



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MARAGA, MURGOR JJ, A)**

**CIVIL APPLICATION No. NAI. 52 OF 2014**

**BETWEEN**

**OTIENO RAGOT & COMPANY ADVOCATES.....APPLICANT**

**AND**

**CAPITAL CONSTRUCTION LTD.....1<sup>ST</sup> RESPONDENT**

**VENKATA CHAILULU GANTI.....2<sup>ND</sup> RESPONDENT**

**PRASAD GANTI.....3<sup>RD</sup> RESPONDENT**

**AL-KARIM BADRUDIN SUNDERJI.....4<sup>TH</sup> RESPONDENT**

**EQUITY BANK LTD.....5<sup>TH</sup> RESPONDENT**

*(An application for stay of proceedings from the ruling and orders of Havelock J delivered on 6<sup>th</sup> March 2014*

**in**

**H.C.C.C. NO. 645 OF 2006)**

**RULING OF THE COURT**

Before us is a Notice of Motion dated 20<sup>th</sup> March 2014 that arises from the ruling of Havelock J delivered on 6<sup>th</sup> March 2014 wherein the applicant seeks a stay of execution of the proceedings in High Court civil Case No. 645 of 2006 pending the hearing and determination of their intended appeal.

The brief facts of the case as can be ascertained from the affidavit of **Brian Otieno** which is attached to the notice of motion, are that the applicant were appointed to represent the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in H.C.C.C. NO. 645 of 2006 wherein they had been sued by the 5<sup>th</sup> respondent for a sum of Kshs.725,132,446.41 together with interest and costs. The applicant says that it successfully defended the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as the suit, was subsequently, struck out with costs. The 5<sup>th</sup> respondent applied to have the ruling reviewed and set aside, but its application was dismissed by the High Court. As a consequence, the 4<sup>th</sup> respondent's taxed his bill of costs, whereupon, the taxed sums were paid by the

5<sup>th</sup> respondent, to the applicant.

It seems that thereafter the firm of Kamwendwa & Company Advocates (Kamwendwa) was appointed to take over the representation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the same suit, as by a letter dated 11<sup>th</sup> February 2014, they demanded that the applicant do release the taxed amounts to them. When the applicant refused to do so, Kamwendwa, without leave of the court filed a Notice of Change of Advocates, together with a Bill of Costs for taxation on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. By this time no costs had been paid to the applicant by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

The applicant soon thereafter filed an application seeking orders of stay of all proceedings in the suit, as undertaken by Messrs. Kamwendwa or any other firm other than the applicant, and to expunge from the record all documents that the firm had filed. When the application went before Havelock J, both Mr. Otieno of the applicant and Kamwendwa were in court. Mr. Kamwendwa applied for leave to be placed on record for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents instead of the applicant and submitted that the bills of costs he had filed on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be deemed as properly filed, arguing that the court had discretion under Section 1A and 1B of the Civil Procedure Act to allow his application, and that the applicant was not estopped from taxing their bill in the normal manner.

The Court allowed the firm of Kamwendwa to be placed on record instead of the applicant, but struck out the pleadings already filed by the firm.

According to the applicant the court's ruling was unjust as there had been no notification by the incoming advocate of the intention to replace the existing advocates after judgment, contrary to Order 9 Rule 9 (b) of the Civil Procedure Rules. Furthermore, the applicant was dismissed unheard as the learned judge dealt substantively with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent's application, yet what was required of him at that stage was to certify the applications as urgent. The applicant contended that it has not been paid any part of its fees and so, had a lien over the Party and Party costs until the advocate's fees are paid in full.

In a replying affidavit sworn by **Venkata Chailulu Ganti**, the 2<sup>nd</sup> respondent and director of the 1<sup>st</sup> respondent, it was conceded that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had indeed appointed the applicant to represent them in HCCC 645 of 2009, and that the suit had been struck out. It was confirmed that the applicant had filed a bill of costs, and had been paid a sum of Kshs. 6,117,678.00. It was contended that the applicant had failed to notify the 4<sup>th</sup> respondent of the payment, and had also refused to remit to the respondents the said sums hence the apprehension that the applicant would also retain the taxed sums in respect of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' bill of costs. Consequently, it was considered necessary to appoint Kamwendwa to act on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents by filing a notice of change, and a bill of costs. No leave was obtained to do so.

Learned counsel for the applicant, **Mr. Otieno** submitted before us that the appeal was arguable and not frivolous, as Mr. Kamwendwa had attempted to place his firm on record for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents without having regard for the requirements of Order 9 Rule 9 of the Civil Procedure Rules; that Kamwendwa had failed to duly notify the applicant, contrary to the said rules, and had instead sought to validate this omission by filing the notice of motion dated 6<sup>th</sup> March 2014 in the High Court. Counsel went on to submit that when the application for urgency was placed before the learned judge, a decision was rendered without the applicant being heard.

With respect to whether the appeal would be rendered nugatory in the event the proceedings were not stayed and the appeal was successful, counsel contended that an advocate has a right to exercise a lien over party and party costs, where it can be demonstrated that his legal fees had not been paid; that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had not paid any fees and therefore the applicant had exercised a lien over the party and party costs, until such time as the bill was taxed and the fees were paid, and finally that from his affidavit it was clear that the 1<sup>st</sup> respondent was a shell company, as its place of business was unknown and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not have any attachable assets, so that, in the event that the appeal

was successful, there was no entity or person capable of settling the outstanding legal costs.

In response **Mr. Kamwendwa** learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the application and submitted that leave of the court had been sought by the firm of Kamwendwa to represent the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents; that the change of advocates was precipitated by the applicant's failure to disclose receipt of the 4<sup>th</sup> respondent's taxed party and party costs, and that the applicant is not without recourse, as it is entitled to file its advocate/client bill of costs for taxation in the usual manner, and execute to recover the amounts due.

**Mr. Ogot** learned counsel for the 5<sup>th</sup> respondent informed the court that the application did not affect the 5<sup>th</sup> respondent, but that, nevertheless, he would be keen if the disposal of the application would be expedited so as to minimize the legal costs to his client.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application for stay of proceedings brought pursuant to **Rule 5(2) (b)** of the Court of Appeal Rules. The principles which guide the court in considering applications of this nature made under **Rule 5 (2) (b)** are now well settled and we need only restate them from **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd** – Civil Appl. No. Nai. 93/02 (UR), thus: -

***“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-***

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”***

With respect to whether the application is arguable or not frivolous, the applicant submitted that Kamwendwa did not comply with **Order 9 Rule 9**, as it had not been notified of the impending change of advocates; that no leave was sought from the court by Kamwendwa to replace the applicant in the suit, and that the applicant's application to stay the proceedings had been dismissed unheard.

Mr. Kamwendwa on the other hand admits that he did not serve the applicant but said contends that his application was allowed by the court and, therefore, this was sufficient to validly placed him on record. We take the view that the purpose of which Order 9 rule 9 of the Civil Procedure Rules was specifically to ensure that an outgoing counsel was duly notified of any changes in representation so as to take such steps as would be necessary to safeguard their interests. There is nothing more disconcerting to counsel, than to be placed in a position where there is the real likelihood of being denied legal fees for professional services already rendered by incoming counsel. If indeed the requisite procedure was not followed by Kamwendwa as the incoming counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents, we consider this to be an arguable issue for determination on appeal.

With respect to whether the appeal would be rendered nugatory if the proceedings were not stayed and the appeal was successful, Kamwendwa informed us, that the applicant was at liberty to tax its bills, execute against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as necessary. What Mr. Kamwendwa did not state is whether indeed the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were financially capable of honoring their obligations to the applicant, given the concerns raised by the applicant. We have a distinct impression that, if the course of action proposed by Mr. Kamwendwa was to be followed, the applicant would inevitably be left holding the wrong end of the stick.

In the circumstances, we consider that an order for a stay of proceedings is warranted, until determination of the intended appeal.

Accordingly, we order that there will be a stay of proceedings in terms of prayer one of the notice

of motion dated 20<sup>th</sup> March 2014. The costs of the application shall be in the intended appeal.

***DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of JUNE, 2014***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**D.K.MAGARA**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**