



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MUSINGA & GATEMBU, JJ.A)**

**CIVIL APPLICATION NO. NAI 236 OF 2014 (UR 184/2014)**

**IN THE MATTER OF INTENDED APPEAL**

**BETWEEN**

**GOVERNORS BALLOON SAFARIS LIMITED ..... APPLICANT**

**AND**

**THE ATTORNEY GENERAL ..... FIRST RESPONENT**

**SKYSHIP COMPANY LIMITED ..... SECOND RESPONDENT**

**THE COUNTY GOVERNMENT OF NAROK ..... THIRD RESPONDENT**

*(Being an application for Conservatory or Interim Orders pending the hearing and determination of the Intended Appeal against the Ruling and Order of the High Court of Kenya, Milimani Law Courts, Constitutional & Human Rights Division, Nairobi given on 9<sup>th</sup> September 2014 by (Odunga, J.)*

*in*

***HIGH COURT PETITION NO. 428 OF 2014***

**\*\*\*\*\***

**RULING OF THE COURT**

1. Governors Ballon Safaris Limited, the applicant, has moved this Court under Rule 5(2)(b) of the Rules of the Court to stay an order given by the High Court on 9<sup>th</sup> September 2014 in Constitutional Petition Number 428 of 2014 pending the hearing and determination of the intended appeal from that order. The applicant also seeks, orders for stay of execution or enforcement of an order made on 17<sup>th</sup> July 2014 in High Court Civil Case Number 461 of 2008 and for stay of execution of warrants of attachment and sale issued by the High Court in that suit pending the hearing and determination of the intended appeal. The applicant has further sought a mandatory injunction to compel the High Court to release to the applicant a sum of Kshs. 23,058,614.00 deposited into court pursuant to the order of the High Court given on 17<sup>th</sup> July 2014 in High Court Civil Case Number 461 of 2008.

2. The application is based on the grounds that the applicant has strong arguable grounds of appeal against the decision of the court given on 9<sup>th</sup> September 2014 in Constitutional Petition Number 428 of

2014 in that the High Court erred in refusing to enforce and protect the applicant against outlawed judicial process; that the applicant is being compelled, in violation of its constitutional rights, to comply with warrants of attachment procured in a process that violates Article 160 of the Constitution; that the object of the intended appeal will be defeated and rendered nugatory if the orders sought are not granted and that it is in the interest of justice that conservatory orders be granted.

### **The background**

3. In August 2008 the applicant filed suit in the Commercial and Admiralty Division of the High Court being HCCC No. 461 of 2008. In that suit the applicant averred that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were in breach of an agreement under which it claimed that it had exclusive rights to carry on air services for passengers using hot air balloons within the area adjacent to Little Governors Camp in the Maasai Mara Game Reserve. Together with the suit, the applicant also filed an application for interlocutory injunctive relief in that suit that was dismissed by the court on 11<sup>th</sup> September 2008 after interparty hearing.

4. Based on an application by the 2<sup>nd</sup> respondent dated 31<sup>st</sup> March 2010 and filed on 16<sup>th</sup> April 2010, the High Court (Mabeya, J.) in a ruling given on 22<sup>nd</sup> November 2013 dismissed the applicant's suit for want of prosecution. Aggrieved, the applicant filed a notice of appeal and moved this Court in Civil Application No. NAI 35 of 2014 seeking to stay further proceedings in HCCC No. 461 of 2008 pending the hearing and determination of an intended appeal from the decision of the High Court made on 22<sup>nd</sup> November 2013. This Court dismissed that application on 13<sup>th</sup> June 2014.

5. After the dismissal of the applicant's suit in HCCC No. 461 of 2008, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents presented their respective party and party bills of costs to the court for taxation. In separate rulings delivered on 5<sup>th</sup> June 2014, the Deputy Registrar of the court taxed and allowed costs in the sum of Kshs. 23,010,674.00 in favour of the 2<sup>nd</sup> respondent and Kshs. 23,056,164.00 in favour of the 3<sup>rd</sup> respondent. A certificate of taxation dated 11<sup>th</sup> July 2014 was issued and thereafter the 2<sup>nd</sup> respondent commenced execution proceedings for the recovery of taxed costs. A warrant of sale of the applicant's property in execution was issued on 18<sup>th</sup> July 2014.

6. On 23<sup>rd</sup> July 2014 the applicant presented an application to the High Court under Rule 11(2) of the Advocates Remuneration Order of the Advocates Act seeking to review and reverse the taxation by the Deputy Registrar and asking the court to re-assess the costs. Meanwhile, on 26<sup>th</sup> July 2014, auctioneers proclaimed the applicant's moveable property and intimated that they would proceed to remove the proclaimed goods from the applicant's premises and sell the same by public auction unless the applicant paid Kshs. 23,058,614.00 and auctioneers charges within 7 days of the proclamation.

7. The proclamation precipitated an application by the applicant presented to the High Court on 28<sup>th</sup> July 2014. In that application the applicant sought an order to stay execution of the warrants of attachment and sale issued by the court. The applicant prayed that execution of the order of the court awarding costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be stayed pending the hearing and determination of the application dated 23<sup>rd</sup> July 2014. The grounds in support of that application were that the warrants of attachment and sale issued in execution are invalid, null and void having been issued in the absence of an application for execution as required under the rules of civil procedure and without payment of the prescribed court fees; and that it would be prejudicial and defeat the ends of justice to execute for costs in the face of the impending application for review and assessment of costs by a judge.

8. The applicant's application dated 28<sup>th</sup> July 2014 was heard on the same day by Gikonyo, J. who gave an order, ex-parte, in favour of the applicant staying execution of the warrants of attachment on condition that the applicant deposits the entire taxed costs in the amount of Kshs. 23,056,164.00 into court within 45 days. The learned judge directed the applicant to serve the application dated 28<sup>th</sup> July 2014 and scheduled the same for hearing inter partes on 23<sup>rd</sup> September 2014.

9. On 28<sup>th</sup> August 2014, and while the application dated 28<sup>th</sup> July 2014 referred to above was pending determination the applicant initiated new proceedings by petitioning the Constitutional and Human Rights Division of the High Court in Petition No. 428 of 2014 for numerous reliefs. The applicant sought a declaration that the certificate of taxation and the subsequent warrants of attachment and sale issued on 11<sup>th</sup> July 2014 in HCCC No. 461 of 2008 without an application and without payment of requisite court fees are unconstitutional, invalid, null and void; a declaration that the process leading up to the issuance of the certificate of costs and warrants of attachment in the said suit is unconstitutional; a declaration that to compel the applicant to obey or comply with the warrants of attachment is unconstitutional; a declaration that the order issued by the High Court on the applicant's own motion in HCCC No. 461 of 2008 granting conditional order of stay is unconstitutional; an order of permanent injunction to restrain the respondents from enforcing orders issued in HCCC No. 461 of 2008; an order for criminal proceedings to be instituted with respect to that suit to identify and prosecute the persons or authority that exerted undue influence, control or direction of due process in the said suit and for costs.

10. That petition was premised on the applicant's contention that its constitutional rights under Articles 2, 159, 50, and 160 of the Constitution of Kenya, 2010 had been contravened in the course of exercise of judicial authority in HCCC No. 461 of 2008 that resulted in the execution process complained of in that suit. After hearing the parties in that petition, the High Court (G. V. Odunga, J.) in a ruling delivered on 9<sup>th</sup> September 2014 stated that:

***“It is clear that the applicant herein approached the Commercial Division of this Court for redress which it obtained though the redress may not have been to its satisfaction. Before the said matter could be heard to its conclusion, the applicant has invoked this Court's jurisdiction without even bothering to withdraw the proceedings in the said Division. In my view the applicant is with due respect playing lottery with the judicial process. In Charles Mugunda Gacheru vs The Senior Resident Magistrate, Principal Magistrate's Court Nyeri & Others Nyeri HCMA No. 24 of 2005, this Court held that a party who having filed a case in court, refers the matter to arbitration, goes to another court while the arbitration proceedings are pending and obtains an order there from without disclosing the existence of the earlier case, abandons the latter case and files another case without disclosing the existence, pendency and connection with the first case, is abusing the process of the court .”***

11. The learned judge proceeded to hold that the petition by the applicant ***“is an abuse of the process of the Court”*** and struck out the same alongside the accompanying application by which the applicant sought conservatory orders:

***“Being satisfied that this petition was instituted for some ulterior motive or some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process i.e. to avoid complying with the conditions given by the Commercial and Admiralty Division of this Court, it is my duty and obligation to bring a stop to these proceedings. In my view a party ought not to open a new legal battle front while engaging his or her opponent at a different combat zone with a view to achieving the same or substantially the same results. In the premises, the petition herein including the application for conservatory orders is hereby struck out with costs to the Respondents.”***

12. Dissatisfied, the applicant lodged a notice of appeal dated 15<sup>th</sup> September 2014. The applicant's grounds of appeal against that decision as set out in a draft memorandum of appeal contained in the record of application before us are that the learned judge erred by *dismissing* the petition and application *“by relying on a law that had been repealed and revoked by the Constitution”*; that the judge denied the applicant access to justice by treating as a mere irregularity the exercise of judicial authority that was outlawed by the Constitution; that by dismissing the petition and application for conservatory orders the learned judge thereby sanctioned invalid warrants of attachment and sale that had been obtained by the 2<sup>nd</sup> respondent through exercise of judicial authority that is outlawed by the Constitution.

13. It is against that background that applicant has moved this Court under Rule 5(2)(b) of the Rules of

this Court for the orders to which we have referred at the onset of this Ruling.

### **Submissions by counsel**

14. At the hearing of the application before us, the parties were represented by learned counsel. Mr. D. Oyatsi appeared with Ms. E. Akello for the applicant. Mr. W. Amoko with Mr. S. Luseno appeared for the 2<sup>nd</sup> respondent. Mr. J. Kemboi with Ms. J. Jakaila appeared for the 3<sup>rd</sup> respondent. Though served, there was no appearance for the 1<sup>st</sup> respondent.

15. Mr. Oyatsi submitted that under Article 160(1) of the Constitution of Kenya, 2010 it is an edict that the judiciary should not be subject to the control or direction of any person or authority when exercising judicial authority; that in the present case that constitutional edict was contravened to the extent that warrants of attachment and sale of the applicant's property were issued without due process and without compliance with the provisions of the Civil Procedure Rules; that no application for execution as required under rule 7 of Order 22 of the Civil Procedure Rules was submitted to the court and that the prescribed court fees under the Judicature Act were not paid; that the prescribed process under the Civil Procedure Rules ensures due process is followed and rule of law respected and to the extent that the prescribed procedure was not followed prior to the issue of the warrants of attachment and sale of the applicant's property, then whoever exercised judicial authority to issue warrants acted either on verbal direction or some form of influence by some parties unknown to the applicant; that the purpose of due process and rule of law is integrity of process; that the learned judge was wrong and made a fundamental error in regarding the non compliance with due process as mere irregularity when in fact the non observance of due process was a violation of the Constitution.

16. In support counsel referred us to the decision of this Court in **Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation Civil Appeal No. 59 of 1993** for the proposition that as the warrants of attachment and sale were issued in violation of Order 22 rule 7 of the Civil Procedure Rules and without payment of court fees, then the same are invalid, null and void; that if an act is void, then it is in law a nullity and not a mere irregularity as the learned judge of the High Court held. Counsel also referred us to the High Court case of **Chemey Investments Limited vs. A.G and another High Court Petition No. 94 of 2005** where the court emphasized that the Constitution protects a higher value of integrity and rule of law which cannot be side stepped and that in the present case the integrity of the proceedings have been undermined.

17. Mr. Oyatsi went on to say that the learned judge also erred in taking the view that the constitutional violations that the applicant complained of could be canvassed in the Commercial and Admiralty Division of the Court in the context of HCCC No. 461 of 2008. According to counsel, under rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules), constitutional issues arising should be addressed through separate constitutional procedure. For those reasons, Mr. Oyatsi argued, the applicant has demonstrated that it has an arguable appeal and the requirements for the exercise of this Court's discretion under Rule 5(2)(b) of the rules of this Court have been fulfilled.

18. Counsel further submitted that having regard to the principle in **Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation** (supra) this Court should issue a mandatory injunction as sought for the release of the payment made into court; that a prima facie case for a conservatory order has been made out and this Court has the power, as exemplified in the case of **Haircare Beauticians Ltd vs. Standard Properties Limited and Another Civil Application No. 179 of 1998**, to issue mandatory injunction; that the amount deposited in court is a lot of money and to deny the applicant the use of it indefinitely will render the object of appeal nugatory.

19. Opposing the application, Mr. Amoko for the 2<sup>nd</sup> respondent submitted that the applicant's application is an abuse of the process of the court and is based on unsubstantiated allegations against judicial officers; that the order given by the High Court on 9<sup>th</sup> September 2014 from which the applicant intends to appeal is a negative order in that it struck out the applicant's petition and application and is therefore incapable of being stayed; that to the extent that the applicant is seeking stay of execution of warrants of attachment

and sale issued in HCCC No. 461 of 2008, there is no jurisdiction to stay proceedings when the intended appeal is in relation to different proceedings; that in any event the validity of the warrants of attachment and sale with respect to which the stay is sought lapsed; that the order given by the High Court in HCCC No. 461 of 2008 granting the applicant conditional stay of execution subject to deposit of the decretal amount has not been appealed against and neither has the applicant sought review of the same and this Court cannot grant the mandatory injunction sought; that on account of the manifest absence of jurisdiction to grant any of the orders sought, the application should be dismissed.

20. According to Mr. Amoko, the applicant has not demonstrated that it has an arguable appeal; the petition before the High Court was effectively a challenge against execution which is a matter falling under section 34 of the Civil Procedure Act to be addressed by the court seized of the matter and not by a separate suit as the applicant purported to do; even if there was violation of procedure, which is not the case, that does not elevate the matter to a constitutional issue.

21. Counsel referred us to the decision of **Naomi Wangechi Gitonga and others vs. IEBC and others Civil Application No. 2 of 2014** where the Supreme Court declined to assume jurisdiction on account of the issues there being significantly remote from reaching the constitutional threshold. Counsel submitted that the applicant's petition before the High Court did not set out, as required, the alleged violations of the constitution. In that regard counsel referred us to the decision of this Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012**. For those reasons, it was counsel's view that there is nothing arguable in the intended appeal.

22. On the question whether the intended appeal will be rendered nugatory unless we allow the application, Mr. Amoko stated that the applicant has already deposited the amount ordered by the High Court and that there is already a stay of execution by consent that was recorded upon the money being deposited and there is therefore no question of the intended appeal being rendered nugatory. With that, Mr. Amoko urged us to dismiss the application.

23. Mr. Kemboi for the 3<sup>rd</sup> respondent, referred us to the replying affidavit sworn by Lenku Kanar Seki, the County Secretary of the 3<sup>rd</sup> respondent, and submitted that the application is an abuse of the process of the court; that the intended appeal is not at all arguable; that the applicant admitted before the High Court that the grounds on the basis of which the application for stay of execution in HCCC No. 461 of 2008 was based are the same grounds that formed the basis of the constitutional petition; that having placed all its grievances before Gikonyo, J. who granted the applicant conditional stay of execution, ex parte, the applicant then reformulated the very same grounds and presented them as constitutional issues; that by dint of Article 165(3)(b) of the Constitution, each and every High Court judge has jurisdiction to deal with constitutional issues arising in any action and the learned judge of the High Court was right to hold that the Commercial and Admiralty Division of the High Court is empowered to hear and determine any constitutional issue.

24. According to Mr. Kemboi, the object of the applicant's constitutional petition was to stay orders imposing the condition for the payment of the decretal sum in HCCC No. 461 of 2008; that the question whether the warrants of attachment and sale were regularly issued is a matter for determination by the High Court in HCCC No. 461 of 2008. Counsel concluded by saying the intended appeal, though frivolous, will not be rendered nugatory if we decline to grant the orders sought.

25. In his brief rejoinder, Mr. Oyatsi reiterated that the proceedings before the High Court in the constitutional reference and before this Court are concerned with the constitutional issue of integrity of the process and rule of law; that the petition in the High Court having been struck out, a final order was thereby issued and this Court can entertain the present application and grant the reliefs sought; that the deposit sought to be released was paid into court to prevent execution and that this Court should order the release of that money through mandatory injunction.

### **Determination**

26. We have considered the application, the affidavits and the rival arguments. The rationale behind

empowering the Court to grant relief under rule 5(2)(b) was captured by Githinji JA in Equity Bank Limited vs. West Link Mbo Limited Civil Application No Nai 78 of 2011 (Ur. 53/2011), where he stated:

*“It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. ... It is clear that rule 5(2)(b) is a procedural innovation designed to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”*

27. And in the earlier case of Ishmael Kagunyi Thande v HFCK Civil Application Nai No. 157 of 2006 this Court stated:

*“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant 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.”*

28. The first substantive prayer in the applicant’s application under consideration is for stay of the order given on 9<sup>th</sup> September 2014 in Constitutional Petition No. 428 of 2014. That order struck out the applicant’s petition and application as an abuse of the process of the court. That order did not require the applicant to do or refrain from doing anything at all save to the extent that the court awarded costs to the respondents. There is therefore merit in the respondents’ submission that there is nothing for us to order to be stayed. In Kanwal Sarjit Singh Dhiman v Keshavji Shah Civil Application Nai No. 320 of 2006 [2008] eKLR this Court stated:

*“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By an order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences v Oranga & others [1976] KLR 63 at page 66 paragraph C).”*

29. In Western College of Arts & Applied Sciences v Oranga & others (supra), Law, V.P. said:

*“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for stay, to enforce or restrain by injunction.”*

30. Recently in the case of Marangu v Rucha & Another v

Attorney General & 10 others [2014] eKLR (Civil Application NO. 180 of 2013 (Ur 127/2013)) this Court stated that:

*“The above, in our view, does not constitute an order directing any party to do or refrain from doing anything. We can do no better than to reproduce a statement made recently by this Court in F&S Scientific Ltd v Kenya Revenue Authority & another, Civil Application No. 260 of 2012. The Court said:-*

*“Asking for “stay of implementation” of a decision by the respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law it is not possible to grant an order*

***of stay of “execution” or “implementation” where the action has been dismissed.” this is the view of this Court as expressed in many decisions. For instance, in the case of Republic v Kenya Wildlife Services & 2 others, Civil Application No. Nai 12 of 2007 the Court said in part:-***

***“The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the Superior Court which can be the subject matter of the application for injunction or stay...”***

31. The other orders that the applicant seeks are that:

***“There be a stay of execution of the warrants of attachment and sale issued by the High Court on 17th July 2014 in HCCC No. 461 of 2008 pending hearing and determination of the intended appeal;***

***There be a stay of execution or enforcement of the Court order made on 17th July 2014 in HCCC No. 461 of 2008 pending hearing and determination of the intended appeal. ”***

32. It is clear that those orders were made in HCCC No. 461 of 2008. In applications brought under rule 5(2)(b) it is the lodging of the notice of appeal that gives this Court the jurisdiction to grant any order of stay of execution under the same rule. See: **Halai & another v Thornton & Turpin (1963) Ltd [1990] KLR 365**. It follows therefore that the stay can only relate to stay of execution of the subject matter of the notice of appeal, which is the decision of the High Court in Petition No. 428 of 2014, which is the decision to be appealed against. The warrants of attachment did not arise from this petition and therefore this Court has no place or jurisdiction to issue orders touching on the warrants. Furthermore, section 34(1) of the Civil Procedure Act provides that all questions arising between parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.

33. Even if we were to proceed on the basis that the applicant’s application is properly before us, the applicant’s main complaint in the intended appeal is that the learned judge of the High Court was wrong to conclude that the irregularities complained of in relation to the warrants of attachment and sale, namely; the absence of an application for execution and non-payment of court fees, are ‘mere irregularities’ and did not amount to constitutional violation. Quite apart from the fact that the applicant has proceeded, as is evident from the draft memorandum of appeal, on the wrong footing that its petition was “dismissed” when it was in fact “struck out” as an abuse of the process of the court, it is clear to us that the petition before the High Court was based on the very grounds upon which the applicant’s application dated 28<sup>th</sup> July 2014 in HCCC 461 of 2008 was based. The applicant obtained a favourable order staying execution but was displeased by the condition imposed that required it to deposit the decretal amount in court. Even before that application was heard inter partes, the applicant lodged the constitutional petition on the very grounds. The issue of the validity or legality of the warrants of attachment and sale is the subject of the application pending determination by the High Court. It was unnecessary, and indeed an abuse of process of the court, to institute another suit in Petition 428 of 2014, before the Constitutional Division of the High Court over the same matter. Can the learned judge of the High Court then be faulted for taking the view that the applicant “ought not open a new legal battle front while engaging his or her opponent at a different combat zone with a view to achieving the same or substantially the same results?” We do not think so. We are therefore not persuaded that the intended appeal is arguable.

34. Rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 sets out the matters that a petitioner should disclose in an application under rule 4 of those rules. The requirement under rule 10(2)(e) of those rules for a party to indicate the suit in which a constitutional issue arises cannot be construed to mean that the High Court could not, in HCCC 461 OF 2008 that was pending in the Commercial and Admiralty division, have jurisdiction to hear and determine a constitutional issue. As the learned judge of the High Court stated, the jurisdiction of the High Court under Article 163 of the Constitution empowers the High Court to hear and determine a

constitutional issue. To that extent, we are not convinced that the intended appeal is arguable.

35. For all the above reasons we do not consider that the applicant's application before us has got any merit. Being of that view, we need not consider the question whether the intended appeal will be rendered nugatory if we decline the application. We accordingly dismiss the application with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of January, 2015.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**