IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI 306 OF 2013 (UR 223/2013)

BETWEEN

PETER KAMAU IKIGU…..…….....…….……..……..…….APPLICANT

AND

BARCLAYS BANK OF KENYA LTD…….…….....1ST RESPONDENT

PETERSON OGINO ONGARO.……..…..2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Odunga, J.) dated 27th February, 2013

in

HCCC NO. 719 OF 2003)

****

RULING OF THE COURT

The background to the application for stay of execution before us is the exercise, by the 1st respondent, ***Barclays Bank of Kenya Limited***, of its statutory power of sale by which it sold and transferred ***L.R. No 2/653 Kilimani, Nairobi*** (the suit property) to the 2nd respondent, ***Peterson Ogino Ongaro.*** On or about 7th May 1997, the applicant, ***Peter Kamau Ikigu*** had charged the suit property in favour of the 1st respondent to guarantee payment of a loan of Kshs 3 million advanced to ***Kanconsult Limited***. Upon default in payment of the loan, the 1st respondent, in the exercise of its statutory power of sale,sold by private treaty and transferred the suit property to the 2nd respondent on 6th January 2004.

Aggrieved by the sale, the applicant filed ***HCCC No 719 of 2003*** in which he sought, among others, a declaration that the sale and transfer of the suit property to the 2nd respondent and his subsequent eviction from the suit property were illegal, null and void. He further prayed for an order for the cancellation of the transfer and restitution of his possession of the suit property, together with damages, costs and interest.

The suit was heard by ***Odunga, J***. who on 27th February 2013 dismissed the same as lacking in merit.

Further aggrieved by the dismissal of his suit, the applicant filed a notice of appeal in this Court and followed it up with ***Civil Appeal No. 233 of 2013*** which is now pending for hearing.

In the Motion before us taken out principally under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules,*** the applicant seeks three substantive prayers. The first is to restrain the 2nd respondent from selling, mortgaging, leasing or dealing with the suit property pending the hearing and determination of the appeal. The second relief sought is to prohibit the Principal Registrar of Titles from registering any dealings as regards the suit property pending the hearing of the appeal. Lastly the applicant craves stay of taxation of the 1st respondent's Bill of Costs dated 2nd August 2013 and that of the 2nd respondent dated 1st March 2013 or any other Bills of Costs or execution arising from the judgment and decree of the High Court until the final determination of his appeal.

It is common ground that before the hearing of this application, the 2nd respondent had already sold and transferred the suit property to a third party, ***Westlands Residential Resort Ltd***, which is not a party before us. Indeed,from the conveyance between the 2nd respondent and the said Westlands Resident Resort Ltd, it would appear that the suit property was sold and transferred to the latter even before the applicant filed this application.

In those circumstances, the applicant elected to abandon the first prayer because what he sought to restrain had already taken place and acceding to his prayer would have amounted to this Court issuing orders in vain or orders that were impossible to comply with. As this Court has stated time and again, where the event meant to be restrained by an injunction has already taken place, no purpose will be served by granting an injunction purporting to restrain from happening that which has already happened. (See for example, ***PRISCILLAH KROBOUGHT GRANT V. KENYA COMMERCIAL FINANCE CO LTD & OTHERS, CA No 227 of 1995*** and ***JARIBU HOLDINGS V. KENYA COMMERCIAL BANK LTD, CA No 314 of 2007).*** In the same vein, in light of the applicant's conscious decision not to bring ***Westlands Residential Resort Ltd*** into these proceedings whilst it is clearly a party directly affected by the proceedings, the applicant could not sustain the second prayer, which sought to inhibit dealings withthe title to property now vested in a party that was not before us. Proceeding otherwise would have entailed making orders against a party without affording it an opportunity to be heard, which this Court will not countenance. (***MUTISO V. MUTISO (1984) KLR 536).*** That effectively left the applicant to pursue only the third prayer, limited to stay of taxation of the Bills of Costs.

Mr. Khalwale, learned counsel for the applicant, for reasons wholly beyond our comprehension, hinged his case for stay of taxation of the Bills of Costs exclusively on the inability of the 2nd respondent to refund any moneys that may be paid to him as costs. In spite of direct prompting by the Court, learned counsel totally eschewed the question whether he had, in the first instance, placed before the Court an arguable appeal.

Be that as it may, it was learned counsel's submissions that upon dismissal of the applicant's suit, the 1stand 2ndrespondents had filed in the High Court Bills of Costs for Kshs 7,280,748.00 and Kshs 7,084,531.00 respectively. In counsel's view, these amounts, totaling to over Kshs14 million were utterly undeserved because the suit in the High Court was not a suit for a liquidated sum, but was a simple suit for a declaration and cancellation of title to a property that had been charged to secure Kshs 3 million only.

It was Mr. Khalwale's further submission that if any costswere paid to the 2nd respondent, the applicant's appeal would be rendered nugatory because it would be impossible to recover the amount.To demonstrate that the applicant's apprehension was well founded, learned counsel submitted that in separate litigation between the applicant and the 2nd respondent, being ***CMCC No 6880 of 2004***, the 2nd respondent was ordered to pay to the applicant costs of ***Kshs 53, 610.00***. To date, counsel submitted, the 2nd respondent has not paid the said costs and efforts by auctioneers to attach his property had been fruitless, as they could not trace any of his assets. For good measure, learned counsel added that in the proceedings before the High Court, the 2nd respondent had been ordered to pay Kshs 15,000/= to the applicant as thrown

away costs within 10 days from 30th October, 2007 which he had not done. To add insult to injury, counsel submitted, the 2nd respondent had not even paid Kshs 75 before filing his defence in the High Court.

Counsel concluded by submitting that the 2nd respondent was resident in the United Kingdom and was of devious or doubtful character. This allegation was founded on the fact that the 2nd respondent's name was given in various documents as ***PETERSON OGINO ONGARO, ONGARO PETERSON OGINO AMOS,*** and ***ONGARO PETERSON OGINO A***. In counsel's view, all this was evidence of an evasive person, who upon receiving payment of costs from the applicant may never again be traced in the event the appeal is successful.

Mr. Okoth, learned counsel for the 1st respondent opposed the application, submitting that the applicant had not presented any arguable appeal to justify an order for stay of taxation of the 2nd respondent's Bill of Costs in the High Court. In particular counsel contended that the applicant had not placed any material before the Court to suggest that costs paid to the 1st respondent would not be recoverable in the unlikely event that the applicant's appeal was successful.

Mr. Sirima, learned counsel for the 2nd respondent joined ***Mr. Okoth*** in opposing the application. In his view, no case had been made out for an order of stay of execution because the applicant had failed to satisfy the two conditions upon which an order for stay of execution is premised. Counsel submitted that the applicant had failed to establish that he had an arguable appeal and that such appeal, if successful would be rendered nugatory. On the authority of the decision of this Court in ***SILVERSTEIN V. CHESONI (2002) 1 KLR 867,*** counsel submitted that the applicant is obliged to prove not only one but both of the requirements, which he had failed to do.

Mr. Sirima further submitted that the mere fact that the 2nd respondent was resident out of Kenya was not evidence that he would not be able to repay any costs found to have been undeservedly paid to him, and further that he had adequately explained that all the names in his official documents were his names, with the name ***Amos*** being his father's name. The 2nd respondent concluded his submissions by citing the decision of this Court in ***FRANCIS KABAA V. NANCY WAMBUI & ANOTHER CA NO NAI 298 OF 1996 (UR 113/96)*** in which the Court expressed the view that an order of stay of execution ought not to be granted in respect of an order for costs.

We have carefully considered the applicant's application and the submissions by respective counsel. The order of stay of execution, or for that matter, any other relief under Rule 5(2)(b) does not issue as a matter of course. In ***REPUBLIC V. MUNICIPAL COUNCIL OF MOMBASA & 2 OTHERS EXP ADOPT A LIGHT LTD, CA No 15 of 2007:*** this Court

expressed itself as follows regarding its jurisdiction under Rule 5(2) (b):

"The principles upon which this Court exercises its jurisdiction under Rule 5 (2) (b) of its rules are well known. It is original and discretionary. For the applicant to succeed, it must satisfy the two guiding principles that the intended appeal is not frivolous or is arguable, and that unless a stay is granted, the appeal or intended appeal, if successful would be rendered nugatory. Those principles will, of course, be considered against the facts and circumstances of each case"

(See also ISAAC GATHUNGU WANJOHI & ANOTHER V. ATTORNEY GENERAL & 6 OTHERSCA No Nai 101 of 2012 (UR 79/2012)). Thus the onus lies upon the supplicant under Rule 5(2) (b) to satisfy those two well-known principles. ***(KENYA COMMERCIAL BANK LTD V. BENJOH AMALGAMATED LTD & ANOTHER, CA No 50 of 2001).***

An arguable appeal has always been understood to mean not an appeal, which must necessarily succeed, but one, which is not frivolous, or one, which deserves to be heard by this Court. ***(See KENYA RAILWAYS CORPORATION V. EDERMANN PROPERTIES LTD CA No. Nai 176 of 2012).***

Whether or not a successful appeal will be rendered nugatory must depend on the peculiar circumstances of each case. In ***AHMED MUSA ISMAEL V. KUMBA OLE NTAMORUA & 4 OTHERS, Civil Application No. 256 of 2013*** this Court observed that the purpose of the requirement that a successful appeal should not be rendered nugatory is:

"[T]o preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."

And in **STANLEY KANGETHE KINYANJUI V. TONY KETTER & 5 OTHERS CA No 31 0f 2012** the Court added:

"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved"

Turning to the application before us,we find the applicant's approacha bit perplexing, if we understood him correctly. He neither makes the argument, nor demonstrates that he has an arguable appeal, which is likely to succeed and therefore overturn the order issued against him by the High Court to pay costs to the respondents. Whether or not the order for payment of costs will be overturned after the hearing of the appeal is not, in the circumstances of this application, an issue that can be considered in isolation and independent of the merits of the appeal; it is irretrievably bound to the possibility of success of the entire appeal. This is the very issue that the applicant ought to have addressed in this application, but decided to avoid, opting instead to challenge separately the Bills of Costs pending before the High Court.

Those Bills of Costs by both respondents have not been taxed. At the time of taxation, the applicant will have the opportunity to object to any item on the Bills of Costs. He will have the opportunity to show that the amounts claimed in the Bills of Costs are preposterous, fanciful and unjustified, given the nature of the real dispute that was before the High Court. It has been stated time and again by the courts in this jurisdiction that when it comes to matters of taxation of Bills of Costs, the taxing master is the real authority and except in exceptional cases, courts will defer to his or her views, opinions and decisions. (See ***STEEL CONSTRUCTION PETROLEUM ENGINEERING (EA) LTD V. UGANDA SUGAR FACTORY*** **(1970) EA 141)**.

With due respect to the applicant, as presented and argued, the application before us is utterly premature and speculative. Nobody knows what items the taxing master will strike off the respondents' Bills of Costs and what the final figure awarded will be. Many are the times when after taxation, the Bill of Costs as drawn cannot be recognized from the Bill of Costs as taxed. In any event, the law provides a very elaborate process for challenging the decisionor the exercise of discretion by the taxing master, which in this case is yet to be invoked.

On the basis of material placed before us, we entertain real doubts about the arguability of the appeal. We shall say no more lest there be an erroneous impression of conclusive findings.

Failure to satisfy any one of the twin principles is enough to warrant dismissal of the application before us.*(See* ***REPUBLIC V. KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31*****).** Indeed in ***DAVID KAMAU V. SAVINGS & LOAN KENYA LTD, CA No. 255 of 2005***, the view was strongly expressed that where the applicant has not shown that the intended appeal is arguable, it is unnecessary to consider whether the appeal would be rendered nugatory if an order of stay of execution is not granted. Be that as it may, we are not satisfied on the basis of the material before us that,even assuming after full hearing the appeal is somehow successful; the same will be rendered nugatory. Firstly, *ex concessis* there is no basis for suggesting that the 1st respondent cannot refund whatever costs are paid to it. Secondly as regards the 2nd respondent, we are not satisfied that what the applicant considers to be discrepancies in his name or the fact of his being non resident in Kenya would *ipso facto*render a successful appeal nugatory. There are clear legal procedures for enforcement of an award in favour of the applicant, which he did not invoke, in his previous disputes with the 2nd respondent. In such

circumstances we would be reluctant to conclude, as the applicant invites us to do, that he is incapable of recovering costs from the 2nd respondent.

In the premises, we find no merit in the applicant's application and the same is dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 7th day of November, 2014.

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

jkc