



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & MURGOR, JJ.A.)

CIVIL APPLICATION NO.56 OF 2013 (UR.36/2013)

BETWEEN

KENYA MEDICAL LAB TECHNICIANS &
TECHNOLOGISTS BOARDS.....APPLICANT

AND

PRIME COMMUNICATIONS LIMITED.....RESPONDENT

*(Being an Application for stay for an Order pending the hearing and
determination of an intended appeal from the Ruling of the High Court of*

Kenya at Nairobi (Havelock, J.) dated 23rd January, 2013

in

H.C.C.C. NO.489 OF 2012)

RULING OF THE COURT

By its notice of motion dated 12th March, 2013, the applicant board invoked the powers donated by **Rules 5(2)(b)** and **42** of this Court's Rules seeking two main orders pending hearing and determination of Civil Appeal No.245/13 said to have since been filed. The orders are:

- i. *that there be a stay of execution of the order in H.C.C.C. 489 of 2012 made on 23rd January, 2013 and also*
- ii. *that there be a stay of proceedings in the same suit.*

The motion was premised on the grounds set out in its body and in the affidavits sworn by **Michael Abala Wanga**, the executive officer of the applicant, and **Patrick Kisabei**.

M/S Kinyua Njagi & Company Advocates, appearing on record for the respondent company, were shown to have been duly served with the hearing notice but did not show up. In the circumstances, **Ms. Wangui**

Shaw, learned counsel for the applicant, proceeded to argue the motion.

The ruling of 23rd January 2013 followed the respondent's application for summary judgment brought under **Order 36 Rule 1(1), (2) of the Civil Procedure Rules**. By that application, the respondent sought judgment for Sh.7,937,750/= and a further Sh.2,937,500/= as against the applicant. The respondent had filed a claim for those sums of money following a contract for services between the two litigants which the latter had allegedly rendered but the applicant had not paid for. After hearing the parties **Havelock, J.** found for the respondent but allowed the applicant to defend the suit on condition that it paid Sh.7,937,350/= to the respondent within 30 days, in default the respondent company would be entitled to the full sum ordered, plus interest. The applicant being aggrieved by that decision has filed the appeal aforementioned and therefore seeks the orders above-stated.

Ms. Shaw told us that in the appeal, it will be argued that the two parties had in their agreement stated that payment for services performed by the respondent, would be subject to the respondent availing invoices to the applicant for examination and verification first. Only after that would payment issue. That the respondent did not abide by that condition and yet proceeded to bill the applicant demanding payment. Further that the learned Judge was also inclined to order payment to be made to the respondent on the basis that the applicant had not filed any defence yet as per the procedure, where an application for summary judgment is filed, the respondent therein is limited to replying to that application and then only to moving to file a defence if and when the court gives leave to defend. Accordingly, so **Ms. Shaw** continued, the learned Judge should not have taken in regard absence of filing a defence to give the conditional leave as aforementioned.

We heard further that the replying affidavit raised reasonable and triable issues to entitle the applicant to defend unconditionally. We were told that the contents of the draft memorandum of appeal filed along with the motion, were those reflected in the appeal itself which had been filed and served. They raised triable issues.

Asked to say why the applicant had written out cheques in favour of the respondent for payment, thereby appearing to admit owing the sum claimed, **Ms. Shaw** contended that the cheques had been drawn on a "without prejudice" basis, according to the parties' long business relationship. Of course, this argument could not find much space in the circumstance that theirs was a written contract which excluded any oral understanding, namely that the cheques were written in anticipation of the respondent availing third party invoices for verification before payment. Then, finally, counsel told us that the respondent had done some work, and accordingly the applicant was ready to make a deposit of part of the sum ordered by **Havelock J.** A defence was later filed, nonetheless, and on 24th January, 2014 this Court granted a temporary stay of execution.

As to whether the appeal would be rendered nugatory if it eventually succeeded and yet the whole sum of Shs.7.9 million had been paid over, we were told that the applicant could not easily recover that money from the respondent whom it considered as having no assets to recover the sum from. And that in any event, it was unconscionable to have the applicant pay for whole sum claimed as if the whole job had been performed.

In applications of this nature, falling under **Rule 5(2)(b) of the Court of Appeal Rules**, there have been numerous decisions stating and restating over and over that in order for an applicant to succeed, one must demonstrate first that one has an arguable appeal – not a frivolous one, and then that if the sought orders are not granted and in the end the appeal succeeds, that appeal shall be ordered nugatory.

In considering whether an arguable appeal has been made out, it is not a requirement that that appeal will necessarily succeed. It is sufficient that the appeal appears one that will be fully argued before the Court (see **Joseph Gitahi Gachau & Another vs Pioneer Holdings (A) Ltd and Others Civil Application No.124 of 2008**). And besides, an appeal is considered arguable even if it raises a single bona fide only (see **Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd Civil Application No.345 of 2004.**)

In the present matter the applicant has contended that it will raise the ground that any payment due to the respondent would only be made in accordance with the parties' agreement, namely, that the respondent had first to furnish 3rd party invoices which the applicant could verify first before effecting payment, and not otherwise. We heard that the respondent did not comply with this condition and so it was not entitled to any payment. In our view this point is sufficient and by it the applicant has demonstrated on arguable ground to present an appeal.

Similarly, we are satisfied that in the event the sum ordered to be paid is paid and in the end the appeal succeeds, not only will the applicant be faced with the often lengthy and money-consuming process to institute recovery proceedings, but it could also be unfair to order full payment when it is agreed by both sides that only some of the work was done.

In the event, we allow the application on condition that the applicant do deposit Sh.4,000,000/= in an interest earning bank account in the names of the appellant's counsel and the Registrar of the Court within the next 30 days from the date hereof. In default, the leave to defend will be lost and due orders will follow. The respondent is hereby ordered to pay the costs of the application to the applicant.

Dated and delivered at Nairobi this 24th day of October, 2014

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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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