



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, J. MOHAMMED & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. NAI. 191 OF 2015**

**BETWEEN**

**ABN AMRO BANK N.V.....APPELLANT/APPLICANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

*(Being an application for stay of proceedings in respect of the respondent's party & party*

*Bill of Costs dated 15/01/2015 emanating from the Ruling of the High Court of Kenya*

*at Nairobi (Gikonyo, J.) dated 30<sup>th</sup> September, 2014*

**in**

**HCCC. No. 3 of 2012)**

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**RULING OF THE COURT**

By an amended plaint filed at the High Court of Kenya, Nairobi (Commercial and Tax Division), the applicant, **ABN AMRO BANK N.V.** sued the respondent **KENYA PIPELINE COMPANY LIMITED** for various sums of money and damages said to be owed in respect of various heads set out in the plaint. The thrust of the claim related to sale and storage of various petroleum products. The respondent filed a statement of defence and raised a set-off particulars which are set out in the defence.

The respondent did not stop there. It filed an application by Notice of Motion where it was prayed that certain documents it said were held by the applicant be produced within specified time but in default of production the suit to stand struck out with costs. That application which was opposed by the applicant was heard by F. Gikonyo, J, who in a Ruling delivered on 30<sup>th</sup> September, 2014 allowed the same with no order as to costs. Those orders are the subject of Civil Appeal No. 149 of 2015 filed in this Court. That appeal is not however before us today. What is before us is an application stated to be brought under **Sections 3(2), 3A, 3B** of the **Appellate Jurisdiction Act, Cap 9** of the **Laws of Kenya, Rules 1(2), 5(2) (b), 42** of the **Court of Appeal Rules, 2010, Article 159 (2)** of the **Constitution** and all other enabling provisions of the law where we are asked in the main to:

***“2. THAT this Honourable Court be pleased to grant a stay of proceedings relating to the taxation of the Respondent’s party and party Bill of Costs dated 15/01/2015 filed on even date in Nairobi HCCC No. 3 of 2015 pending inter partes hearing of this application.***

***3. THAT this Honourable Court be pleased to grant a stay of taxation of the Respondent’s party and party Bill of Costs dated 15/01/2015 filed on even date in Nairobi HCCC No. 3 of 2012 pending the hearing and determination of Civil Appeal No. 149 of 2015 filed in this Honourable Court.***

***4. THAT costs of this application be provided for.”***

In the grounds in support of the Motion and in an affidavit by a director of the applicant it is stated that the applicant’s suit was struck out with costs; that the respondent had filed a party and party bill of costs in the sum of about Shs.26 million set for taxation on 13<sup>th</sup> July, 2015; that taxation of that bill was premature and threatened the proper determination of the applicant’s appeal against the ruling of the High Court; that the applicant will suffer irreparable loss if that bill was taxed; that the memorandum of appeal filed in this Court demonstrated an arguable appeal with high probability of success; that the issue of payment of costs following the striking of the applicant’s suit is irretrievably bound to the possibility of success of the applicant’s appeal and was not an issue that could be considered in isolation and independent of merits of the appeal; that it is fair, just and equitable that the application be certified urgent and be heard immediately and that if orders were granted they would not occasion any prejudice on the respondent.

In a replying affidavit sworn by the Legal Officer of the respondent the background of the matter before the High Court is set out and it is also deponed that the respondent was entitled to tax a bill of costs and that it had requested the applicant to point out any items in the bill of costs which it contested but that there was no response to that request; that the applicant had not asked for a stay at the High Court after the suit was struck out and that the respondent was a State Corporation based in Kenya with sufficient funds to refund any costs if it became necessary to do so if the appeal succeeded.

There are further affidavits by the applicant but it is not necessary to go into them here.

**Ms. Grace K. Omwenga**, learned counsel appeared for the applicant when the motion came up for hearing before us. Learned counsel referred to the various depositions in the affidavits sworn on behalf of the applicant and in support of the arguability of the intended appeal learned counsel thought that the learned judge of the High Court had misapplied the law regarding discovery of evidence and that was a point that should be argued on appeal. Counsel further submitted that documents sought by the respondent at the High Court from the applicant were not relevant to the case and that the defence filed was one where no substantive defence was raised but was a defence comprising of mere denials. Counsel further submitted that the effect of what was applied for before the judge at the High Court amounted to the applicant being asked to assist the respondent. On the nugatory aspect counsel thought that if taxation proceeded the taxed amount would be paid, that the sum would be colossal and would jeopardize operations of the applicant. Counsel relied on the case of **Reliance Bank Ltd v Norlake Investments Ltd**, [2002] 1 EA 227 and submitted that because of the amount stated in the bill of costs stay should be granted on that basis alone.

**Ms. Wanjiru Ngige** for the respondent opposed the application and submitted that because taxation had not taken place the nugatory aspect of the matter could not be met. On what was the sum to be awarded by the Taxing Master counsel thought that was a matter that should be left to that court. In further submissions Ms. Ngige thought that discovery of documents is a province of the trial court and should be left there.

The principles applicable for determination of applications under **order 5 (2) (b)** of this **Court’s Rules** are now well settled as was observed by this Court in **Patrick Mweu Musimba v Richard N. Kalembe Ndile & 3 Others** [2013] eKLR in the following words:

***“The law applicable in respect of applications under Rule 5(2)(b) of the Court of Appeal Rules is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective. See Githunguri vs Simba Credit Corporation Ltd 2 [1988] KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982-88] 1088, and Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd [2006] eKLR 1.”***

We have considered the Motion, the rival affidavits and the submissions made before us. We have also perused memorandum of appeal in Civil Appeal No. 149 of 2015.

The learned judge of the High Court was dealing with an application where discovery was sought by the respondent from the applicant and where it was alleged that certain specified documents were in the possession of the applicant. The learned judge allowed the application in the event ordering the applicant to supply to the respondent some documents within a limited period in default the suit to be struck out. The applicant did not supply the documents as ordered and the suit was struck out. Whether or not the learned judge was right to hold that documents and information requested were relevant is to our mind an arguable point. As has been held by this Court in various decisions one arguable point will suffice for purposes of satisfying the condition on arguability of an appeal.

Ms. Omwenga learned counsel for the applicant on the nugatory aspect of the matter submits that because the bill of costs is drawn in the sum of about Shs.26,000,000/= that sum is colossal and if awarded would jeopardize operations of the applicant and this to her makes the appeal nugatory. This argument stands on quick sand. The party and party bill of costs filed before the Taxing Master has not been taxed. The applicant was asked by the respondent by formal letter to indicate which items it was objecting to in the bill of costs but it did not do so. It is not known what amount the bill will be taxed at and it is not clear to us why the applicant would not await taxation and ask for stay at that court if that be necessary. As has properly been pointed out by Ms. Wanjiru Ngige for the respondent the applicant is a large foreign bank and it is not known how its operations would be affected if it had to pay costs if the same were raised. The applicant has failed to demonstrate that the appeal will be rendered nugatory and having failed to satisfy that principle the application must fail. The motion dated 10<sup>th</sup> July, 2015 is hereby dismissed with costs.

***Dated and Delivered at Nairobi this 11<sup>th</sup> day of December, 2015.***

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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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**