



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI , NAMBUYE & G.B.M. KARIUKI- JJ.A)**

**CIVIL APPLICATION NO.NAI 322 OF 2013 (UR 236 OF 2013)**

**BETWEEN**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> APPLICANT**

**COMMISSIONER OF CUSTOMS AND EXCISE-**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> APPLICANT**

**COMMISSIONER GENERAL**

**KENYA REVENUE AUTHORITY.....3<sup>RD</sup> APPLICANT**

**AND**

**KING-BIRD (KENYA) LIMITED..... RESPONDENT**

*(Application for an Order of Stay of execution and/or stay of any further proceedings pending the hearing and determination of an Intended Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Milimani) Judicial Review Division (Korir. J) Dated 27<sup>th</sup> March, 2012*

**in**

***H.C. Misc. Civil Appl. No. 243 of 2010)***

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**RULING OF THE COURT**

The Respondent, ***King-Bird (Kenya) Limited*** filed High Court Misc. Application No.243 of 2010 on the 11<sup>th</sup> day of August, 2010. It was premised on order LIII Rule 3 of the Civil Procedure Rules and sought an order of *certiorari* to quash the decision of the applicants to detain the respondent's imported motor cycles.

The applicants opposed that application through a replying affidavit of ***Seraphine Ana Manjia*** dated and filed on the 22<sup>nd</sup> day of February, 2011.

The parties were heard on their merits, before the High Court (***W.K. Korir J***) who delivered his judgment

on 27<sup>th</sup> day of March, 2012 stating inter alia, thus:-

***“The motor cycles have already been released to the Applicant. There is therefore no need to grant the relief sought. It is however clear that this Court would have directed the release of the motor cycle once the applicant had no outstanding obligations to the respondents. The reasonable thing to do is therefore to direct the discharge of the bank guarantee in the sum of Kshs.2,966,079 provided by the applicant so as to secure the release of its motor cycle by the respondents. I therefore order the discharge of the said bank guarantee. The applicant has unjustly suffered in the hands of the respondents and it shall have costs from the respondents”***

Consequent upon the above orders, the respondent presented its bill of costs for taxation which bill was taxed at Kshs.798, 180.00.

The applicants being aggrieved by the decision of the learned Judge, are desirous of appealing against that decision and have lodged the requisite notice. They have also lined up a total of 18 grounds of appeal in a draft memorandum of appeal.

The applicants who are now before us have in the meantime sought interlocutory relief by their Notice of motion dated 27<sup>th</sup> November, 2013, which is premised on Rule 5(2) (b), 42 and 47 (1), (2) and 3 of the Court of Appeal Rules and the inherent powers and jurisdiction of this Court. It seeks two substantive orders:-

***“2. That there be a stay of execution pursuant to the decision of the Honorable Justice W.K. Korir in Nairobi Judicial Review No. 243 of 2010. King-Bird (K) Limited- versus Kenya Revenue Authority and 2 others pending the lodgment, hearing and determination of the intended Appeal herein.***

***3. That there be a stay of further proceedings Nairobi Judicial Review Application No. 157 of 2013. King-Bird (K) Limited versus –Kenya Revenue Authority and 2 others pending the lodgment, hearing and determination of the intended appeal herein”***

The application is based on the grounds in the body of the application as well as the supporting affidavit of ***Seraphine Ana Manjia*** filed with the application on the 25<sup>th</sup> day of November, 2013. In summary, the applicants aver that they have duly filed and served a Notice of appeal against the decision of the High Court. Their further grievance is that the respondent has already presented its bill of costs which has already been taxed at Kshs. 798,180.00.and is in the execution process having sought an order for mandamus in judicial Review application No.157 of 2013.

It is the applicant’s contention that if the orders sought are not granted, the applicants will suffer irreparable loss; that no prejudice will be suffered by the respondents if the orders sought are granted and that the applicant will speedily process the appeal for hearing and disposal.

In his oral submissions before us, learned counsel ***Mr. Twahir Ali Mohamed*** appearing for the applicants urged us to consider the issues raised in the memo of appeal exhibited with the application and find that the intended appeal is arguable. On the intended appeal being rendered nugatory, if it was successful, ***Mr. Twahir*** conceded that the respondents are still in business but contended that there is a likelihood of the applicants loosing intended fines if they succeed on appeal. Lastly, he stated that the applicant is amenable to an order of conditional stay whereby the taxed costs are deposited in an escrow account until the conclusion of the intended appeal.

In response ***Mr. Otieno Thomas K’bahati***, learned counsel for the respondent opposed the application on the basis that the applicants’ application does not meet the threshold of Rule 5(2) (b) of the Court of Appeal Rules; that the same is premature as Judicial Review application No. 157 of 2013 was yet to be determined; that the applicants have even failed to respond to that application; that the applicants have moved to this Court and presented this application just to impede the hearing of application No. 157 of

2013 (Supra).

**Mr. K'bahati** submitted further that the applicants intended appeal is not arguable as there is no way the applicants can agitate for a curtailed right to impose fines in the absence of a conviction; that there is no way the success of the applicants' intended appeal can be rendered nugatory as what is involved is the matter of costs and that the respondent having demonstrated during the proceedings in the Judicial review application No.230 of 2012 that it is a viable trading company capable of refunding the taxed costs if paid out to it. It was incumbent upon the applicant to rebut that presumption. It is **Mr. K'bahati's** argument that the applicant has not satisfied the necessary threshold for the relief sought under Rule 5(2) (b) of the Court of Appeal Rules and on that account urged us to dismiss the application with costs to it.

Our jurisdiction to grant or withhold relief under Rule 5(2) (b) is purely discretionary. The Rule provides, inter alia:-

***“Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may in any civil proceedings where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”***

This Court has laid down the parameters within which to exercise this discretion in numerous decisions. We shall cite a few for purposes of the record only. In **Safaricom Limited versus Ocean View Beach Hotel Limited & 2 others civil application No. 327 of 2009 (UR) Omolo JA** had this to say:-

***“At the stage of determining an application under Rule 5(2) (b), there may be no actual appeal. Where there is no actual appeal already lodged, there nevertheless must be an intention to appeal which is manifested by lodging of a notice of appeal. If there is no notice of Appeal lodged, one cannot get an order under Rule 5(2) (b) because, as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeal from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court”***

In **Equity Bank Limited versus West Link MBO Limited –Civil Application No. 78 of 2011 (UR)** the Court held, *inter alia*, that Rule 5(2) (b) is a procedural innovation designed to empower this court to entertain interlocutory applications for preservation of the subject matter of the appeal in order to ensure the just and effective determination of the appeal. Lastly there is also the case of **Githunguri versus Jimba Credit Corporation Limited (No.2) [1988] KLR 838** wherein the following guiding principles were laid out:

- 1. That the jurisdiction of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules to grant either a stay of execution, an injunction or a stay of further proceedings arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with Rule 74.***
- 2. The rule conferred an original independent discretion on the Court and the Court had to decide denovo on the suitability or otherwise of the relief sought.***
- 3. The general principles on which the Court would base its unfettered discretion were, first that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly that the Court should ensure that the appeal, if successful should not be nugatory”***

Applying the above principles to the rival arguments herein, we are satisfied that the applicant has satisfied the first requirement of procedurally invoking our jurisdiction, that is, by lodging of an appropriate notice of appeal.

On the issue of the intended appeal being arguable, it is now trite that an arguable point need not be one which must succeed, but one which is worthy of the court's interrogation. Secondly, that existence of a solitary *bona fide* arguable point will suffice. We have revisited the intended grounds of appeal and we are satisfied that the issues raised therein are not frivolous. It is arguable, for example: whether fines and penalties can be imposed in the absence of a conviction; (ii) whether the respondent had committed any crimes as alleged by the applicant (iii) whether the applicants had acted in bad faith, unreasonably and maliciously in the manner they handled the respondent's case and (iv) whether the applicants had acted in excess of jurisdiction. The first requirement under the Rule has been met.

As for the second requirement, we find that this has not been established for the following reasons: **One**, the respondent is a viable trading company, a matter admitted by the applicants. **Two**, the documentation exhibited by the applicants themselves demonstrates that the applicant made demands on the respondent for payment of alleged levies and duty ranging up to Kenya shilling three million (Kes.3,000,000.00) which were met. **Three**, the respondents were required to deposit security of Kshs.2, 966,079.00 which they also met. The amount was refunded to the respondents at the conclusion of the judicial review proceedings.

In the premises, we agree with **Mr. K'bahati's** submission that the respondent has demonstrated financial ability to refund any costs paid out to it. In the circumstances, the applicants have failed to demonstrate that the intended appeal if it eventually succeeds, will be rendered nugatory. The rule is that both ingredients have to be met before a litigant can access relief under Rule 5(2) (b) of this Courts Rules. In the result, we find no merit in this application. The same is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of May, 2014.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**

**D/O**