IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, J. MOHAMMED & OTIENO-ODEK, JJ.A.)

CIVIL APPLICATION NO.NAI 86 OF 2015

BETWEEN

PETER NYAGA MUVAKE……APPLICANT

AND

JOSEPH MUTUNGA .....RESPONDENT

(Being an Application for stay of execution pending hearing and determination of an intended appeal against the ruling of the High Court of Kenya at Nairobi (Mabeya, J.) delivered 27th day of February 2015

in

H.C.C.APPEAL NO.528 OF 2014)

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RULING OF THE COURT

APPLICATION

1. The application by notice of motion dated 25th March 2015 came up for hearing before us on 11th June 2015. It was made by Peter Nyaga Muvake (the applicant) against Joseph Mutunga (the respondent).

2. The application was premised on Rules 5(2)(b) 45, 47, 48 and 49(1) of the Rules of this Court. It sought the following orders –

1. Spent

2. This Honourable Court be pleased to grant a stay of execution of the judgment delivered on 4th November 2014 by the subordinate court (Hon. Obulutsa) and consequential decree pending hearing and determination of the application herein and the appeal, or in the alternative;

3. Spent

4. Costs of this application be provided for.

3. The application was made on the grounds, inter alia, that –

i. a notice of appeal dated 10th March 2015 has been filed against the ruling made by Mabeya J.

ii. there are fundamental points of law and fact against the ruling of Mabeya J.

iii. the applicant is willing to deposit the decretal dues in Court.

iv. The respondents intends to execute the decree

v. The decretal sum is Shs.2,038,450/=

vi. The applicant who has made this application without undue delay and the respondent will not be prejudiced if the application is allowed.

BACKGROUND

4. On 4th November 2014, the Chief Magistrate's court entered judgment in favour of the respondent (Joseph Mutunga) in Milimani CMCC No.4109 of 2010 for Shs.2,038,450.00 plus costs and interest against the applicant (Peter Nyaga Muvake).

5. The applicant appealed the judgment to the High Court in Nairobi Civil appeal No.528 of 2014. He also applied to the High Court for an order of stay of execution of the judgment and decree pending the hearing and determination of the appeal in the High Court.

6. The applicant's application to the High Court for stay of execution of the decree came up for hearing before Mabeya J who on 27th February 2015 dismissed it prompting the appeal to this court.

7. By his notice of appeal dated 10th March 2015 and lodged in Court on 11th March 2015, the applicant sought to manifest his intention to challenge on appeal in this court the ruling and decision of Mabeya J declining to grant stay of execution of the decree of the Magistrate Court.

8. The applicant has not yet lodged the record of appeal in this Court.

9. However, on 30th March 2015, the applicant lodged in this court the said application by notice of motion dated 25th March 2015 seeking the aforesaid orders.

HEARING

10. When the application came for hearing before us on 11th June 2015, learned counsel Mr. Mbabu appeared for the applicant while learned counsel Ms Migiro appeared for the respondent.

11. Relying on the supporting affidavit by the applicant, Mr. Mbabu submitted that the entire decretal sum has been deposited in court; that if the decretal dues are paid out to the respondent, the latter will be unable to refund should the appeal succeed and stay is refused; that that will render the appeal nugatory and that the appeal is arguable.

12. On her part, Ms Migiro, relying on the replying affidavit opposed the application. She submitted that it (the application) is not supported by a competent affidavit as the affidavit sworn by the applicant is not dated; that no leave to appeal was sought and obtained; that the appeal to this court is from a decision made in an application for stay of execution under Order 43 of the Civil Procedure Rules; that both the Civil Procedure Act (S.75) and the Civil Procedure Rules (Order 43) shows that the appeal lies only with leave of the High Court; that the applicant did not procure such leave and consequently his appeal is incompetent; that in the case of **Javer v. Pioneer General Insurance Society Ltd** [1991] KLR, this Court held that, no appeal lies as of right from any decision of the court under an application in Order 41

Rule 4 (now Order 42 Rule 6) in the 2010 amendments); that it was imperative for the applicant to procure leave of the High Court to appeal; that the notice of appeal filed by the applicant without leave to appeal was invalid and or improper; that in Javer's case (supra) the notice of appeal was struck out for want of leave to appeal; that the appeal is not arguable; that nothing against the decision of Mabeya J is sought; that there is not allegation that the learned Judge misdirected himself; that the applicant has not showed that the respondent is a man of straw; that respondent has no burden in this regard; that the applicant did not place any material before the court to demonstrate substantial loss; that the balance of convenience lies with the respondent; that warrants of arrest have been issued; that the application should be dismissed.

13. Mr. Mbabu in retort drew our attention to the applicant's willingness to deposit the money in court.

14. We have carefully perused the application and given due consideration to the rival submissions made by counsel for the parties. The issues for our determination on which the application vest are (1) whether the application is defective; (2) whether there is an arguable appeal, (3) whether the appeal, if successful, will be rendered nugatory if stay is not granted.

15. As stated by this Court in **Peter Gathecha Gachiri v Attorney General and 4 Others** (Civil Application Nai 24 of 2014 (unreported) with regard to the principles that govern grant of orders under Rule 5(2)(b) of the Rules of this Court -

> ***"Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410."***
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> ***"It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."***

16. In **Martin Nyaga Wambora v. The County Assembly of Embu and 6 Others** (Civil Application Nai 46 of 2015 (unreported)) this Court stated with regard to the exercise of its discretion under Rule 5(2) (b) – as opposed to the principles that govern the grant of interlocutory injunctions in the High Court under Order 40 of the Civil Procedure Rules –

> ***"The motion before us is one for injunctive orders under Rule 5(2)(b) of the Court of Appeal Rules. The guiding principles in invoking this Court's jurisdiction under that rule, is as restated in Kenya Hotel Properties Limited v Willsden Investment Limited & 6 Others, (supra) as follows – "first, the intended appeal should not be frivolous or as otherwise put, the applicant must show that it has an arguable appeal, and secondly, this Court should ensure that an appeal if successful should not be rendered nugatory".***
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> ***"The principles that govern an application for injunction under rule 5(2)(b) of the Court Rules, are not the same as the principles that govern an application for interlocutory injunction under Order 40 of the Civil Procedure Rules 2010 (formally Order 39 of the repealed Civil Procedure Rules). In the latter, the principles were well settled in the***

celebrated case of Giella vs Cassman Brown & Co. Ltd. [1973] EA 358, that:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.

"...A careful examination of these principles reveals that unlike Rule 5(2)(b), where the establishment of an arguable appeal that is not frivolous is sufficient, (an arguable appeal not necessarily meaning one which must succeed), an application under Order 40 requires that a prima facie case with a probability of success must be established and as stated in Mrao Ltd. v. First American Bank of Kenya Ltd. & 2 Others, [2003] KLR 125 –

"...A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case". Emphasis added.

"Thus the principles for granting an interlocutory injunction under Order 40 of the Civil Procedure Rules provides a bar which is a notch higher than that required for granting an injunction under Rule 5(2)(b) of this Court's Rules.

17. The affidavit by the applicant in support of the notice of motion dated 25th March 2015, though signed by the applicant before a Commissioner for Oaths, is not dated. Section 18 of the Oaths and Statutory Declarations Act Chapter 15 of the Laws of Kenya requires that all oaths made by persons who may lawfully be examined or may be required to give evidence before any Court (see S.17 of the Act, Cap 15) must be administered according to the forms now in use. Rule 10 of the Oaths and Statutory Declarations Rules stipulates –

"the forms of jurat and of identification of exhibits shall be those set out in the Third Schedule."

18. The Third Schedule shows that the jurat must show the date and the place of oath or affirmation taken, and the name and signature of the commissioner for oaths.

19. In this case the supporting affidavit, though signed by the deponent (applicant), and the commissioner for oaths, whose names are reflected in the jurat, it does not show the date when the oath was administered. The supporting affidavit was filed in court on 30th March 2015 without the date on which the oath was administered. It is patent that the date was inadvertently omitted. Did this render the affidavit defective? Article 159(1)(d) of the Constitution enjoins courts in exercising judicial authority to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The omission of the date in the jurat has not been shown to have been deliberate. It seems, ostensibly, to have been inadvertent. It was a human error. The affidavit was filed in support of the motion which was dated. The date the affidavit could bear could only be a date on or before the date of the filing in Court. The omission does not vitiate the substance of the affidavit. We are not inclined to hold that the affidavit is bad in law on account of the omission when it is plain to discern that the omitted date could be on or before the filing of the application.

20. As to whether the appeal is competent, there is no contest that the appeal arises from the decision of Mabeya J made under Order 42 Rule 6 of the Civil Procedure Rules. Section 75 of the Civil Procedure Act, Cap 21, stipulates the thematic orders from which appeals lie as of right. Appeals from other orders lie only with the leave of the court. An order made under Order 42 Rule 6 is not exempt from the requirement of leave. It does not lie as of right.

21. In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As

the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant's appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a *sine qua non* to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.

22. In light of the above finding, it is not necessary to consider whether the principles governing the grant of an order for stay under Rule 5(2)(b) of the rules of this court were met because our jurisdiction has not been invoked through the lodgment of a valid notice of appeal.

23. For this reason we dismiss the application with costs to the respondent.

Dated and made at Nairobi this *31st day of July 2015*.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. O. ODEK (PROF)

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR