



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CIVIL APPLICATION NO. NYR. 8 OF 2014 (UR 6/2014)

IN THE MATTER OF AN INTENDED APPEAL

JUSTUS KARIUKI MATE.....1ST APPLICANT

JIM G. KAUMA.....2ND APPLICANT

-versus-

MARTIN NYAGA WAMBORA.....1ST RESPONDENT

JIM G. KAUMA.....2ND RESPONDENT

(An application for stay of the Judgment and Decree in Kerugoya Petition No. 3 of 2014 in so far as the same applies to Kerugoya Misc. Application No. 4 of 2014 and stay of further proceedings in Kerugoya Misc. Application No. 4 of 2014, pending the hearing and determination of an intended appeal from the Judgment and Decree (Ong'undi, Githua & Olao, JJ.) dated 16th April, 2014,

RULING OF THE COURT

[1] Before us is an interlocutory application by way of a Notice of Motion which is principally brought under the provisions of **Rule 5 (2) (b)** of the **Court of Appeal Rules** amongst a host of other provisions of the law. Justus Kariuki Mate and Jim G. Kauma, the 1st and 2nd applicants respectively seek for orders *inter alia* of stay of execution and/citing for contempt of court for disobedience of the order of the High Court made on 23rd January, 2014, in **Embu High Court Petition No 1 of 2014, Hon. Martin Nyaga Wambora and Another Vs The Speaker County Assembly of Embu, and Another** pending the hearing and determination of the intended appeal.

[2] As aforesaid these orders are sought under **Rule 5(2) (b)** of the rules of this Court and the principles that guide the Court in considering such applications are now well settled. The applicant in order to succeed must satisfy the court that the appeal or intended appeal is an arguable one, that is, it is not a frivolous appeal. Secondly that if an order of stay is not granted and the appeal were it to succeed, would be rendered nugatory by the refusal to grant the stay orders. - See **Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd., – Civil Appl. No. Nai. 93/02 (ur)**.

[3] The brief background to the application, as far as we can gather from the record, is this: on the 23rd January, 2014, Martin Nyaga Wambora, the 1st respondent filed a Constitutional Petition No. 1 at Embu High Court against the County Government of Embu, Clerk and the Speaker who are the applicants in this application. In the petition, the 1st respondent sought for various declaratory orders, including orders of certiorari and prohibition against the applicants. The matter was placed before **Githua J.**, on the same day and the learned Judge issued the following interlocutory orders which are relevant to the application before us:-

1. ***“The matter herein is certified as urgent.***

2. ***Conservatory orders be and are granted restraining the 1st, 2nd and 3rd respondents from holding any impeachment proceedings without having first served the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed and without giving him an opportunity to be heard.***

3. ***The order will remain in force till the 5th February 2014 when the matter will be placed before the Resident Judge Embu for directions”.***

[4] The Petition was consolidated with another one as well as a **Judicial Review Misc. Appl. No 17 of 2014**, as they all related to the same

subject matter; the proceedings to impeach the Embu County Governor from office. All the suits were heard by a Bench of three Judges, **Ong'undi, Githua and Olao, JJ.** The 1st respondent also filed an application by way of Notice of Motion dated 28th January, 2014, seeking for orders of committal to civil jail of the applicants on the grounds that despite having been served with the above orders, they disobeyed the orders and purported to proceed with the impeachment proceedings against the 1st respondent. That Notice of Motion was also heard together by the same Bench alongside the all the other suits that are cited above. The Judges seem to have considered all the issues raised in all the matters in some considerable detail in the consolidated judgment that was delivered on 16th April, 2014.

[5] In regard to the application for contempt of court the learned Judges made the following conclusion and orders *inter alia*:

“We have found that the 1st, 2nd, 5th, and 6th, respondents acted in violation of the Court orders of 3rd February 2014 and 23rd January 2014 respectively...”

We hereby direct that summons be issued and served on the respondents in Misc. Application No. 4 of 2014, namely Mr. Justus Kariuki Mate and Mr. Jim G. Kauma to appear before this Court on 15th May 2014 for further orders”.

This was followed hot on the heels with a notice of summons served upon the applicants is dated 23rd April, 2014, requiring them to appear in court on the 15th May, 2014. Those orders provoked the present application which is predicated on the fact that the applicants will file an appeal and they annexed a draft memorandum of appeal.

[6] During the hearing of the application, Mr. Njenga, learned counsel, appeared for the applicants. There was, however, no appearance by the respondents although the records showed that they were duly served with the application and the hearing notice. Mr. Njenga on behalf of the applicants submitted that there is an arguable appeal as the applicants were not served with the court orders which they were found to have contravened; the finding of contempt was predicated on two affidavits of service which clearly show the order was not served upon the applicants but on one Boniface Muthomi who acknowledged receipt and affixed a stamp of the Speaker of the County Assembly of Embu. The applicants stated in their replying affidavits that they were not aware of the court orders, thus it was incumbent upon the respondents to demonstrate “*beyond reasonable*” doubt that service of the order was effected upon them.

[7] It was further submitted that the learned Judges relied on the evidence of service that was effected upon the secretary of the Clerk County Assembly of Embu. This was not personal service as provided for under **Order 48** of the **Civil Procedure Rules**. Counsel argued that an order ought to be served the same way as the summonses to enter appearance. The Judges also relied on a letter written by the Deputy Registrar of the High Court at Kerugoya dated 28th January, 2014, in response to a letter written by the County of Embu Commander who had sought clarification on whether the Court order issued on 23rd January, 2014, bore the official seal of the Court. The Deputy Registrar confirmed the order was genuine. Counsel also faulted the alleged publication of the Court orders in the Daily Newspapers which he claimed were done without first obtaining leave of the Court to effect service by way of substituted service. Lastly, Mr. Njenga submitted that the intended appeal is arguable for reasons that the application was not served upon the Attorney General and secondly the orders of contempt of court were made contrary to the provisions of **Article 196 (3)** of the **Constitution** and the provisions of the **National Assembly (Powers and Privileges) Act** as read with the **County Government Act**.

[8] We have weighed the issues raised in this application with considerable anxiety. We are conscious that the issue of disobedience of a court order is core to the administration of justice and the maintenance of rule of law. This aspect was well appreciated and articulated by the learned Judges as they reviewed several authorities on contempt of court. The case of ***Hadkinson v Hadkinson, (1952) 2 All ER 211*** was cited. The dicta cited which was well propounded in that case bears repeating as follows;

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must be obeyed. Such being the nature of this obligation, two consequences will in general follow from its breach. The first is that anyone who disobeys an order of the Court is in contempt of court and may be punished by committal or attachment or otherwise...”

[9] The power of guarding and protecting the authority and dignity of court orders, although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case. The applicants intend to appeal against the order finding them in contempt of a court order and hence this application. This application raised two issues regarding non service and competency of the order. These issues are central to the intended appeal, going by the draft memorandum of appeal that was attached to this application. For the foregoing reasons we do not wish to explore and express ourselves on those issues at this interlocutory stage as we do not wish to prejudice the intended appeal, suffice it to state the appeal cannot be said to be frivolous.

[10] On the nugatory aspect of the appeal, Mr. Njenga submitted that the applicants have already been summoned to appear before the High Court at Kerugoya on 30th May, 2014, where they are likely to be convicted for contempt of court. In that case the intended appeal will be rendered fatuous. We do not know what orders may follow, what is clear is that by that time, the intended appeal is not likely to have been heard.

[11] In view of the foregoing, we are inclined to allow this application on the following conditions:

i. The applicants are hereby granted an order of stay from being convicted/or cited for contempt for disobedience of the orders of the High Court Kerugoya of 23rd January 2014 in Petition No 1 of 2014 for a period of sixty (60) days from the date of this ruling.

ii. The applicants to file and serve the intended appeal within 30 days.

iii. In default the Deputy Registrar High Court Kerugoya shall forthwith reissue the summons upon the applicants to appear as per the earlier summons.

iv. The Court of Appeal Registry to assign the appeal a hearing date on priority basis.

v. Costs of this application to abide the outcome of the intended appeal.

Dated and delivered at Nyeri this 28th day of May, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR