IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, AZANGALALA & ODEK, JJ.A)

CIVIL APPLICATION NO. NAI 205 OF 2015

BETWEEN

PENELOPE COMBOS……..……1ST APPLICANT

ANTHONY COMBOS……..2ND APPLICANT

AND

KAGWIMI KANG'ETHE & CO. ADVOCATES…….....…RESPONDENT

Application for injunction pending the lodging, hearing and determination of an intended appeal from the Ruling

of the High Court of Kenya at Nairobi (Gikonyo, J.) dated 19th June 2014

in

NRB MISC. CASE NO. 394 OF 2008)

****

RULING OF THE COURT

This is an application under rules 5(2)b and 42 of the Court of Appeal Rules for orders:-

> ***"1) THAT pending the hearing and determination of the Appeal by the Applicants against the judgment and order made by the High Court on 19th June, 2014 by Gikonyo J. in Misc. HCC Cause No. 394 of 2008, Kagwimi Kangethe & Company Advocates - v- Penelope Combos and Anthony Combos, there be stay of execution of the said judgment and decree.***
>
> ***2) FURTHER pending the hearing and determination of the Appeal by the Applicants against the judgment and order made by Justice Gikonyo on 19th June 2014, there be a stay of all proceedings in HCC Misc Cause No. 394 of 2008, Kagwimi Kangethe & Company Advocates -v- Penelope Combos and Anthony Combos"***

The background to the application is briefly as follows: The applicants, **Penelope Combos** and **Anthony Combos** (hereinafter "the clients") engaged the **respondents** (hereinafter "the advocates") to act for them

in respect of a dispute they had with **National Bank of Kenya**. Pursuant to the clients' instructions, the advocates filed **Nairobi HCCC NO 440** of **2003 and Nairobi HCCC No. 565** of **2003** against the said bank. The results of those cases are not an issue in this application.

The relationship between the clients and the advocates appears to have soured after some payments had been made by the clients to the advocates. It therefore became necessary for the advocates to have their costs for acting for the clients taxed. They accordingly lodged their bills of costs for taxation in **HCC Misc. Application No. 393 and 394 of 2008**. The bills were eventually taxed by the Taxing Masters of the High Court.

The contentious cause in this application is HCC Misc. Application No. 394 of 2008 in which the Taxing master (Hon. Kandet) taxed the advocates' bill at Kshs.947,485/42. Aggrieved, the clients filed a reference which was heard and dismissed by **Mabeya J**. The advocates therefore obtained a Certificate of Taxation of their costs which was duly signed by the Taxing master on 27th January, 2009. The amount indicated in the certificate was Kshs.947,485.42.

The advocates then applied by way of Notice of Motion dated 27th November, 2012 for judgment against the clients for the said sum of Kshs.947,485.45 plus interest at 14% p.a. from the date of the Certificate until payment in full. The Notice of Motion was lodged under **section 51 (2)** of the **Advocates Act** and **sections 1A, 1B and 3A** of the **Civil Procedure Act.**

The application was heard by **Gikonyo J**., and in a reserved ruling dated 19th June, 2014 the learned Judge allowed the Notice of Motion. The learned Judge granted interest, on the said sum at 12% p.a. from 27th January, 2009 until payment in full. He also awarded the advocates costs of the Notice of Motion.

The clients being aggrieved by the decision of **Gikonyo J.,** lodged a Notice of Appeal on 30th June, 2014. They then filed the application before us on 23rd July, 2015.

Mr. Singh, learned counsel for the clients/applicants contended that their appeal is arguable because the advocates despite demands having been made in that regard, have failed to furnish the clients with a statement of account which statement if availed would show that the clients owe the advocates no money but to the contrary it is the advocates who owe them Kshs.507,846/47. It was also learned counsel's view that unless a stay of execution is granted the appeal, even if it eventually succeeds, will be rendered nugatory as the clients matrimonial home will be sold. As security, learned counsel submitted that the clients are prepared to deposit the decretal amount in court pending the determination of the appeal.

Mr. Kangethe, in opposing the Notice of Motion, submitted among other things, that the conditions for granting a stay of execution have not been demonstrated by the clients. In learned counsel's view all the complaints the clients are making in this application have been made before in the High Court and have been rejected. In learned counsel's view, as references were preferred from the taxations and refused without further challenge, the appeal is not arguable. The advocates further contended as they had done before the High Court that they are not impecunious and therefore they are able to refund the decretal amount in the event the appeal eventually succeeds. In that event, according to learned counsel, the success of the appeal will not be rendered nugatory.

In **Kenya Shell Limited -v- Kibiru & Another [1986] KLR 410,** this Court held:-

> ***"1. …….***
>
> 2. ***In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.***
>
> 3. ***In application for stay the Court should balance two parallel propositions first that a litigant if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.***

4. ***In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."***

The principles applicable in an application of this kind have now crystallized and they are:

1. ***An applicant must satisfy the Court that the intended appeal or appeal if one has been filed is arguable and***

2. ***That unless the order sought is granted, the appeal, if successful, would be rendered nugatory***.

See **Reliance Bank Ltd (in liquidation -v- Norlake Investments Ltd. [2002] IEA 227; Githunguri -v- Jimba Credit Corporation Ltd. (M12) [1988} KLR 838** and **JK Industries Ltd. –v- Kenya Commercial Bank Ltd [1982-88] 1 KAR 1088**, among many.

In the draft grounds of appeal annexed to his application, the advocates complain, among other complaints, that the learned trial Judge erred in awarding interest on the decretal amount when no sums were owed by the clients; that he also erred in concluding that the matter was res judicata when it was not; that having found that the clients' complaints were serious, he erred in failing to order investigation before entering judgment in favour of the advocates.

In refusing the clients' plea that judgment ought not to be entered in favour of the advocates, the leaned judge, among other things, stated:

> ***"Perhaps, the Respondent may have to resort to the general right to account and demand for a final account from their advocates rather than ask the court to order a reconciliation <u>in such unclear</u> <u>situation</u>. That process is completely apart from the one obtaining in these proceedings. On that premises it is not shown to the satisfaction of the court that there exists serious issues of accounts between the parties herein which would prevent the court from entering judgment pursuant to Section 51 (2) of the Advocates Act."****(underling ours)*

That finding of the learned Judge would suggest that the accounts between the advocates and the clients may not have been satisfactorily settled in which event there would be doubt if judgment would properly be entered under **section 51(2)** of the **Advocates Act.**

We would in the circumstances find that the clients have an arguable appeal. It must be remembered that an arguable appeal is not one which must eventually succeed**.**

On the nugatory aspect of the application, the only reason given by the clients was that unless a stay of execution is granted, their matrimonial home will be sold in which event even if their appeal eventually succeeds the success will be pyrrhic as their matrimonial home will then be out of their reach. With respect, the clients have misapprehended what is before us which is an application to stay execution of a money decree which money they have indeed deposited in court pursuant to an order made by the court below. The advocates' stance is that no allegation has been made that they are impecunious. This was indeed an express finding of **Gikonyo J.,** on 26th June 2015 when considering the clients application for stay of execution. In his own words:-

> ***"Substantial loss normally lies in the inability of the***
>
> ***Decree-holder to refund the decretal sum if the appeal is successful…….. In this case, all parties agree that the Applicant is able to refund the decretal sum in the event the appeal succeeds."***

We cannot therefore appreciate how the appeal would be rendered nugatory if the order of stay is not granted. The clients have therefore not satisfied one of the conditions for the grant of an order of stay of execution pending the intended appeal or appeal itself if one has been lodged. In **PKA -v- MSA [2009]**

KLR 744 it was held:

> ***"……..***
>
> ***5. It was a legal requirement that the twin principles stated had to both be demonstrated before an order of stay could be granted. It was the***
>
> ***Court's view that in that application only one of them, the arguability of the appeal had been demonstrated but not the nugatory aspect."***

The same position obtains in this application as only the arguability of the appeal has been demonstrated but not the nugatory aspect.

We therefore have no alternative but to dismiss the clients' application which we hereby do with costs to the advocates.

DATED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2015.

M.K. KOOME

…….

JUDGE OF APPEAL

F. AZANGALALA

……

JUDGE OF APPEAL

J. OTIENO-ODEK (PROF.)

……

JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR