IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI,OKWENGU&SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI.289 OF 2015(UR.247/15)

BETWEEN

NAROK COUNTY GOVERNMENT.....APPLICANT

AND

THE SENATE.....1ST RESPONDENT

THE SPEAKER OF THE SENATE.....2ND RESPONDENT

(Being an application for injunction pending the determination of

an intended appeal from the Ruling of the High Court of Kenya

at Nairobi (Onguto, J.), dated 9th November, 2015

in

H.C. Petition No.424 of 2015)

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RULING OF THE COURT

[1] The applicant, Narok ***County Government*** has moved this Court under Rule 5(2)(b) of the Court Rules, by way of a notice of motion dated 3rd December, 2015. The application which was certified urgent seeks an order of interlocutory injunction restraining ***The Senate*** (1st respondent), and/or its Committee from debating and considering any questions on revenue collection from Mara Conservancy and the expenditure thereof, pending the hearing and determination of an intended appeal against a ruling delivered by the High Court ***(Onguto, J.),*** on 9th November, 2015 in Petition No.424 of 2015.

[2] Litigation leading to the motion now before us, was commenced by the applicant through a petition filed in the High Court on 2nd October, 2015. Filed contemporaneously with the petition, was an interlocutory application for conservatory, prohibitory and injunctive orders. The bone of contention between the applicant and the 1st respondent is the revenue collection and expenditure from the Mara Conservancy, which is within the geographical boundaries of the applicant's County.

[3] ***Hon. ole Ntutu*** the Senator for the applicant has submitted questions concerning the revenue received and expended from the Mara Conservancy for debate and consideration by the 1st respondent. The applicant objects to the 1st respondent's entertaining the questions as in its view the revenue from the Mara Conservancy was locally generated revenue. It was the applicant's contention that the 1st respondent was abusing its powers under Article 96(3) of the Constitution, by exercising oversight role over the County in relation to the revenue from the Mara Conservancy, which revenue was not national revenue, allocated to the applicant by the National Government.

[4] In his ruling dated 9th November, 2015, the learned Judge dismissed the application for injunction and conservatory orders, holding *inter alia* that the questions raised in the Senate were limited and did not amount to superintending, controlling or managing the locally generated revenue of the County Government; that no prejudice was likely to be suffered by the applicant if the debate by the 1strespondent on the revenue continued; that the public would be better served if no interim orders were given, and that there were no exceptional circumstances to warrant the granting of the orders sought.

[5] The applicant's motion before us, is supported by an affidavit sworn by its County Secretary, ***Lenku Kanar Seki***, in which it is deponed *inter alia* that the 1st respondent has summoned the leadership of the applicant for questioning on the revenues generated in the Mara Conservancy; that there has been litigation in which orders have been issued restraining the Senator for Narok County from interfering with the leadership of the applicant; and that it is because of the hostility and tension that the Senator is instigating the interference with the applicant's revenue.

[6] In support of the motion, the applicant filed written submissions that were duly highlighted before the Court by Prof. Ojienda, SC. In a nutshell, the applicant is relying on ***Chris Munga N. Bichage vs Richard Nyagaka Tongai & 2 Others [2013] eKLR***; and ***Martin Nyaga Wambora vs County Assembly of Embu & 6 Others [2015]eKLR***, for the proposition that injunctive orders under Rule 5(2)(b) of the Court Rules ought to issue only where there is an intended appeal that is arguable, and in addition, if it is shown that if the orders are not granted, the appeal if successful would be rendered nugatory. Counsel sought to distinguish an arguable appeal under Rule 5(2)(b) of the Court Rules and a *prima facie* case under Order 40 of the Civil Procedure Rules maintaining that in this case, the applicant only needs to prove an arguable appeal and this is a lower bar than that of a *prima facie* case.

[7] ***Hashmukhlal Virchand Shah & 2 Others vs Investment & Mortgages Bank Limited [2004] eKLR*** was relied upon for the submissions that an arguable point need not be one that must succeed but simply one that is worth the court interrogating, and that a single *bona fide* arguable point would be sufficient. In regard to the nugatory aspect, ***Reliance Bank Limited vs Norlake Investment Limited [2002] 1 EA 227,*** was relied upon for the proposition that what may render the success of an appeal nugatory has to be considered within the circumstances of each case, and that the word "nugatory" must be given its full meaning. This is that the appeal will not be rendered worthless, futile, invalid or even trifling.

[8] It was submitted that the questions tabled in the Senate by ***Hon. Ntutu***, for debate and consideration concerned the generation and expenditure of resources from the Mara Conservancy that is locally generated revenue by the applicant; that there was an apparent error and contradiction on the ruling of the learned Judge; and that while the learned Judge agreed with the holding in ***NRB HCCP No. 8 of 2013 International Legal Consultancy Group vs Senate & Clerk of the Senate [2014] eKLR***, that the Senate oversight role in matters concerning revenue was restricted to national revenue allocated to the County Government, he went on to dismiss the applicant's motion seeking to stop the Senate from exercising oversight role over the revenue generated locally.

[9] In addition, it was argued that the learned Judge misdirected himself in failing to realize that the questions that he put forth did not fall under the oversight powers of the Senate as spelt under Article 96(3) of the Constitution. It was reiterated that where there was a specific procedure established by law, such procedure should be strictly followed, and therefore the applicant had an arguable appeal based on

the inconsistencies and irregularities apparent in the decision of the High Court. It is contended further, that in failing to follow the holding in ***NRB HCCP No. 8 of 2013 International Legal Consultancy Group vs Senate & Clerk of the Senate [2014] eKLR***, the learned judge failed to uphold the integrity of the court.

[10] Further, it was argued that there was breach of constitutional provisions specifically Article 47 on right to fair administrative action; Article 189, 174 and 175 on cooperation between government; principles of governance, and objects of devolution. These breaches it was postulated, raised valid triable issues that were determined by the learned Judge, and upon which an arguable appeal could be founded.

[11] On the nugatory aspect, it was pointed out that the leadership of the applicant having been summoned to appear before the 1st respondent, unless the interlocutory orders were issued, the debate would proceed and the appeal would be rendered a mere academic exercise. The Court was thus urged to grant the orders sought.

[12] ***Jeremiah Nyengenye*** (Nyengenye)Clerk of the Senate responded to the motion through a replying affidavit. Nyengenye depones that Hon. Senator ***Stephen ole Ntutu***, the Senator of Narok County forwarded a petition to the Senate relating to financial mismanagement and irregularities in procurement by the County Government of Narok; that in accordance with the Senate standing orders, the petition was approved and tabled in the Senate; that the Speaker directed the Senate Standing Committee on Finance, Commerce and Budget, to investigate the matter and table a report in the house within 60 days; that the Standing Committee tabled a report in the house dated 20thApril, 2015; that the speaker referred the matter to Standing Committee for Public Accounts and Investments for investigations; that during its investigations the Standing Committee on Public Accounts and Investments issued a witness summons to the Governor of the applicant, and it is pursuant to that summons that the petition and application for injunction was filed.

[13] The respondent also filed written submissions that were duly highlighted by learned counsel Mr. S. N. Mwendwa. In brief, it is submitted that the Senate exercises a sovereign power of the people of Kenya in all the 47 Counties, and therefore the applicant's motion offends the Constitution under which power is delegated to the Senate; that under Article 96 of the Constitution, Senators and Members of Parliament defend the Constitution by raising questions and seeking statements from the Executive; that the applicant is obliged under Article 10 of the Constitution to abide by the national values and principles of governance that obligate it to be accountable for public funds, and to exercise good governance, integrity and transparency in its affairs.

[14] In addition, that the attempt by the applicant to bar the 1st respondent from accessing information on revenue collected from the Mara Conservancy is an affront to good governance; that under Article 96 of the Constitution the 1st respondent protects the interests of the Counties and the Government, and therefore it has unfettered constitutional mandate to represent the interest of the entire County; that Article 218 and 220 of the Constitution requires a County Government to disclose in its budget estimates and proposals the sources of revenue and expenditure, before benefiting from the annual revenue allocation; under Article 35 of the Constitution citizens have a right to information and the Senator for Narok was merely exercising his constitutional mandate and right in seeking information from the applicant; and that the Senate has a constitutional mandate to consider any matter of public importance relating to revenue and expenditure of a County Government.

[15] Further, it is submitted that the Court lacks jurisdiction to entertain the issues raised by the applicant by virtue of parliamentary privilege entrenched in Article 117 of the Constitution that provides for freedom of speech and debate in Parliament, and Section 12 of the National Assembly (Privileges and Immunities Act) Chapter 6 Laws of Kenya that provides that proceedings of the National Assembly or its Committees cannot be questioned in any court.

