



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MOHAMMED - JJ.A)

MISC. CIVIL APPLICATION NO. 121 OF 2014 (UR.99/2014)

BETWEEN

RIFT VALLEY WATER SERVICES BOARD.....1ST APPLICANT

JATHETH MUTAI.....2ND APPLICANT

THE COUNTY GOVERNMENT OF NAKURU.....3RD APPLICANT

H.E. KINUTHIA MBUGUA.....4TH APPLICANT

AND

GEOFFREY ASANYO.....1ST RESPONDENT

JOHN CHERUIYOT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Application for stay of Execution of the Judgment of the Nakuru Industrial Court. Petition No.4 of 2014 pending the lodging, hearing and determination of an intended appeal against the whole of the Judgment (Ongaya, J) Dated 30th May, 2014

in

Industrial Court of Kenya at Nakuru Petition No. 4 of 2014

RULING OF THE COURT

The brief background information to this ruling is that, the first respondent **Geoffrey Makana Asanyo** (the petitioner) moved to Nakuru High Court and presented Petition number 4/2014 directed against **Rift Valley Water Services Board, John Cheruiyot, Japheth Mutai**, the Country Government of Nakuru, **H.E. Kinuthia Mbugua**.

In a summary, the first respondent sought the High Court's intervention to declare the decision and process of advertising and intended filling of the positions of 6 directors of the Rift Valley Water Services Board as being opaque, egregious, clandestine, capricious, whimsical and contrary to Articles 41 and 47 of the Constitution of Kenya hence unconstitutional and consequently null and void; the action of the 2nd, 4th and 6th respondent (3rd respondent, 2nd applicant, and 4th applicant) contravened Articles 10, 41, 47 and 73 of the Constitution of Kenya and the Public Officers Act of 2003 hence unfit to hold any public office; the respondents were escapists and had abdicated their duty to respect and uphold the Constitution of Kenya in their administrative action. The petition was supported by the petitioner's affidavit.

The petition was filed together with an application by way of Notice of Motion seeking interim preservative orders pending the hearing and disposal of the petition. Both the petition and the interim application were opposed by a preliminary objection filed by the 3rd respondent on 18th March, 2014; another by the 1st, 2nd, 3rd and 4th applicants filed on the 20th March, 2014 and on 25th March, 2014 respectively. The ruling of 30th April, 2014 indicates that there were also counter applications by way of Notice of Motion filed by the 2nd and 4th applicants on the 20th day of March, 2014 and another filed by the 1st and 3rd applicants on 4th April, 2014. As borne out by the content of the ruling of 30th April, 2014, all the above applications were consolidated and heard together, resulting in dismissal orders against each of them as consolidated. A notice of appeal was lodged against that decision on the 8th day of May, 2014.

The dismissal orders paved the way for the merit disposal of the petition resulting in the judgment of the learned trial **Judge, Byram Ongaya**, of 30th May, 2014 sought to be impugned herein. The applicants are aggrieved by the said judgment. They lodged a notice of appeal to this Court on 30th May, 2014. Their grievances are contained in a draft memo of appeal annexed to the application.

On the notice of appeal aforementioned, the applicants proffered an application by way of Notice of Motion premised on Section 3A & 3B of the Appellate Jurisdiction Act Cap 9 and under rule 5(2) (b) of the Court of Appeal Rules, 2010. The substantive relief sought is that, pending the hearing and determination of the application in the first instance and the appeal in the second instance, this Honourable Court be pleased to grant a temporary stay of execution of proceedings arising from the aforesaid judgment. The application is grounded on the grounds in the body of the application, the supporting affidavit of **Japheth Mutai**, the 2nd applicant, his supplementary affidavit deposed on the 6th day of June, 2014 and filed on the 9th June, 2014; his further affidavit deposed on the 18th day of June, 2014 and filed on the 20th day of June, 2014. There is also a supporting affidavit deposed by one **Joseph Motari** on the 18th day of June, 2014 and filed on the 2nd July, 2014.

The application has been opposed by a replying affidavit by the petitioner deposed on the 7th day of June, 2014 and filed on 9th June, 2014, a replying affidavit deposed by one **Ibrahim Osman** on the 7th day of June, 2014 and filed on 12th June, 2014 and a further affidavit by the petitioner deposed on the 16th day of June, 2014 and filed the same date. The Petitioner also filed a further further replying affidavit on the 2nd day of July, 2014.

The applicant also filed written submissions and authorities. In his oral submissions, Senior Counsel Prof. **Tom Ojienda** for the applicant reiterated the contents of the grounds in the body of the application and all the depositions filed on behalf of the applicants as well as their written submissions. He urged us to allow the application because, according to him, the applicant has satisfied the twin prerequisites required to be met before a litigant can earn a relief under rule 5(2) (b) of this Court's Rules.

