



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. 18 OF 2016 (UR 11/2016)

BETWEEN

KALUMASS COMPANY LIMITE.D 1ST APPLICANT

MASSIMO SPINELLI ALESANDRO 2ND APPLICANT

AND

EMMANUEL CHARO TINGARESPONDENT

(Being an application for stay of execution of the ruling of the Environment & Land Court at Malindi (Angote, J.) dated 1st April, 2016

in

E.&L.C.C. No. 125 of 2009)

RULING OF THE COURT

The learned Judge of the Environment & Land Court (**Angote, J.**) rejected the applicant's two informal applications for adjournment of the trial in Malindi Environment & Land Court Case No. 125 of 2009 and one asking him to recuse himself, prompting the applicant to take out a formal application for stay of proceedings in Malindi Environment & Land Court Case No. 125 of 2009 pending the hearing and determination of the intended appeal challenging the two aforesaid decisions. The learned Judge rendered a ruling dismissing the application with costs, holding that it did not satisfy the requirements of the provisions of **Order 42 rule 6(2)** of the Civil Procedure Rules.

By a notice of appeal lodged on 20th April 2016 and a draft memorandum of appeal the applicant has evinced the intention of challenging Angote J's decision refusing to grant an order of stay of proceedings. Should the intended appeal be lodged the solitary issue, from the draft memorandum of appeal, will be principally to determine whether the learned Judge properly and judicially exercised his discretion in rejecting the application for stay of proceedings. That being the case we cannot say anything that would go to the merit of that question, the application before us being one of stay of proceedings in a pending suit in the Environment & Land Court until the intended appeal is lodged, heard and determined.

Whether an application seeks stay of execution, stay of further proceedings or an injunction under **Rule**

5(2) (b) of the Court of Appeal Rules, the twin considerations remain the well-trodden path which requires the applicant to persuade the court that the appeal or the intended appeal is not frivolous or unarguable, and secondly, that if the application for stay is not granted, the intended appeal, if successful, will be rendered nugatory. We emphasise that both limbs must be satisfied, and more importantly that, in considering an application under **Rule 5(2) (b)** the court must not make any definitive or final findings of either fact or law as such determination may embarrass the ultimate fair hearing of the appeal or intended appeal. See **Stanley Kangethe Kinyanjui v Tony Ketter & 5 others Civil Application No. 31 of 2012.**

It is a rare thing as can be seen in most decisions of this Court, for the Court to find that an appeal or intended appeal is unarguable at this stage. However there are those very clear cases that *ex facie* are so weak that the Court can so find without doing violence to the requirement that no definitive finding may be made at this stage. Again without expressing our opinion firmly on why we think so, the intended appeal, on the basis of the history of the dispute as reflected on record, and the draft memorandum of appeal, with respect is not arguable.

On the nugatory aspect, we likewise think that should this application be rejected, as it shortly will, the intended appeal will not be rendered nugatory because should the trial court proceed to determine the suit in favour of the respondent, the applicant will have the chance to challenge it on the full merit on appeal with the advantage of saving costs. At least if it will serve as a consolation, the applicant called four (4) witnesses, and the respondent closed his case without tendering any evidence.

For these reasons, the applicant having failed to satisfy both limbs of the application, the motion filed on 6th May 2016 is hereby dismissed with costs.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR