



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 311 OF 2013 (UR. 227/2013)

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

AND

THE INTERIM SECRETARY.....1ST RESPONDENT

THE CHIEF FINANCE OFFICER.....2ND RESPONDENT

DIRECTOR OF LEGAL AFFAIRS ALL OF NAIROBI

CITY COUNTY.....3RD RESPONDENT

GEORGE GIKUBU MBUTHIA.....Ex-Parte APPLICANT

(An application under Rule 1(2); 5(2) (b) of the Court of Appeal Rules (2010) and Sections 3A, 3B and 5 of Appellate Jurisdiction against the Ruling and Orders of the High Court of Kenya at Nairobi (Wendoh, J.) dated 12th March, 2007, 27th March 2007 and 27th May, 2009 (W.K. Korir, J) dated 30th May and 10th October, 2013

in

JR Misc. Civil Application No.1033 of 1998)

RULING OF THE COURT

This is an application by **George Gikubu Mbutia** mainly brought under

Rule 5(2)(b) of the Court of Appeal Rules essentially for orders that:

- a. Stay of execution and stay of any further proceedings be granted.
- b. The orders given by Wendoh, J on 12th March, 2007; 27th March, 2007 and 27th May, 2009 be set

aside.

- c. The ruling by the Deputy Registrar, W. M. Muiruri dated 3rd August, 2007 are null and void *ab initio*.
- d. The orders given by Korir, J on 30th May, 2013 and 10th October, 2013 be set aside.
- e. The taxed costs computed by A. N. Ongeru on 2nd August, 2013 be set aside.

At the hearing of the application the applicant abandoned prayers (b) and (c) and pursued prayers (a), (d) and (e). The main dispute is between the applicant and Nairobi City Council – the 3rd respondent herein. The 1st, 2nd and 3rd respondents are officers of the 3rd respondent. The applicant acts in person while all the respondents are represented by **Mr. D. B. Wati**.

In outline, on 12th May, 1997, the applicant obtained a decree against the 3rd respondent in HCCC No.1874 of 1988 for a total of sum shs.11,179,746. In 1998, the applicant filed a Judicial Review Application in HCCC Misc. case No.1033 of 1998 against the 3rd respondent seeking an order of *mandamus* to compel the 3rd respondent to pay the decretal sum, costs and interest.

On 1st October, 1998 the High Court granted the order of *mandamus* which did not specify the amount payable. By a notice of motion dated 29th September, 2006, the applicant sought leave to institute contempt of court proceedings against the 3rd respondent on the ground that the 3rd respondent had paid shs.12,823,025 over a period of four years leaving an unpaid balance of shs.2,246,767 as at 30th September, 2006. Upon hearing the application for leave, Wendoh, J formed the opinion that the disagreement between the parties was on the sum due and on 12th March, 2007 ordered the Deputy Registrar to deal with the issue of accounts. By a statement of account, W. M. Muiruri, Senior Principal Deputy Registrar computed the amount due as shs.319,501/75. On 27th March, 2007, Wendoh, J ordered the 3rd respondent to pay the computed amount failing which the application for contempt should proceed to hearing. A subsequent application by the applicant to have the computation reviewed was dismissed on 3rd August, 2007. A further application dated 20th January, 2009 by the applicant seeking an order to set aside the entire proceedings commenced by his own application for leave dated 29th September, 2009, was dismissed by Wendoh, J on 27th May, 2009.

The applicant made two further applications in the High Court seeking various orders including an order to set aside the order of 27th March, 2007 by Wendoh, J.

The High Court (Korir, J) dismissed the application on 30th May, 2013 but ordered the Deputy Registrar to, among other things, calculate interest on shs.319,501/76 which was outstanding as at 27th March, 2007; tax the respondent's bill of costs and list the matter before the court on 27th June, 2013 for further orders.

By an application dated 19th July, 2013 the applicant again, applied for various orders including the setting aside of the orders of Korir, J dated 30th May, 2013 and the order of Wendoh, J dated 27th May, 2009. The application was dismissed by Korir, J on 10th October, 2013 who further directed that the Deputy Registrar to comply with the order of 30th May, 2013 and fix the matter for mention within 21 days.

The applicant filed a notice of appeal dated 14th October, 2013 against the ruling of Korir, J dated 10th October, 2013. In the meantime, A. N. Ongeru, the Deputy Registrar had taxed the respondent's bill of costs at shs.311,175 and computed the interest on shs.319,501/76 at shs.236,449 and the total sum owed to the applicant at shs.555,950 as at 2nd August, 2013.

The application is opposed on the grounds, *inter alia*, that the application is incompetent; that the applicant has not shown that the intended appeal is arguable and that the applicant has not shown that the appeal would be rendered nugatory if stay is not granted.

In a 5(2)(b) application, an applicant is required to demonstrate that the appeal is arguable and that, unless the application is granted the intended appeal or the appeal would be rendered nugatory.

As regards the arguability of the intended appeal, it is clear from the notice of appeal dated 14th October, 2013 that the applicant intends to appeal against the ruling of Korir, J dated 10th October, 2013. By the said ruling Korir, J dismissed the applicant's application seeking orders to set aside *inter alia* the orders of Wendoh, J dated 27th May, 2009 and his own order dated 30th May, 2013.

The applicant has not, either in the application or in the supporting affidavit disclosed the grounds on which he intends to appeal against the ruling of 10th October, 2013. Instead, he asks the Court to set aside the orders made by Korir, J on 30th May, 2013 and on 10th October, 2013 including the taxation of costs by A. N. Onger, Deputy Registrar, on 2nd August, 2013. The application as it relates to the setting aside of the orders and the taxation is obviously incompetent. This not being an appeal, the Court has no jurisdiction to set aside the impugned order and the taxation.

The prayers for stay of execution and stay of any further proceedings have not been substantiated. The applicant has not demonstrated that there is anything in the impugned orders capable of execution or that there are further proceedings prejudicial to him which are likely to take place in the High Court. The impugned orders were precipitated by the application by the applicant for leave to institute contempt proceedings against the respondents for non-payment of the full decretal sum. It transpired at the hearing of the application that the 3rd respondent had paid a substantial sum and the dispute was about the computation of the outstanding balance. Appropriate orders were made by Wendoh, J and Korir, J and the outstanding amount has been computed showing that the applicant is owed shs.319,501/76 together with shs.236,449 as interest – a total of shs.555,950. The 3rd respondent's bill of costs has also been taxed showing that the applicant owes the 3rd respondent shs.311,175 in form of costs.

The proceeding pending in the High Court is simply to make a formal order on the accounts. It is apparent from the computation by A. N. Onger that the applicant is owed shs.244,775. He is the only one who can execute to recover that sum. Thus the prayer for stay of execution and stay of any further proceedings has no basis. Furthermore, it is doubtful that the impugned orders being orders made in execution proceedings are appealable.

Lastly, the applicant has not demonstrated that if stay of execution or stay of further proceedings is not granted, the appeal if successful would be rendered nugatory. In our view, an intended appeal cannot be rendered nugatory if stay is not granted.

For those reasons, the application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 29th day of May, 2015

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR