IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO, & MURGOR JJ.A)

CIVIL APPLICATION NO. NAI 121 OF 2013 (UR 83/2013)

BETWEEN

HON. ATTORNEY GENERAL……...……APPLICANT

AND

JAMES HOSEAH GITAU MWARA….....RESPONDENT

(An application for stay of Proceedings and Execution in Respect of the Ruling of the High Court of Kenya at Nairobi (Waweru J) Dated 7th December,2012

in

H.C.C.C. NO.2892 of 1993)

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RULING OF THE COURT

Before us is an application by way of Notice of motion dated the 6th day of June, 2013 and lodged in this Court on the 11th day of June, 2013. It is expressed to be brought under Article 159 of the Constitution of Kenya 2010, Sections 3A and 3B of the Appellate jurisdiction Act and Rule 5(2) (b) of the Court of Appeal Rules. In it, the applicant seeks an order that this Honourable Court be pleased to grant a stay of execution of the ruling and order of the High Court at Nairobi by the Honourable ***Mr. Justice H.P.G. Waweru*** delivered on the 7th day of December, 2012 firstly pending the hearing and determination of this application; and secondly pending the lodging, hearing and final determination of the applicant's intended appeal in Nairobi HCCC No. 2892 of 1997 ***James Gitau Mwara versus the Attorney General*** and lastly that costs of and incidental to this application do abide the result in the intended appeal.

The application is premised on the grounds in the body of the application. In summary, these are that the applicant was aggrieved by the orders of the ***Hon. Mr. Justice H.P.G. Waweru*** made on 7th December, 2012; that they are desirous of appealing against the said orders; that they are within the ambit of the prerequisites required to be established before one can earn a relief under Rule 5(2) (b) of this Court's Rules; that no prejudice will be suffered by the respondent if the application is allowed; that in contrast the applicant stands to suffer loss of colossal amounts of money which the respondent will not be in a position to refund should the appeal succeed.

The applicant also relies on the content of a supporting affidavit deponed by ***Waigi Kamau.*** In summary,

it is deponed that the respondent initially filed a Civil suit HCCC No. 2892 of 1993 seeking damages from the applicant; the suit was followed by the filing of a Constitutional Reference H.C. Misc. Appl. No. 56 of 2005; that the respondent was awarded damages in both. That as at the time the applicant filed grounds of opposition in the Constitutional reference case (Misc. 56 OF 2005), they were not aware of the existence of the civil suit; that being unaware of the existence of this other suit was a genuine mistake as the office of the Attorney General handles numerous cases, and the possibility of failure to recognize cases with similarity cannot be ruled out.

The deponent goes on further to depone that, upon realizing the existence of the two proceedings in favour of the respondent they filed an application by way of Notice of Motion dated 15th November, 2011 seeking to set aside the Judgment of ***Abida Ali J*** delivered on the 9th day of June, 2010; that that application was heard and determined by ***H.P.G. Waweru J*** in a ruling delivered on the 7th day of December, 2012 sought to be impugned. They reiterate that their intended appeal is arguable and that if the stay order sought is not granted their intended appeal will be rendered nugatory.

The application has been opposed by the content of a replying affidavit deponed by the respondent ***James Hoseah Mwara*** sworn and filed on the 18th day of June, 2013. The grounds put forth by the respondent are that the applicant is undeserving of this Court's relief because they have come to this Court with unclean hands having disobeyed the High Court orders made on 3rd day of May, 2013 for the release of the decretal sum in HCCC. No. 2892 of 1993; that the applicant is therefore a contemnor, and for this reason they cannot be granted the relief sought; that the application under review should be dismissed as the High Court has directed the applicant not to file any applications in any court until they comply with the release of funds in HCCC Number 2892 of 1993.

The respondent further denies allegations of unjust enrichment by reason of the existence of alleged two parallel but similar claims; that the two suits concern different causes of action; that the existence of the proceedings in HCCC No 2892 of 1993 was disclosed in the constitutional Misc. Application Number 56 of 2005.

The respondent further argues that the applicant's intended appeal is not arguable and is an exercise in futility as it is intended to be premised on an incompetent draft memorandum of appeal where no specific reliefs are sought in the intended appeal.

In their oral submissions to this Court, learned counsel ***M/S Stella Munyi*** for the applicant while reiterating both the grounds in the body of the application and the supporting affidavit urged us to allow their application. She reiterates that the appeal is arguable, namely, because issues arise as to whether the two causes of action in HCCC No. 2892 of 1993 and Misc. Appl. No. 56 of 2005 are one and the same; whether the respondent failed to disclose the existence of HCCC No. 2892 of 1993 in Misc. Application Number 56 of 2005; whether upholding the two awards in favour of the respondent would amount to an unjust enrichment; and whether any prejudice will be suffered by the applicant should both awards stand.

Turning to the second ingredient, learned counsel argued that public interest overrides private interest; that public funds are at the risk of being wasted as the respondent may not be in a position to refund the amount specified in the two decrees should the applicant's intended appeal succeed; that having argued that the respondent will not be in a position to refund the decretal sum, the burden shifts on to the respondent to demonstrate that he will be in a position to refund the decretal sum if paid out to him, in the event the applicants' intended appeal succeeds; that the respondent has not discharged this burden on the basis of the content of his replying affidavit and the annextures thereto. Lastly that if granted the relief being sought the intended appeal will be expedited.

Turning to the respondent, learned counsel ***Mrs. G.M. Gichuhi*** urged us to dismiss the application. She reiterated the content of the replying affidavit that the Solicitor General was served by the respondent with the order issued by the High Court on 3rd May, 2013 together with a penal notice; that service of this order was effected on the 7th May, 2013; that vide the said order the applicant was directed to release the decretal sum awarded to the respondent in HCCC No. 2892/1993; that the applicant's failure to do so

amounts to contempt of a court order; and that the applicant is therefore a contemnor, and for this reason the applicant should be denied audience.

Turning to the application under review, learned counsel ***Mrs. Gichuhi*** submits that the applicant stands non suited because there is no notice of appeal in place. It is learned counsel's arguments that since the ruling sought to be impugned was delivered on 7th December, 2012, the notice of appeal purportedly filed on the 9th January, 2013 was filed out of time; that there is no saving for the applicant by reason of the exclusion of the days comprising the Court's Christmas vacation; that no explanation has been advanced by the applicant for this delay. Neither have they sought leave of Court for an extention of time within which to comply.

Turning to the second ingredient of the appeal being rendered nugatory should the Court decline to grant the order sought; learned counsel ***Mrs. Gichuhi*** argued that, this will not arise because, the respondent has already furnished the High Court with title documents and log books of property owned by him, and valued in excess of Kshs. 22 million; that this fact has not been disputed by the applicant; that the issue of loss of public funds fronted by the applicant does not hold because the Ministry concerned has already released the funds to the office of the Attorney General for onward transmission to the respondent, the applicant declined to do so, and has instead moved to this Court to seek stay orders.

Learned counsel has argued further that the intended appeal is not arguable as the causes in both Nairobi HCCC No. 2892 of 1993 and HCCC Petition Number 56 of 2005 are totally different; that the cause of action in HCCC No. 2892 of 1993 is based on the tort of negligence, whereas the claim in Misc. Petition Number 56 of 2005 is based on infringement of fundamental rights. While commenting generally on the submissions of learned counsel for the applicant, ***Mrs. Gichuhi*** reiterated that the applicant has only taken refuge in this Court to escape the consequence of contempt proceedings filed against them in the High Court; that they have not rebutted the respondents documentary proof that his property net worth is in excess of Kshs.22 million which is well beyond the decretal amounts in both claims, and is therefore capable of refunding the decretal sum should the applicant succeed in their intended appeal. We are urged to find that the applicant's application has been presented in bad faith and dismiss the same.

In response to the respondents submissions, ***M/S Stella Munyi*** for the applicant while reiterating their earlier submissions, added that their Notice of appeal was filed in Court after taking into account the Court's statutory Christmas vacation; that knocking out their request in terms suggested by the respondent will offend the provisions of Article 159 (2) (d) of the Constitution; that the very fact that the applicant claims that Nairobi HCCC No. 2892 of 1993 and HCCC Misc Petition Number 56 of 2005 are one and the same, whereas the respondent alleges that these are different is in itself arguable; that they still maintain that the respondent is guilty of non disclosure of material particulars when he presented Misc. Application No.56 of 2005; and that there is nothing to show that the valuation reports filed by the respondent in HCCC No. 2892 of 1993 are correct counsel conceded that they were aware of the contempt proceedings pending in the High Court against them, but maintained that they were properly before this Court.

Parties also relied on case law to strengthen their arguments. We have perused all of these. We shall bear in mind the principles enunciated therein in the determination of this application. There is the case of ***East African Cables Limited versus the Public Procurement Complaints Review and Appeals Board and the Kenya Power and Lighting Company Limited [2007] eKLR;*** the case of ***Kenya Hotel Properties Limited versus Willsden Investment Limited and 8 others [2013]eKLR;*** the case of ***Kenya Posts Telecommunications Corporation versus Paul Gachanga Ndarua Nairobi Civil Appeal No. Nai 367 of 2001 [194 of 2001 (UR]*** ;the case of ***Githunguri versus Jimba Credit Corporation Limited [1988] KLR 838*** ; the case of ***Kenya Pipe Line Company Limited versus Stanley Munga Githunguri [2011] eKLR*** and lastly the case of ***ABN AMRO Bank N.V. versus Lemonde Foods Limited Civil Application No. Nai 15 of 2002***

All these reecho the well known principle that the Court's jurisdiction under Rule 5 (2) (b) of this Cour's Rules is purely discretionary, which discretion has to be exercised judiciously, namely not on a whim, caprise or sympathy but on sound reason. That in order for one to earn a relief under Rule 5 (2) (b) of this

Court's Rules, there has to be demonstration of existence of two ingredient, namely existence of an arguable appeal and secondly that if the stay order or injunction sought is not granted, the appeal/intended appeal if ultimately successful will be rendered nugatory.

With regard to the second principle, where an applicant alleges the respondent's inability to refund the decretal sum if the appeal ultimately succeeds, the burden is shifted onto the respondent to prove ability to refund by showing list of assets, bank accounts inter alia.

Being so guided, we now proceed to perform the task we have been called upon to do, that is to determine whether on the basis of the rival arguments herein, a case has been made out for us to either grant or withhold the relief sought from us by the applicant and give reasons either way. First of all, we have to deal with the issue as to whether we are properly seized of this matter. This arises from the respondents contention that both the draft memorandum of appeal and the notice of appeal on which the application is premised are incompetent, because the draft memorandum of appeal does not have the prayers it intends to seek from this Court, and the notice of appeal was filed out of time. And lastly that the applicant is undeserving of this Court's exercise of its discretion in its favour because it is in contempt of the Court orders made in HCCC No. 2889 of 1993.

With regard to the allegations of existence of an incompetent notice of appeal, until struck out under the relevant Rules of this Court, it provides an anchor for the applicants application. Secondly the applicants' explanation that it is saved by reason of the exclusion of the days comprising the Courts' Christmas vacation is plausible, and this has not been contested by the respondent. We therefore find the notice of appeal proper and filed in time. Turning to the imperfect draft memorandum of appeal, it is inconsequential as the imperfection is limited to the reliefs intended to be sought. Of importance to this Court at this juncture are the grounds intended to be raised and not the reliefs. Since these are in place, the applicant's application appears to be safe. Lastly, the draft memorandum of appeal being a draft can be perfected before the filing of the appeal.

As for the contempt of Court proceedings pending in HCCC No. 2892 of 1993 against the applicant, we find these proceedings to be out of our reach, and will not prevail to deny the applicant decision on its application.

Turning to the merits of the application, it is common ground that there is no dispute that there are two judgments by the High Court both of which are in favour of the respondent. The first of this was the judgment delivered by ***Ali-Aroni-J*** on the 9th day of June, 2010 in which the respondent who was the plaintiff was awarded an aggregate sum of Kshs.4, 008,100/= made up of general, special, exemplary damages and costs. The applicant was aggrieved by that decision and filed a Notice of appeal dated and filed on 16th day of June, 2010. A month later on the 21st day of July, 2010, **Okwengu J** (as she then was) awarded the respondent 1.5 million in a judgment where several matters among them Misc. Application No. 56 of 2005 relating to the respondent, had been consolidated and heard together but specific sums made in favour of each claimant separately. There is no notice of appeal which has been exhibited on the court record as against this second award.

The presence of the notice of appeal in 2892 of 1993 notwithstanding the applicant presented an application by way of notice of motion **dated 15th November, 2011** seeking among others stay of execution of the decree therein pending the hearing and the determination of the application inter partes, that the honorable Court be pleased to set aside the judgment dated 9th June, 2010; that the Court to proceed to strike out the suit with costs and that costs for the application be provided for. The respondent opposed that application. Parties were heard on their merits.

In a ruling delivered on the 7th day of December, 2012 ***H.P.G. Waweru J*** had this to say in part:-

> ***"I have also perused the papers concerning Nairobi HC Misc. Civil case No. 56 of 2005 (O.S) annexed to the application. This case was a constitutional reference under Section 84 of the then Constitution of Kenya. The plaintiff alleged violation of various fundamental***

rights and freedoms under Section 70,72,74,77,78,79,80 and 82 of that Constitution and sought various damages under sSction 84(2) of that Constitution."

On 22nd July, 2009, the defendant (Attorney general) filed grounds of opposition to the originating summons raising various grounds. None of those grounds was that the plaintiff had already filed another suit in which he sought damages based on the same or similar cause of action.

The reference was heard together with several other similar Constitutional references filed by other persons. In a consolidated Judgment dated and delivered on 21st July, 2010 by Okwengu J (as she then was) the plaintiff was awarded general damages of Kshs. 1.5. Million.

As already seen in the present suit (Nairobi HCCC No.2892 of 1993) was based on the tort of negligence. The damages awarded were based on that pleaded tort. On the other hand, Nairobi HC. Misc. Civil case No. 56 of 2005 (O.S.) was based on violation of fundamental rights and freedoms under the Constitution then in place, and the damages awarded were specifically for those violations.

It is also to be noted that the judgment herein was delivered on 9th June, 2010 while Judgment in Nairobi HC. Misc. Civil case No. 56 of 2005 (O.S.) was delivered on 21st July, 2010. So, if any judgment were to be challenged, it ought to be the latter one, which was in the latter case. There is absolutely no cause to challenge the earlier judgment which was delivered in the earlier case.

For the above reasons I find no merit in the Notice of motion dated 15th November, and is dismissed with costs. It is so ordered."

The applicant was aggrieved by the above order. There is an intention to appeal against this order. This is the order we have been called upon to exercise our discretion under Rule 5(2) (b) of this Courts Rules and stay. The question we have to ask ourselves is whether there is anything capable of being stayed by us in the ruling sought to be impugned. In our considered view, there is no order capable of being stayed. All that the learned Judge did was to express an opinion firstly, on the relationship or otherwise of Nairobi HCCC. 2892 of 1993 and Misc. App. Petition Number 56 of 2005; secondly, according to the learned Judge stay orders should have been sought with regard to the later decision of the two causes namely the decision in Misc. Application No. 56 of 2005; thirdly there was no pronouncement on the prayer sought for the court to set aside the judgment in Nairobi HCCC No. 2892 of 1993 and then strike out the suit.

We have no doubt that the applicant has a right to exercise its undoubted right of appeal and seek a second opinion on the arguable points fronted by them. However, it is now trite and we cannot lose sight of the fact that in order for a party to succeed on a relief sought under Rule 5(2) (b) of this Courts' Rules one has to demonstrate the existence of both ingredients, that is arguability of the intended appeal and that the intended appeal would be rendered nugatory if a stay order is not granted and the appeal ultimately succeeds.

Herein, we entertain no doubt that the points fronted by the applicant as arguable points, are indeed arguable. By arguable we do not mean those that will ultimately succeed, but those that justifiably warrant interrogation by the Court. However as for the second limb of the intended appeal being rendered nugatory if the stay order sought is not granted, we find that this has not been made out. This is borne out by the fact that all that the learned judge did was to express an opinion on two aspects of the application that was before him as demonstrated above and then declined completely to express an opinion on a 3rd issue of setting aside the judgment in HCCC No. 2892 of 1993 and striking out the suit, followed by a negative order of dismissal. We find nothing capable of being stayed in the circumstances displayed above.

Having arrived at the conclusion that there is nothing capable of being stayed, there is no need for us to endevour interrogating the other issues raised i.e whether the relief should be withheld from the applicant on account of the contempt proceedings pending against it in HCCC No. 2892 of 1993 on the one hand , and whether the respondent has discharged the burden shifted to him to demonstrate the ability or otherwise of refunding both the decretal sum in HCCC No. 2892 of 1993 and Misc. Application No. 56 of 2005 if paid out to him should the intended appeal ultimately succeed.

In the result and for the reasons given above, we find no merit in the applicant's application it is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 14th day of March, 2014

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

D/O