



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OUKO & GATEMBU, J.J.A)

CRIMINAL APPLICATION NO. NAI. 3 OF 2014 (R)

BETWEEN

TIMOTHY ISAAC BRYANT1ST APPLICANT
GITONGA GERRY GRAHAM 2ND APPLICANT

(Both practicing law in the firm and style of Bryant & Associates Advocates)

REGISTERED TRUSTEES OF KENYA

YOUTH HOSTELS ASSOCIATION 3RD APPLICANT

AND

INSPECTOR GENERAL OF POLICE.....1STRESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

ADAN AHMED HASSAN3RD RESPONDENT

DESIRAL COMPANY LTD.4TH RESPONDENT

JAMES OSOGO5TH RESPONDENT

GIDEON CHRIS MAINA6TH RESPONDENT

MUSA MUKANGWA7TH RESPONDENT

FRANCIS MUTHINI 8TH RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling of the High Court of Kenya (Achode, J.) dated 12th August, 2014

in

HCC MISC. APPLICATION NO. 194 OF 2013)

RULING OF THE COURT

The dispute giving rise to the instant application and to which this ruling relates arose out of some Kshs. 31,565,548.40 which was deposited in the 1st and 2nd applicants' account No. 01109162693500 with Cooperative Bank of Kenya Limited, Upper Hill Branch by the purchasers of the 3rd applicant's parcel of land known as Nairobi LR No. 209/965/2 along Ralph Bunch Road.

The money, part payment of the purchase price was received by the 1st and 2nd applicants in their capacity as advocates for the 3rd applicant. It subsequently emerged that the sale may have been entered into by persons who were not authorized to sell the property on behalf of the 3rd applicant. As a result, the respondents claiming to be the *bona fide* trustees of the 3rd applicant and another group claiming to have also purchased the same property, reported the matter to the police. Chief Inspector of Police, Adan Ahmed Hassan, the investigating officer moved the subordinate court in the Chief Magistrate's Court Misc. Criminal Application No. 640 of 2013 for a warrant to investigate and freeze the aforesaid bank account.

After the court granted the two prayers and upon the applicant's learning of them, the latter moved to the High Court for their revision relying on **Article 165 (6)** of the Constitution and **sections 362, 364 and 365** of the Criminal Procedure Code. The learned Judge, (Achode, J.) in effect found in her ruling of 12th August 2014 that the orders to freeze the applicant's account by the subordinate court were properly issued on the material presented to that court; that there was reasonable suspicion that a crime had been committed in the purported sale of the suit property. With that, the learned Judge declined to review the order for investing and freezing the account, instead directing that the funds in the aforesaid account be deposited in the Judiciary Account and only then the applicants would be free to operate the account; further that the applicants to furnish accounts concerning the operation of the bank account for the relevant period.

Upon another application by the applicants, the learned Judge clarified that, pursuant to her aforesaid order only Kshs. 23,000,000 be transferred to the Judiciary Account from Account No. 01109162693500.

Then came the order of 12th August 2014, prompted by an application in which the 5th to 8th respondents asked the court to order the applicants to transfer the entire balance in the Judiciary Account in order to bring the total funds to be deposited in court to Kshs. 31,565,548.40 plus interest. This order meant that the applicants were to transfer within 21 days from the date of ruling Kshs. 8,694,587.90 together with interest from their account number 01109162693500 to the Judiciary Account, this being the balance after the initial transfer of Kshs. 23,000,000.

Being aggrieved by this order, the applicants have expressed their intention to challenge it on appeal to this Court by filing a notice of appeal. In the meantime, they have instituted the present application under **Rule 5 (2) (b)** of the Court of Appeal Rules to stay the execution of those orders. They have deponed that they are unable to comply with those orders because after having transferred Kshs. 23,000,000 and the court having allowed them to operate the account, they released the rest of the money to their client's account hence under the advocate/client relationship they cannot access the funds; that the balance of the funds in question (Kshs. 8,694,587.90) have no bearing to the proceedings as the complaint related only to Kshs. 23,000,000; that the 5th to 8th respondents filed ELC. No. 1042 of 2013 in which the question of who the *bona fide* trustees of the 3rd applicant is raised and yet to be determined.

From these averments, it is the applicants' view that their intended appeal is arguable; that if the order of stay sought herein is not granted, the applicants stand to be committed to jail for contempt of court due to their inability to transfer the balance of the funds.

In opposing the application, the respondents have argued that the order to deposit the funds into court was intended to avoid loss and further embezzlement; that if the balance is deposited in court and should the

court find that the respondents are not entitled to the money, it would be released to the applicants; that Kshs. 8,694,587.90 is part of Kshs. 125,000,000 paid through the applicants' law firm. In their opinion, the intended appeal is not arguable, neither have the applicants demonstrated how the appeal will be rendered nugatory if the sum of Kshs. 8,694,587.90 is deposited in court; and that the order of the High Court is intended to preserve the funds pending the hearing and determination of H.C. ELC No. 1042 of 2013.

A motion to stay execution of an order of a court under **Rule 5 (2) (b)** aforesaid generally involves the weighing of two well-known considerations, namely, whether the intended appeal is arguable and whether the rejection of the application for stay would render the appeal or intended appeal nugatory. See **Oraro & Rachier Advocates V. Co-operative Bank of Kenya Limited** Civil

Application No. Nai. 358 of 1999 and **Stanley Kangethe Kinyanjui V. Tony Ketter & 5 others**, Civil Application No. 31 of 2012, relied on by learned counsel for the applicant.

In considering the two principles, the Court must bear in mind that:-

- i) Both limbs must be demonstrated to exist.
- ii) An arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the court;
- iii) Whether or not an appeal will be rendered nugatory is a question of fact which must depend on the peculiar facts and circumstances of each case.
- iv) Where an award of damages is found to be sufficient remedy to compensate the applicant, an order under **Rule 5 (2) (b)** will not normally be granted.
- v) A solitary arguable point is sufficient to discharge the burden on the first limb.

At the same time the Court must weigh the claims by both sides of the dispute and strike an equitable balance. The duty of the Court, at this stage does not extend to consideration of the merit of the intended appeal. See **Ibis Aviation Vs. Equatorial Commercial Bank & Another** [1999] 1 EA 141, **Githunguri vs. Jimba Credit Corporation Ltd & others** [1988] KLR 838 and **Reliance Bank Ltd. Vs. Norlake Investment Ltd** [2002] 1EA 227.

So that we confine our decision to the specific complaint before us, we reiterate that according to the notice of appeal filed on 25th August 2014, it is the orders of 12th August, 2014 that aggrieved the applicants. Prior to this order, we have earlier noted that the learned Judge had made two other orders, namely, on 12th June, 2014, directing that the money, "*the subject matter*" of the dispute be deposited in court and on 26th June, 2014 when she clarified that the money, "*the subject matter*" to be deposited in court was Kshs. 23,000,000.

In the impugned ruling the court found that although the sale price of the suit property was Kshs. 125,000,000 only Kshs. 31,565,548.40 had been proved to be in the applicants' account at the time the freezing order was made by the subordinate Court; that the order of 26th June 2014, ought to have encompassed the entire amount of Kshs. 31,565,548.40 hence the balance must similarly be deposited in court.

The applicants will be challenging the decision on, among other grounds that:-

- i) At the time the order was made, it was not practical to deposit the balance in court because it had been released to their client.
- ii) The balance of funds in question have no bearing on the proceedings before the learned Judge

since the complaint related only to Kshs. 23,000,000, already deposited in Court.

iii) Considering the pendency of H.C. ELC 1042 of 2013 in which the same issues as those raised in the application before the Judge are pending determination, the learned Judge erred in entertaining an application of a criminal nature in a purely civil claim, and issuing orders whose effect was to determine the pending suit before being heard on merit.

iv) The applicants cannot deal with their client's account except in accordance with the law.

These grounds, we think raise points that cannot be considered frivolous. On the second limb, the applicants maintain that they cannot deposit in court what they do not have, the funds having already been released to the order of their client. This will be one of the questions to be determined in the intended appeal although we expected some *prima facie* evidence that the funds are no longer under the applicant's control.

If indeed, as argued but yet to be proved, the funds are no longer with the applicants, it would follow that they would personally be required to raise a whopping Kshs. 8,694,587.90. During the hearing of the application before us, it emerged that the respondents have moved the High Court to commit the applicants to jail for contempt of court.

For these two related reasons, (namely, that the applicants parted with the funds and the imminent contempt of court proceedings) and balancing the claims by both sides, we find that if we do not grant the relief sought herein, the High Court, pursuant to its orders of 12th August 2014, may proceed to punish the applicants for failing to comply with those orders, thereby rendering the intended appeal nugatory. The respondents can take solace in the fact that at least Kshs. 23,000,000 is secured and that should the intended appeal be decided in their favour, the balance will be availed by the parties concerned.

Accordingly, we allow the application and order that there will be a stay of the orders of the High Court made on 12th August 2014 pending the filing and determination of the intended appeal.

Dated and delivered at Nairobi this 6th day of February, 2015.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR