



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 37 OF 2016

BETWEEN

TOBIAS O. SEE.....APPLICANT

AND

MASENO UNIVERSITY.....1ST RESPONDENT

PROF. DOMINIC MAKAWITI.....2ND RESPONDENT

DR. VITALIS OUKO.....3RD RESPONDENT

BEDROCK HOLDINGS LIMITED.....4TH RESPONDENT

(Application for stay of further proceedings pending the filing, hearing and determination of an intended appeal to this Court from the judgment of the High Court of Kenya at Kisumu, (Chemitei, J.)

delivered on 10th March, 2016

in

PETITION NO. 7 OF 2015)

RULING OF THE COURT

1. This is an application brought under **rule 1(2) and 5(2)(b)** of the **Court of Appeal Rules, 2010** seeking an order of injunction to restrain the taxing master from hearing or taxing any of the respondents’ party and party bills of costs pending hearing and determination of an intended appeal.

2. The application is supported by the applicant’s affidavit. He states that on 10th March, 2016 the High Court dismissed his **Constitutional Petition No. 7 of 2015** that he had filed against the respondents; that the judgment was to be delivered on notice but no notice was issued to him or at all; and that he learnt of

the said judgment on 4th April, 2016 after he was served with the 2nd respondent's bill of costs

3. The applicant was aggrieved by the said judgment and intends to file an appeal against it, having been granted leave by this Court to file a notice of appeal out of time.

4. The applicant further states that the respondents have filed their respective bills of costs for taxation and unless this Court grants the order sought the bills shall be taxed and execution shall follow, in which event the intended appeal, if it were to succeed, will have been rendered nugatory.

5. The applicant believes that the intended appeal is arguable and the respondents shall not suffer any prejudice if the application is allowed.

6. In his brief submissions, **Mr. Gachube**, learned counsel for the applicant, told the court that it was unfair for the trial judge to exercise his discretion to award costs to the respondents. He further pointed out only the 4th respondent had opposed the application, the others had not filed any replying affidavit; but even then, the 4th respondent's affidavit is incompetent because it had been sworn by a person who had not been duly authorized to do so.

7. Counsel urged the Court to grant the order of injunction as sought by the applicant, saying that the applicant had satisfied the requirements for granting such an order as per this Court's decision in **Safaricom Limited v Ocean View Beach Hotel Ltd. & 2 Others [2010] eKLR**.

8. The four respondents were represented by **Mr. Qeu, Mr. Keuko, Ms Neto** and **Mr. Mwamu**, respectively.

Mr. Mwamu made the lead submissions that were largely adopted by the other advocates. Mr. Mwamu based his submissions on a replying affidavit sworn by Stephen O. Ayugi, a director of the 4th respondent. The deponent stated, *inter alia*, that the applicant's advocate was well aware of the date when the judgment was scheduled to be delivered, but on that date neither the applicant nor his advocate attended Court.

9. Mr. Ayugi further stated that there was undue delay in making this application and urged the Court to dismiss the application.

10. **Mr. Mwamu** submitted that the respondents' bill of costs had been taxed and only a ruling on the same was yet to be delivered; that grant of costs is discretionary and the trial judge did not err in the exercise of his discretion; that the intended appeal is not arguable; and the same shall not be rendered nugatory if the order sought is not granted.

11. Lastly, Mr. Mwamu submitted that the application was wrongfully filed before this Court; that the applicant ought to have waited for the taxing master's ruling and if he was dissatisfied with it, file a reference to the High Court. And that the respondent is capable of repaying the taxed costs to the appellant in the event the intended appeal is successful.

12. We have considered the affidavits on record and the submissions by counsel. In considering an application for stay of execution pending appeal or intended appeal, the Court exercises its discretion. The principles that guide the exercise of that discretion are well settled. For an applicant to succeed, he must demonstrate that the appeal or intended appeal is arguable and that if the order sought is not granted, the success of the appeal will be rendered nugatory. See **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR**.

13. Having perused the High Court judgment and the draft memorandum of appeal, we are satisfied that the intended appeal is arguable. We need not say more on that issue, lest we embarrass the bench that shall ultimately hear the appeal.

14. Turning to the second limb of the twin principles that must be satisfied, we need to consider whether the intended appeal, if successful, is likely to be rendered nugatory unless stay of execution is granted.

15. The impugned judgment was delivered on 10th March, 2016. The applicant's petition was dismissed with costs to the respondents. The respondents proceeded to file their respective party and party bills of costs. As at the date when this application was argued, the bills had been argued before the taxing master and only a ruling thereon was pending. We cannot therefore tell the exact amount that may be ordered to be paid as costs.

16. The applicant did not contend that the respondents are impecunious and therefore would not be able to refund the taxed costs, in the event that the intended appeal is successful. The respondents are institutions and persons of substance who had averred that they would be well able to repay the costs, if the intended appeal is successful.

17. In the circumstances, we do not think that the intended appeal, if successful, shall be rendered nugatory. Consequently, this application is dismissed with costs to the respondents.

DATED and DELIVERED at KISUMU this 16th day of December, 2016.

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.