[16] In highlighting the submissions, learned counsel Mr. Mwendwa urged the Court to dismiss the

applicant's motion as it was a frivolous application contravening the powers bestowed on the Senate by virtue of Article 124 and 125 of the Constitution; that the applicant had not satisfied the conditions for granting a stay with regard to the nugatory aspect as the issuance of a summon would not render any intended appeal nugatory; and that in any case, the summons issued by the 1st respondent had already been honoured and there was therefore no further threat.

[17] The motion before us being one under Rule 5(2)(b) of the Court Rules the issue that arises for determination is whether the applicant has satisfied the twin principles regarding arguability of the appeal and the nugatory aspect. These principles have been reiterated by the court many times, as captured by both learned counsel in their written submissions. It is clear that in order for the applicant to succeed in its motion, it must satisfy this Court that it has an arguable appeal, which may be rendered nugatory unless the orders sought are granted.

[18] We take note of the fact that the applicant's interlocutory application that gave rise to the appeal now before us, was for conservative, injunctive and prohibitory orders. A copy of the motion was not availed to us. However, the applicant's submissions sought to draw a distinction between an interlocutory application under Order 40 of the Civil Procedure Rules and an interlocutory application pending appeal under Rule 5(2)(b) of the Court Rules. This gave the impression that the motion in the High Court was brought under Order 40 of the Civil Procedure Rules. If that be the case, an interlocutory injunction under Order 40 of the Civil Procedure Rules will normally as laid down in ***Giella vs Cassman Brown & Company Ltd[1973] EA 358*** and explained in ***Mrao Limited vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125***, be granted if the applicant has established a *prima facie* case with a probability of success. However, since the applicant sought a conservatory order, it may well be that the interlocutory application was also anchored under Article 23 of the Constitution of Kenya. Be that as it may, the issue whether the applicant had established a *prima facie* case with a probability of success, to justify the granting of interlocutory injunction or a conservative order by the learned Judge in the High Court, is one for determination during the hearing of the substantive appeal. Suffice to state that at this stage, the Court is more concerned with preserving the *status quo* so as to ensure that the subject of the appeal will not be rendered obsolete. This means that the Court is more concerned with preserving the right of appeal, and therefore, the applicant must satisfy the Court that he has an arguable appeal that is worth preserving.

[19] A copy of the draft memorandum of appeal has been availed, wherein it is alleged *inter alia*, that the learned judge erred in delivering a ruling which was directly inconsistent with his finding on the role of the Senate, that is, that the Senate only provides oversight role in matters concerning national revenue allocated to the County Government and not revenue generated locally by the County Government. It is not disputed that this issue has been subject of a ruling by the High Court in ***International Legal Consultancy Group vs Senate & Clerk of the Senate [2014] eKLR,*** and that there is an appeal pending before this Court in regard to that case. In his ruling, the learned Judge was aware of this fact and generally accepted that holding. Nonetheless, the learned Judge was of the view that the Senate was not purporting to open up the County Revenue to "structured scrutiny" as would be required in its oversight role but was simply seeking information, and that the questions posed did not amount to superintending, controlling or managing the County Government's locally generated revenue. In our view, the finding of the learned Judge raises a triable issue with regard to his application of the law and this is an issue that is arguable on appeal.

[20] In regard to the nugatory aspect, the question is, what is the threat of injury or violation of rights that the applicant seeks to prevent, and will its appeal be rendered nugatory if the order of stay is not granted. In considering this issue, the learned Judge having noted that the applicants were *inter alia* seeking declaratory orders, stated as follows:

> ***"I hold the view that public interest will be better served if no orders are granted in the interim. I have also ascertained that if the orders are not granted the petitioner would not be of necessity put to hardship or unnecessary prejudice. If too the orders sought are not granted, the petition itself is not likely to be rendered nugatory."***

[21] We entirely agree with the views expressed by the learned Judge. The applicant sought to have the

Senate restrained from considering, debating, discussing and or otherwise overseeing the expenditure and or revenue generated from the Maasai Mara Conservancy. Even if the debate in the Senate proceeds, no significant loss, injury or prejudice is likely to be suffered. In any case, if the applicant is successful, a declaratory order if issued, will clarify and rectify the position. In our view, if the orders sought are not granted, this appeal will neither be rendered nugatory nor a mere academic exercise. We decline to grant an order of stay pending appeal. Consequently, the applicant's motion fails and is dismissed with costs.

Dated and Delivered at Nairobi this 9th day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR