IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI 70 OF 2013

BETWEEN

ROYAL MEDIA SERVICES ……………………………………….. APPLICANT

AND

TELCOM KENYA LIMITED ……………………………….. 1ST RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA .... 2ND RESPONDENT

KENYA BROADCASTING CORPORATION ………….. 3RD RESPONDENT

ATTORNEY GENERAL …………………………………… 4TH RESPONDENT

NICHOLAS ETYANG ……………………………………… 5TH RESPONDENT

DANIEL MUSAU ……………………………………………. 6TH RESPONDENT

FRANCIS WANGUSI ……………………………………… 7TH RESPONDENT

DANIEL WATURU ………………………………………… 8TH RESPONDENT

J. N. KAMUNGE …………………………………………… 9TH RESPONDENT

PHILIP N. KAMANGA ……………………………………. 10TH RESPONDENT

GEORGE KHOJALA ……………………………………… 11TH RESPONDENT

MUSA ETIKO ………………………………………………. 12TH RESPONDENT

HENRY WEST ……………………………………………… 13TH RESPONDENT

KAREN LANG'ATA DISTRICT ASSOCIATION ………..14TH RESPONDENT

(An application for stay of execution pending the hearing and determination of Civil Appeal No. 31 of 2008 from the Ruling and Order of the High Court of Kenya at Nairobi (Mugo, J.) dated 24th November,

2004

in

H. C. C. C. No. 15 of 2000)

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RULING OF THE COURT

1. This is an application under ***Rule 5 (2) (b)*** of the Court of Appeal Rules and also expressed to be made under Sections ***3A*** and ***3B*** of the Appellate Jurisdiction Act. The application seeks one substantive order in the following terms:-

> ***"That an order of stay of execution be issued staying the ruling and order made in Nairobi High Court Civil Suit No.15 of 2000 by Hon Lady Justice Mugo pending the hearing and determination of the intended appeal as against the said ruling."***

2. The applicant, Royal Media Services, sought orders in the said application on grounds that their intended appeal was arguable, based on 25 reasons stated in the notice of motion. Further, it was the applicant's case that the intended appeal would be rendered nugatory if the orders sought were not granted. Those grounds were supported by an affidavit sworn on behalf of the applicant by Samuel Kamau Macharia on 27th March, 2013.

3. What triggered the filing of the application is a ruling in H.C.C.C. 15 of 2000 by the High Court (Mugo, J.) in which the High Court dismissed the suit for want of prosecution and ordered that costs of the suit be paid by the applicant herein.

4. The 3rd respondent filed its party and party bill of costs dated 6th October, 2005 against the applicant in which the 3rd respondent claimed the sum of Kshs.400,255,315.00 as service fees and disbursements against the applicant. When the bill of costs came up for taxation, the Deputy Registrar of the High Court agreed with the learned counsel for the 3rd respondent that the value of the subject matter was determinable from the pleadings and the same totals Kshs.26,646,670,778/=. In a ruling delivered on 30th April, 2009, the Deputy Registrar stated that the instruction fees was chargeable under paragraph 1 (b) of the Advocates Remuneration Order, 1997, Schedule VI and went ahead to tax and allow costs of Kshs. 394,004,112/= payable by the applicant to the respondent.

5. Being dissatisfied with that order of taxation, the applicant filed a reference in the High Court, in a chamber summons application dated 30th July, 2009 filed under ***Rule 11*** of the Advocates Remuneration Order and ***Order XXI*** of the Civil Procedure Rules, to set aside the taxation and to have the bill of costs taxed afresh on the grounds that the taxing officer erroneously held that the value of the subject matter was Kshs.26 billion whereas the value of the subject matter could not be determined from the pleadings. It was contended that the Taxing Master failed to take into account the fact that the suit was dismissed for want of prosecution, and that there was no judgment or settlement by the parties.

6. In allowing the application, the learned judge, in her ruling delivered on 17th September, 2010 stated that the Taxing officer failed to consider the principles applicable to assessing damages and hence arrived at the wrong decision. The learned judge ordered that the matter be referred to another Taxing officer who shall be guided by the Court of Appeal principles articulated in the case of ***Premchand Raichand Ltd and Another vs Quarry Services of East Africa Ltd and Another*** ***No. 3 East Africa Law Report (1972) E. A. page 162*** to assess the fees payable in item No. 1

7. This matter then came before Hon. Njora and in her ruling dated 13th February, 2013 the learned

Taxing officer taxed item No. 1 of the 3rd defendant's bill of costs at a total of Kshs.1,000,000/=.

8. However, aggrieved by the initial decision of the High Court given on 24th November, 2004, dismissing the suit for want of prosecution, the applicant brings the present application. The application is founded on the grounds set out on the face thereof and also on the averments deponed to in the supporting affidavit of S. K. Macharia, a shareholder and Chairman of the applicant. The supporting affidavit echoes mostly the grounds set out on the face of the application to urge that the intended appeal is arguable. It also echoes that the intended appeal will be rendered nugatory should this Court not grant the orders sought. The reasons for nugatory aspect are given as follows:

(a) That the defendants have filed four bills of costs totaling to about a billion shillings.

(b) That the 3rd defendant's bill of costs was initially taxed at Kshs.393 million for instruction fees alone, however on a successful taxation reference, the same was allowed and taxed at Kshs.1 million and that the 3rd respondent has filed a reference claiming the amount to be too low.

(c) That the bills by the 1st, 2nd, 13th and 14th respondents are pending taxation and are being vigorously pursued.

(d) That if execution were to take place, the company will experience financial hardships.

9. In opposing the application, the 2nd respondent filed its replying affidavit on 2nd October, 2014 stating that there was an inordinate and unexplained delay of eight years in filing this application. It argued that the applicant had failed to identify the alleged grave losses or irreparable injury it stood to suffer in case the 2nd respondent taxed its bill of costs. It also argued that failure on the part of the applicant to disclose its financial position to justify a stay of execution is a sufficient bar to the grant of an order for stay.

10. The application came before us on the 10th June, 2015. At the hearing, Mr. P. G. Nganga appeared for the applicant; Mr. S. M. Mwenesi for 13th and 14th respondents; Mr. S. Inamdar for 2nd respondent; Mrs. Kiranga, holding brief for Mr. Mwangi Chege for 3rd respondent & Mr. Martin Munyu holding brief for Mr. P. B. Jilani for 1st respondent.

11. Relying on the grounds appearing on the face of the application and the supporting affidavit sworn by Samuel Kamau Macharia, Mr. Nganga argued that the appeal raised substantive questions of law, and was indeed arguable. He submitted that the appeal would be rendered nugatory if the applicant is called upon to pay more than Kshs.1 billion, a sum that would not be recoverable should the appeal succeed. He referred us to numerous authorities including ***Exclusive Estates Ltd vs Kenya Posts and Telecommunications Corporation and Another*, No. 62 of 2004** and ***Eastland Hotel Limited vs Wafula Simiyu & Co. Advocates* No. 13 of 2014,** urging us to allow the application.

12. In opposing the application, Mr. Munyu, learned counsel for the 1st respondent, argued that the bill of costs had only just been filed, the same had not been taxed, and that there was no threat of execution.

13. Mr. S. Inamdar, learned counsel for 2nd respondent, submitted that there had been an inordinate delay of eight years in filing this application; that a similar application in the High Court had indeed been rejected by Hon. Mr. Justice Ransley on 7th November, 2005 and that the bills having not been taxed, there was nothing to stay. He urged us to disallow the application.

14. Mrs. Kiranga, learned counsel for the 3rd respondent made similar submissions, referring us to the case of ***Orbit Chemicals Industries*, Misc Civil Application No. 162 of 2006.**

15. Mr. S. M. Mwenesi, learned counsel for 13th and 14th respondents, likewise argued that the application was premature.

16. We have carefully considered the application, the affidavits, rival submissions of the learned counsel and the law.

17. At this juncture the Court cannot go into the merits of the appeal but must attempt to balance the interests of both parties.

18. The principles applicable to the determination of applications under ***Rule 5 (2) (b)*** of the Rules are well settled. This Court clearly elucidated the said principles in the case of ***Republic vs Kenya Anti-Corruption Commission & 2 Others, (2009) KLR 31*** as follows:

> ***"The law as regards the principles that guide the Court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds; the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. See also this Court's decisions in the cases of Reliance Bank Ltd vs Norlake Investments Ltd (2002) 1 EA 227 & Githunguri vs Jimba Credit Corporation Ltd & Others (No. 2) 1988 KLR 828; Wardpa Holdings Ltd & Others vs Emmanuel Waweru Mathai & HFCK (Civil Appeal No. 72 of 2011) [unreported]."***

19. On the point as to whether the intended appeal is arguable, we reiterate what this Court recently stated in ***Dennis Mogambi Mongare vs Attorney General & 3 Others, Civil Application No. Nai 265 of 2011 [UR 175/2011]:***

> ***"An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the Court's consideration."***

20. On the first limb, given that the suit in the High Court was struck out for want of prosecution, and issues of jurisdiction are raised we are of the view that the applicant's appeal is not frivolous and is indeed arguable.

21. On the nugatory aspect, it is trite law that this Court must weigh and balance the competing claims of both parties and that each case must be determined on its own peculiar facts. As this Court held in ***Reliance Bank Ltd vs Norlake Investments Ltd*, (2000) 1 EA 227.**

> ***"In determining the second limb of the test, the Court in Oraro and Rachier Advocates vs Co-operative Bank of Kenya Limited, Civil Application No. Nai 358 of 1999, had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case. Rules 5 (2) (b) conferred on the Court original jurisdiction based on the exercise of discretion by the Judges of the Court."***

22. Further, we are guided on this by this Court's decision in ***African Safari Club Limited vs Safe Rentals Limited, Nairobi Civil Appeal [Application] No. 53 of 2010 (unreported),*** where the Court stated:

> ***"… with the above scenario of almost equal hardship by the parties it is incumbent upon the court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales. … We think that the balancing act as described in the analysis***

of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable. … We believe that the rules of procedure including Rule 5 (2) (b) have considerable value in terms of administration of justice but new challenges brought about by the enactment of the oxygen principle brings into focus the fundamental purpose of Civil Procedure which is to enable the Court deal with cases justly and fairly.”

23. Keeping the above principles in mind, and noting the bills have not been taxed, we agree with counsel for the respondents that there is indeed nothing to stay at this time. We reiterate that this application is premature and misconceived, and must be dismissed, which we hereby do, with costs to the respondents, who were present before us, namely the 1st, 2nd, 3rd, 13th and 14th respondents. Orders accordingly.

Dated and delivered at Nairobi this 10th day of July, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR