IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, SICHALE & OTIENO-ODEK, JJ.A)

CIVIL APPLICATION NO NAI 32 OF 2015

BETWEEN

GOVERNORS BALLON SAFARIS LTD…….....….APPLICANT

AND

SKYSHIP COMPANY LTD…….....…...1ST RESPONDENT

COUNTY COUNCIL OF TRANSMARA….....2ND RESPONDENT

(an application for stay of execution of the certificate of taxation or the decree on costs pending the hearing and determination of an intended appeal against the ruling an order of the High court of Kenya at Nairobi (Gikonyo, J.)

in

H. C. C. Case No 461 of 2008)

****

RULING OF THE COURT

Governors Ballon Safaris Ltd, the applicant herein, sued the 1st respondent, ***Skyship Company Ltd,*** and the 2nd respondent, ***the County Council of Transmara***, in High Court Civil Case No 461 of 2008. It alleged that the respondents had defrauded it, that it has suffered loss in an estimated amount of Kshs 1.5 billion, and therefore sought various reliefs. That suit remained dormant from the year 2009 until 16th April 2010 when the 1st respondent moved to have it dismissed for want of prosecution. There was no resistance from the applicant and on 22nd November 2013, the suit was dismissed and costs awarded to the respondents. In the intervening period, the applicant had moved this Court seeking a stay of further proceedings in the suit pending the hearing and determination of an intended appeal. That application, made under rule 5 (2) (b) of this Court's rules was dismissed on 13th June 2014.

Thereafter, the respondents filed their bills of costs which were taxed by the Deputy Registrar: the 1st respondent's bill was taxed at Kshs 23,010,674.00 and the 2nd respondent's bill was taxed at Kshs 23,056,164.00.

The 2nd respondent moved to execute the costs awarded and the applicant filed numerous applications

before this Court and the High Court seeking to set aside the execution for costs *inter alia* a reference with regard to the taxing masters' decision and a preliminary objection in the High Court in which it stated that the 2nd respondent, having ceased to exist after the enactment of the County Government Act (and the repeal of the Local Governments Act) was improperly before the court. The applications before the High Court were all heard by Gikonyo, J., who ordered the replacement of the name of the 2nd respondent with that of the County Government of Narok. The reasoning for his decision was as follows:

> ***"(6) there is no doubt that, according to the Constitution, the County Governments are the successors of the Local Governments under the repealed Local Governments Act. And it is not in dispute also that County Government of Narok County is the successor of County Council of Transmara, the 2nd respondent. By that succession, they assumed the assets, liabilities as well as any legal proceedings by or against the defunct local authorities therefore, my understanding of the law is that the County Government of Narok County is by law the party in these proceedings and not the County Council of Transmara. Such succession is a matter of the law and the Constiution which the court should take judicial notice of, and make an endorsement to that effect on the record in order to avoid such arguments as the ones I am confronted with. And, for the avoidance of doubt, all subsequent pleadings should bear the name of County Government of Narok County as the 2nd respondent. It is so ordered. In light therefore, I am not able to accede to the argument by Mr Oyatsi that it is only when the party aggrieved files a legal action in Court as prescribed under the law that he becomes a party to proceedings and the Court acquires jurisdiction over him or her. The succession of the 2nd respondent as a party is ordained of law and the Constitution and the County Government of Narok need not file any action as the aggrieved party in order to take over or to acquire rights or obligations in these proceedings. By operation of law, County Government of Narok County steps into the shoes of the County Council of Transmara; acquires the rights and obligations in the suit as if it were the predecessor party. See Section 59 of the Urban Areas and Cities Act, Act No 13 of 2011 as well as section 23(3) (e) of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) which are explicit on pending proceedings where there has been a repeal of law or succession of this nature.***
>
> ***(7) Now therefore, following my decision that County Government of Narok County is by law the party in these proceedings and not County Council of Transmara; and that such succession is a matter of law and the Constitution which the court should take judicial notice of, in the absence of evidence that the firm of Kemboy & Co Advocates is acting without instructions from the County Government of Narok County, the arguments by Mr Oyatsi that the said advocates are not properly on record does not hold any water. The Replying affidavit herein has been sworn by the County Government of Narok County had has confirmed that they are a party herein. I am pleased also to note that Mr Bundotich confirmed their instruction and that the proper party is County Government of Narok County. That submission is not disputed and is the correct position of law. This Court therefore has jurisdiction to deal with this matter on the basis of the succession whereby the proper party before the court is the County Government of Narok County. The upshot is that I dismiss the preliminary objection with costs to the respondents. I will now proceed to determine the applications herein on merit."***

The learned judge also declined to interfere with the decision of the taxing master, finding that the court did not commit any error in principle, and that the assessment of the costs payable was proper, stating that:

> ***"At paragraph 11 of the Amended plaint the plaintiff puts the particulars of loss at an estimated minimum of Kshs 1.5 billion. The pleadings were clear that the value of the subject matter was an estimated loss of KShs 1.5 billion. The taxing officer used her discretion as guided by … the Advocates***
>
> ***Remuneration Order, 2006 and correctly directed herself on the value of the subject matter. The instruction fee of Kshs 22,847,000.00 was proper. There is no error in principle as the taxation***

and all the issues before the taxing officer were decided on merit."

The learned judge ended his ruling on the matter as follows:

> ***"…I do not see any error in principle or any exceptional circumstances which will impel me to interfere with the discretion of the taxing officer herein. I dismiss the reference dated 23rd July 2014 with costs to the respondents. Before I close, I wish to make a finding on the application for stay of execution. Those applications are spent after the court granted stay of execution on condition that the applicant deposits the entire decretal sum in court. If those conditions were not met, the order lapsed after 45 days. And now with this decision, there is nothing to stop execution of the decree. It is so ordered."***

The applicant being aggrieved with the whole of the decision of the taxing master filed an appeal, citing various grounds to upset the entire decision. As a measure to preserve its current status, the applicant filed the present application, brought under rule 5(2)(b) of this Court's rules seeking an order in the main, that

> ***"This Honourable Court be pleased to grant an order of stay of the execution of the Certificate of Taxation or decree on costs in Nairobi High Court Civil Case No 461 of 2008 consequent to the ruling and order made on 4th February 2015, pending the hearing and determination of the intended appeal against the said ruling and order of 4th February 2015."***

The gist of the grounds in support of the application are the applicant has strong arguable grounds of appeal in that the learned judge erred in failing to find that the 2nd respondent ceased to exist as a party to the suit and that consequently, the advocates on record for the 2nd respondent have no standing to appear on its behalf; that the learned judge acted in a partisan manner by enjoining the County Government of Narok to replace the 2nd respondent and thereafter declaring that Kemboy & Co Advocates were properly on record, and thereafter assigning the County Government of Narok the costs that had unlawfully been awarded. In addition, the applicant claims that this bias led him not to receive a fair trial, and was also an indication that the learned judge did not properly apply the law in determining the issues before him.

The applicant also argues that the intended appeal will be rendered nugatory, as it will suffer irreparable loss if it has to pay the decretal sum. The applicant further argues that since it has already provided security for costs to the 1st respondent, it is in the interest of fairness and justice that the order of stay be granted.

The application was opposed. The first challenge to the application is by the 1st respondent who in its written submissions has stated that this Court has no jurisdiction under rule 5(2)(b) to grant an order of stay since there was no positive order made by the High Court that would be capable of staying. The 1st respondent contends that the grounds of appeal raised by the applicant were frivolous; that this Court could not interfere with the discretion of the learned judge who exercised his discretion in the review of the taxing master's decision, and that there was no indication that the learned judge improperly exercised that discretion. In addition, the 1st respondent stated that the applicant has not indicated in what manner the intended appeal would be rendered nugatory and as such has urged us to dismiss the application.

The 2nd respondent also opposed the application. Its position is that the applicant has not raised any issues that are arguable, as the grounds intended to be raised by the applicant in the appeal are the result of a narrow and pedantic construction of the law, and a misapplication of the provisions of Order 24(8) of the Civil Procedure Code. The 2nd respondent submits that the County Government of Narok was properly joined to the proceedings, since it is now an issue of public notoriety that defunct local authorities were to transition to the respective county governments. As such the county government did not need to seek leave of the court to be enjoined as a party to the suit. The 2nd respondent urged that the applicant does not deserve the order of stay as its conduct indicates that it only wants to frustrate the 2nd respondent's efforts to execute the order of costs.

In granting orders under rule 5(2) (b), this Court exercises original jurisdiction. This much the Court in ***Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd*** ***Civil Application No. Nai 157 of 2006*** stated in the following manner:

> ***"The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary."***

This was reiterated by Githinji JA in ***Equity Bank Limited vs. West Link Mbo Limited*** ***[2013] eKLR (Civil Application No. NAI 78 of 2011)*** wherein he stated that:

> ***"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." (emphasis mine)***

In the application before us, the applicants seek an order to stay the execution of costs granted by the Deputy registrar and upheld by the High Court. It is not accurate, as the 1st respondent submits that this Court does not have jurisdiction to order such a stay because there was no positive order made by the High Court that is capable of staying. As illustrated above, this Court has jurisdiction to grant orders of stay, or injunction as the case may be in order to ensure a just and proportionate resolution of an appeal. See ***Mbaabu Mbui & another v Langata Gardens Limited*** ***[2011] eKLR (Civil Application 73 of 2011)***.

There are two principles that an applicant must satisfy in order to benefit from the discretion of the court under rule 5(2)(b). These principles are well settled and have been restated in several decisions of this Court, such as in ***Patel v Transworld Safaris Ltd*** ***[2004] eKLR (Civil Application No. Nai. 197 of 2003)*** when the Court stated that:

> ***"In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application."***

Moreover, in ***Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd*** ***Civil Application No. Nai 157 of 2006*** this Court stated that:

> ***"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."***

An arguable appeal does not necessarily mean an appeal that must succeed. In ***Kenya Medical Lab Technicians & Technologists Boards v Prime Communications Limited*** ***[2014] eKLR (Civil Application No.56 of 2013 (UR.36/2013))*** this Court delivered itself on this very point in the following manner:

> ***"In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears [to be one that deserves to] be fully argued before the Court ... And besides, an appeal is considered arguable even if it raises a single bona fide [point] only."***

The grounds upon which the applicant intends to rely on are contained in the draft memorandum of appeal and in our view, raise two issues: ***An appeal against the dismissal of the reference; and an appeal against the finding on the standing of the 2nd respondent***.

The applicant argues that the learned judge erred in failing to appreciate the law in ordering that the

County Government of Narok succeed the County Council of Transmara, which is in violation of Order 24 rule 8(1) which provides that

> ***"(1) In other cases of an assignment, creation, or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved."***

In our view, we do not find this to be an arguable appeal, or a bona fide issue that deserves the further input of this Court. Section 33 of the Sixth Schedule to the Constitution provided for the transition to the new offices created therein. That section, whose headnote reads ***'succession of institutions, offices, assets and liabilities'***, provides that:

> ***"33. An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name."***

It is undisputed that the Local Authorities Act, which created the County Council of Transmara, was repealed, effectively doing away with local authorities. The provisions of section 33 of the Sixth Schedule of the Constitution of Kenya 2010 come into play. Without going into the merits of the intended appeal, it appears to us that the finding made by the High Court was correct. We therefore not persuaded that this point is arguable.

We are also not convinced that the learned judge improperly exercised his discretion in disallowing the reference and finding that the Deputy Registrar was correct in finding that the subject matter of the suit was Kshs 1.5 billion. It is trite law that in a reference under the Advocates Remuneration Order, a judge would be exercising his discretion. There is nothing that points to the learned judge improperly exercising his jurisdiction, and therefore we find that the appeal on this point as well would not be arguable.

Will the appeal be rendered nugatory? The applicant has alleged that the respondents who moved to execute the decrees have already proclaimed some of their assets. In considering whether an intended appeal would be rendered nugatory, the amount of money involved is one of the factors to consider. In ***Reliance Bank Ltd v Norlake Investments Ltd EALR [2002] 1 EA 227 (CAK)*** the Court expressed itself in the following manner:

> ***"And in the Attorney General v Equip Agencies Case, the Court took into account the fact that the money was to be paid from the public funds and further that the amount involved was so large that immediate payment of it might cripple the operations of the Ministry of Health. All these are legitimate factors for the Court to take into account when it is considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted."***

In considering whether it is just to grant an order of stay of execution, the Court must weigh the competing claims of each party, and make orders as appropriate for the ends of justice. (***Oraro and Rachier Advocates v Co-operative Bank of Kenya EALR [1999] 1 EA 236).***

We note that at no point did the applicant allege that should it pay the costs demanded by the respondents, then the money could not be refunded should the intended appeal succeed. In addition, the applicant has not described the hardship or loss that it would suffer if it were to be forced to settle the costs before the intended appeal is heard. The onus to demonstrate this principle also falls squarely on the applicant; it has not done so and in the premises, the application herein is devoid of merit and we hereby order it dismissed.

Dated and delivered at Nairobi this 12th day of JUNE, 2015

M. WARSAME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR