent Mr. Oguttu-Mboya referred to the replying affidavit sworn by Maxwell Okemwa Mogere the Managing Director of the 1st respondent and submitted that the intended appeal is not arguable; that the complaints the applicants intend to raise in the intended appeal are complaints that could have been raised had the applicants appealed against the earlier High Court order of mandamus that compelled them to pay the 1st respondent; that since the applicants did not challenge that decision, they cannot now complain; that the question of the applicants not having been served with the order compelling them to pay is a red herring as there is clear evidence of service; that in any event, the applicants have been aware of the order of mandamus, otherwise they would not have applied, as they did, to have it stayed before the High Court. According to counsel, the issue whether the responsibility to pay the decreed amount to the 1st respondent lies with the county or national government does not arise as there is a decree in that regard.

11. Mr. Eredi, learned counsel for the 2nd respondent stated that the 2nd respondent would not take a position for purposes of this application and left the matter to the Court.

Determination

12. We have considered the application and the submissions by counsel. To succeed in their bid to stay the orders given by the High Court on 5th April 2016, the applicants need to demonstrate that the intended appeal is arguable and that if we decline to grant the order sought, the intended appeal will be rendered nugatory. In the case of **Ishmael Kagunyi Thande v HFCK Civil Application No Nai 157 of 2006** this Court stated that:

“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show 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 the appeal will be rendered nugatory. ”

13. The applicants say that in reaching the decision that the applicants should be cited for contempt and punished, the court failed to consider statutory provisions in the Intergovernmental Relations Act; that the court failed to appreciate that budget provisions must be made by the County Assembly and that the approval of the Controller of budget must also be obtained; and that service of the order the applicants are said to have breached was not proved. The 1st respondent on his part says that those matters are irrelevant for purposes of the application the learned Judge was dealing with.

14. Mindful, as we are, that an arguable appeal is simply one that is deserving of the Court’s consideration and not one that must necessarily succeed [see held in **Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR**] we do not think, looking at the draft memorandum of appeal attached to the application, that the intended appeal is frivolous.

15. On the question whether the intended appeal will be rendered nugatory unless we grant the orders sought, Githinji JA, in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011** stated that the object of Rule 5(2)(b) of the Rules of this Court is the ***“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”***

16. We are satisfied that the applicants have made out a case for this Court to exercise its discretion under Rule 5(2)(b) of the Rules of the Court in their favour. We allow prayer 3 of the application dated 8th April 2016 and order that there will be a stay of execution of the ruling and order of the High Court of Kenya at Kisii in Misc. Civil Application No. 72 of 2015 pending the hearing and determination of the intended appeal.

17. During the hearing of the application, counsel for the applicants indicated that he would be in a position to file the memorandum and record of appeal within 14 days. We further direct that the applicants shall file and serve the memorandum and record of appeal within 30 days from the date of

delivery of this ruling (if they have not already done so) failing which the order of stay hereby granted shall automatically lapse and the notice of motion dated 8th April 2016 shall stand dismissed with costs to the respondents.

18. Once filed, we direct that the appeal shall be heard on a priority basis.

19. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Kisumu this 29th day of July, 2016.

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR