



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 175 OF 2015 (UR 141/2015)

BETWEEN

PATRICK GITHINJI MWANGI.....APPLICANT

AND

ABDIRAHMAN S. MOHAMED

T/A TOWHID SHOPPING COMPLEX..... RESPONDENT

(Being an application for stay from the Ruling and Order of the Honourable Justice A. Mabeya delivered on the 5th day of June, 2015 at the High Court of Kenya, Nairobi in

Misc. Civil Application No. 46 of 2015)

RULING OF THE COURT

1. This is an application under **rule 5(2)(b)** of the rules of this court and sections **3A and 3B** of the Appellate Jurisdiction Act, Chapter 9 of the laws of Kenya taken out by **PATRICK GITHINJI MWANGI**, (hereinafter referred to as the applicant). The applicant seeks to stay the ruling and order of Justice Mabeya transferring Nairobi CMCC No.2779 of 2014 to the civil division of the High Court on the grounds both on the face of the application and the supporting affidavit by the applicant. In essence, the applicant contends that he has an arguable appeal that would be rendered nugatory if the application is not allowed.
2. The brief facts as they relate to the application are as follows – **Abdirahman S. Mohamed t/a Townhid Shopping Complex**, the respondent herein, filed a suit against the applicant before the Chief Magistrate’s Court at Milimani in Nairobi seeking, *inter alia*, the following prayers:-

“a) permanent injunction to restrain the defendant...from harassing and demanding money from him;

b. An order to compel the Defendant to remit all the monies paid to him by the Plaintiff as rent to the leasor (sic) of the property.”

Concurrently, the respondent sought interlocutory relief to restrain the applicant from interfering

with the respondent's use of the suit property. In his response to the said application the applicant raised a preliminary objection on the ground that the Principal Magistrate (Hon. D. Ole Keiwua) before whom the matter was placed lacked pecuniary jurisdiction to determine the matter and that the suit contravened section 5 of the Magistrate's Court Act. In his ruling the learned magistrate upheld the preliminary objection and in his orders allowed the respondent to prove that the suit was within the jurisdiction of the Chief Magistrates' Courts.

3. Subsequently, the respondent through a miscellaneous application before the High Court sought to transfer the suit from the chief magistrate's court to the High Court. The applicant in his response objected to the proposed transfer on the grounds that the magistrate's court lacked jurisdiction to hear the matter and that in transferring the suit, the respondent was introducing a fresh cause of action. The judge in his ruling allowed the suit to be transferred. That ruling forms the basis of this application and the intended appeal by the applicant.
4. At the hearing before us, **Mr. Obondi Victor** learned counsel for the applicant submitted that the intended appeal was arguable adding that no appeal had been lodged from the decision of the learned magistrate and further that the Chief Magistrate lacked jurisdiction, the subject claim being for a sum amounting to at least Shs.8,500,000/= which was later said to be in excess of Shs.20,000,000/=. Learned counsel faulted the learned judge for not having investigated the case and the manner in which the judge had exercised his discretion.
5. On whether the appeal would be rendered nugatory if stay was not granted, learned counsel argued that the now transferred suit to the High Court would proceed to determination and parties' rights would be determined before the appeal is determined causing judicial embarrassment and waste of judicial time and resources.
6. **Mr. Mude Hashim**, learned Counsel for the respondent opposed the application and relied on the Replying Affidavit sworn by the respondent. He submitted that there was no positive order made by the High Court capable of being stayed as the order made related to merely transferring the suit to the civil division of the High Court. In support of this argument counsel referred us to the cases of *Nairobi Metropolitan PSV Saccos Union*

Limited & 25 others v County of Nairobi Government & 3 others [2014] eKLR, Marangu Rucha & Another v Attorney General & 10 others [2014]eKLR and Peter Anyang' Nyong'o & 2 others v Minister for

Finance & Another [2007]eKLR for the proposition that there is no jurisdiction to grant a relief under **rule 5(2)(b)** of this court's rules where the High Court's order either resulted in a dismissal or a striking out order or where the court did not order either party to do or refrain from doing something capable of being restrained.

7. Counsel for the respondent further submitted that the intended appeal was not arguable as it challenges the exercise of discretion and there was nothing availed by the applicant to show that there was wrong exercise of discretion.

In any event, learned counsel argued, the High Court has jurisdiction to transfer a suit and that the magistrate's court did not dismiss the suit. Referring to paragraph 18 of the plaint, learned counsel argued that there was no pecuniary claim before the magistrate's court and that the application was only clogging judicial process. Mr. Mude argued further that there was nothing to be rendered nugatory and it is the respondent that continues to suffer prejudice by being harassed to remit rent wrongly.

8. In reply, Mr. Bondi submitted that the order of transfer of the suit is a positive order capable of being stayed and the authorities cited to prove otherwise were not relevant. Learned counsel also indicated that the amounts involved were outside the jurisdiction of the magistrate's court.

9. The principles governing the exercise of the court's jurisdiction under **rule 5(2)(b)** of our rules are now well settled. To restate them, firstly, the intended appeal should not be frivolous, or put another way, applicants must show that they have an arguable appeal; and secondly, this Court should ensure that the appeal, if successful, should not be rendered nugatory. See

Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd, Civil Application Number Nai. 93/02 (UR). Lastly, both limbs must be demonstrated to co-exist before an applicant can obtain relief under **rule 5(2) (b)**. (See ***Republic v. Kenya Anti-Corruption Commission & 2 others***

[2009] KLR 31).

10. On the first aspect as to whether the intended appeal is arguable and not frivolous, we restate this court's position that the demonstration of the existence of even one arguable point will suffice. Our consideration of the record and the arguments made before us evinces an objection to the High Court's jurisdiction, as well as that of the magistrate to transfer the suit. Without going into the merits of the intended appeal, as we cannot do that at this early stage, we take the view that jurisdiction is a legal question as opposed to an arguable issue.

11. Jurisdiction of the court flows from the constitution or statute. The High Court is established under **article 165 of the Constitution. Article 165(3)**

(a) gives the High Court unlimited original jurisdiction in civil matters while **article 165(3)(e)** allows the High Court to exercise any jurisdiction conferred by legislation. On its part, **section 18(1)(b) of the Civil Procedure Act** grants powers to the High Court to transfer cases instituted in subordinate courts whether on application of parties or on its own motion. The said section provides as follows:-

“18(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any

stage—

b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or..”

There is no doubt that the dispute between the applicant and the respondent pending before court is civil in nature. The High court has powers to exercise its powers under the above section at any time and at any stage of the proceedings either on application of any parties or on its own motion.

12. As this is an application arising out of an intended appeal from the ruling of the High Court in exercise of its express statutory and constitutional jurisdiction, we are not convinced that the applicant has demonstrated an arguable case that warrants the exercise of our discretion in the applicant's favour under **rule 5(2)(b)**. We are hesitant to interfere at this juncture with the High Court's exercise of its jurisdiction as it did seeing as we do that we were not shown how that exercise of discretion was wrongful and would leave it to the applicant to canvass the matter on merit and perhaps convince the trial bench seized of the substantive appeal.

13. As we have stated time and again, parties are bound by their pleadings and the court can only make a determination on the pleadings made. Our reading of the plaint and the prayers and especially prayer (b) reproduced earlier in this Ruling, is that the respondent sought declaratory orders to have monies remitted to him. At this point, the claim was not liquidated.

14. The applicant not having shown the existence of an arguable point, we need not consider whether

or not the appeal would be rendered nugatory if the orders sought be not granted. And as the matter is still alive in the High Court no party stands to suffer any prejudice.

15. Accordingly, we order that the Notice of Motion dated 29th June, 2015 be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 30th day of October, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

P. M. MWILU

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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