On arguability, **Prof. Ojienda** submitted that the copy of the Memorandum of Appeal exhibited herein raises pertinent issues for interrogation by this Court. Among these are issues of lack of jurisdiction on the part of the Industrial Court to handle a purely company law matter as if it were an employer/employee issue; the learned trial Judge erroneously made an order effecting his judgment of 30th May, 2014 when he was already functus officio; adherence to the dictates of the said order would contravene the now registered Memorandum and Articles of Association of the Company; it will also be contrary to the principles of good corporate governance enshrined in Article 10(2) of the Constitution and the right to

clean and safe water as protected by Article 43(1) of the Constitution of 2010.

With regard to the second ingredient of the appeal being rendered nugatory if the stay orders sought is not granted, **Prof. Ojienda** argued that the balance of convenience tilts in their favour because if the order sought is not granted, the 1st respondent's co-directors will illegally continue perpetuating themselves in office, earning illegal allowances to the detriment of tax payers' money which is contrary to public policy. They will also continue illegally making decisions for the company when they are not legally in office.

In opposition, **Mr. Kiprotich**, learned counsel for the 1st respondent, urged us to dismiss the applicant's application on the grounds that, it is incompetent on account of the applicant's failure to annex the decree from which the appeal arises, reiterates their complaint in the petition and adds that the applicants' present application is nothing but an abuse of the due process of the Court because what they are complaining about in this application has already been executed and or resolved by the meeting of 4th June, 2014. They also contend that they are legally in office and it is the applicants who had attempted to illegally remove them from office. Lastly, that the 2nd applicant has not exhibited any authority from the first applicant authorizing him to file and participate in this application. **To Mr. Kiprotich**, the applicant has not satisfied the twin prerequisites for the grant of the relief sought. The application should therefore be dismissed.

Mr. Ombui for the 2nd respondent adopted and fully associated himself with the submissions of **Mr. Kiprotich**. On that ground, he urged us to dismiss the application with costs.

Parties also relied on case law. The applicant placed reliance on the decision in the case of **Multi Media University & another versus Gitule N. Naitui [2014] eKLR** for the proposition that the principles upon which this Court acts in exercise of its discretion under rule 5(2) (b) of this Court's Rules is first to decide whether the applicant has presented an arguable appeal, and second whether the intended appeal would be rendered nugatory if the interim orders sought were denied; the decision in the case of

Board of Governors, Moi High School, Kabarak & Another versus Malcolm Bell, Supreme Court petition No.6 & 7 of 2013 for the proposition, *inter alia*, that the reason for the exercise of auxiliary interlocutory power is that of safeguarding the character and integrity of the subject matter of the appeal pending the resolution of the contested issues; the case of **Gatirau Peter Munya versus Dickson Mwenda Kithinji and 2 others, Supreme Court Petition Number 2 of 2014** for the reiteration of the two cardinal principles for the grant of the relief under rule 5(2) (b) of this Court's Rules. The decision in the case of **Harveer Investments Company Limited versus Equatorial Commercial Limited & 3 others [2009] eKLR** for the proposition that the applicants' intended appeal is not frivolous; the decision in the case of **David Randu versus Malindi Water & Sewerage Company Limited [2013] eKLR** for the proposition that Section 12 of the Industrial Court Act read together with Article 162 of the Constitution limits the Jurisdiction of the Industrial Court only to disputes related to employment and labour relationships, whereas on the other hand Section 2 of the Companies Act Cap 486 grants to the High Court the exclusive jurisdiction to determine all disputes related to the business and affairs of companies.

The first respondent on the other hand placed reliance on the decision in the case of **Joshua Nyamache T. Omasire versus Charles Kinganga Maena [2014] eKLR** for the proposition that, where the events sought to be forestalled have already taken effect, an injunctive relief under rule 5 (2) (b) of this Court's rules is not viable; the decision in the case of **Kenya Revenue Authority and 2 others versus King-Bird (Kenya) Limited civil application No. Nai 322 of 2013 (UR 236 of 2013) (UR)** and the case of **Unga Group Limited versus Francis Wanganjau Civil Application No. Nai 228 of 2000(104/2000) (UR)** for the proposition that in order for any litigant to earn a relief under rule 5(2) (b) of this Court's Rules both ingredients for the granting of the relief under this rule must be established. Where one ingredient is absent, then the relief cannot be availed.

Our jurisdiction to grant the applicant the relief sought has been invoked under rule 5(2) (b) of this Court's Rules. As observed by this Court in its decision in the case of **Multi Media University & another**

versus Gitile N. Naituti (Supra), while approving its decision in the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 2 others [2013] eKLR, the exercise of this Jurisdiction is now a well beaten path. The guiding principles are now well crystallized namely:-

- (i) ***In dealing with rule 5(2) (b) applications the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.***
- (ii) ***The discretion of this Court under rule 5(2) (b) to grant stay or injunction is wide and unfettered, provided it is just to do so.***
- (iii) ***The Court becomes seized of the matter only after the notice of appeal has been filed under rule 75.***
- (iv) ***In considering whether the appeal will be rendered nugatory, the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.***
- (v) ***An applicant must satisfy the Court on both the twin principles.***
- (vi) ***On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.***
- (vii) ***An arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the Court; one which is not frivolous.***
- (viii) ***In considering an application brought under rule 5(2) (b), the Court must not make definite or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
- (ix) ***The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
- (x) ***Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen, will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.***
- (xi) ***Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut the evidence the claim"***

We associate ourselves fully with the afore set out guiding principles as stating the correct position in law as regards the exercise of our jurisdiction under the said rule 5(2) (b) of this Court's Rules. We have applied these parameters to the rival arguments herein. We note that the applicants have asserted that they have met the threshold for the grant of the relief sought. Reliance has been placed on the contents of the draft memorandum of appeal annexed to the supporting affidavit. As submitted by senior counsel **Prof Ojienda**, they intend to argue that the learned trial Judge fell into an error when he wrongly vested himself with jurisdiction to determine a purely business and company law matter as an Industrial employer/employee matter; when he failed to rule that the first applicant was bound by the provisions of its amended Memorandum and Articles of Association; when he ruled that the first respondent had been discriminated against, when he made supervisory orders not flowing from the Judgment; when he ignored clear principles of case law applicable to the substratum of the litigation; and lastly, when the learned Judge ignored and failed to consider the clear submissions filed by the applicants.

From the above, it is clear that the applicants intend to front more than one arguable point. It is now trite as clearly indicated by the case law principles already set out herein above, that even one arguable point is

sufficient to warrant the grant of the relief sought, so long as the same is not frivolous and it is worth of interrogation by a Court of law. To us, all the points raised herein above are arguable, irrespective of the ultimate end result of the appeal. We are therefore satisfied that the applicants have satisfied the first ingredient for the granting of a relief under rule 5(2) (b) of this Court's Rules.

Turning to the second ingredient, the applicant has contended that the intended appeal will be rendered nugatory because the status quo will perpetuate the 1st respondent and his Co-directors illegal holding on the office on the one hand and the illegal transaction of business purportedly on behalf of the first applicant on the other hand.

In response, the learned counsel for the 1st respondent has argued that even if we were to hold that the applicants' intended appeal raises arguable points of law or fact, there is no way the said appeal can be rendered nugatory because what the applicant intends to forestall has already been sanctioned by the High Court, when the Court granted the first respondent an interim interlocutory injunctive order restraining the applicants from kicking him and his other Co directors out of office as a result of which the said first respondent and his co-directors have been discharging official duties ever since . Lastly, that the applicants' plea has been overtaken by events and therefore the application is an exercise in futility.

We take note that the issue of the first respondent having been granted an exparte interlocutory injunctive reprieve by the High Court in the first instance has not been disputed by the applicants, save that they allege that this reprieve was granted without jurisdiction and is therefore an illegality. They intend to reverse this on appeal. There is also no denial that the 1st respondent and his Co directors have been in office since the granting of the exparte interlocutory injunctive reprieve in their favour which was subsequently confirmed after the merit hearing of the petition. A reversal of this status quo at this juncture would in effect result in an order a kin to a mandatory injunction, which is not one of the reliefs capable of being accessed under rule 5(2) (b) of this Court's Rules. It therefore follows that re-winding the orders of the learned trial judge at this interlocutory stage would no doubt amount to a pre-emption of the outcome of the intended appeal, a matter prohibited by the exercise of our jurisdiction under rule 5(2) (b) of this Court's Rules. We were also asked by **Prof. Ojienda S.C.** to apply the balance of convenience rule. We are afraid this is not one of the principles known to the rule 5(2) (b) procedure as set out above. It cannot therefore be invoked by us to afford a reprieve to the applicant.

The upshot of the foregoing is that, although we have no doubt that the points the applicants intend to raise on appeal are definitely arguable and therefore the first requirement for earning a relief under rule 5(2) (b) of this Court's Rules has been met, we nonetheless find that for the reason given above, the second ingredient has not been satisfied. In the premises, we have no otherwise but to disallow the applicants' application. It is hereby dismissed. The costs of this application shall abide the outcome of the appeal which we have been told has already been filed.

Dated and delivered at Nairobi this 3rd day of October, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR