



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KARANJA & RAWAL, JJ.A.)**

**CIVIL APPLICATION NO.NAI. 80 OF 2010 (UR 57/2010)**

**BETWEEN**

**JAYNE WANGUI GACHOKA.....APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

***(Being an application for stay pending the lodgment, hearing and determination of an intended appeal from the order of the High Court of Kenya at Nairobi (Gacheche, J.) made on the 19<sup>th</sup> day of February 2010***

**in**

***H.C.Constitutional Reference No. 51 of 2010)***

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**RULING OF THE COURT**

This is the ruling in respect of the notice of motion dated 9<sup>th</sup> April, 2010. It is brought under **Rule 5(2)(b)** of the **Court of Appeal Rules**. It has four main prayers but only prayer No. 4 remains for the determination by this Court. The said prayer seeks stay orders of paragraph 4 of the order of Hon. Lady Justice Gacheche in **Constitutional Reference Petition No. 51 of 2010** dated 19<sup>th</sup> February, 2010 pending the hearing and determination of the Appeal. As at the time of filing the notice of motion, the appeal had not been filed but we are informed that the same was filed on 22<sup>nd</sup> April, 2010 and is registered as **Civil Appeal No. 90 of 2010**.

This notice of motion first came to this Court for hearing on 7<sup>th</sup> June, 2010. Upon perusal of the same, the Court observed that it emanated from an order made ex-parte by the High Court. The parties were therefore directed to go back to the High Court and have the application that was pending for hearing before that court heard inter-partes.

In the meantime, this Court gave interim orders of stay pending the hearing of that application inter-partes.

Learned counsel for the parties herein **Mr. Nowrojee** for the applicant and **Mr. Mutua** for the respondent informed us at the hearing of this application that instead of proceeding with the interlocutory application

before the High Court inter-partes, they decided to proceed with the hearing of the Constitutional Petition itself. They have already filed submissions in the matter and are awaiting the constitution of a three Judge Bench to hear the same.

Both counsel appeared to have mainly agreed to have the stay orders granted on 7<sup>th</sup> June, 2010 extended as they await the hearing of the Petition before the High Court. *Mr. Mutua* was nonetheless apprehensive that the Petition before the High Court might take too long and the stay orders should be given a time frame or better still be monitored by this Court by way of having the notice of motion listed for mention before us periodically in order to review the progress of the Constitutional Petition before the High Court. That course was certainly not tenable given our limited jurisdiction under **Rule 5(2)(b)** of the **Court of Appeal Rules**.

It was for that reasons that the parties agreed to have the application heard.

*Mr. Nowrojee* argued that the two principles to be satisfied before this Court grants orders of stay under **Rule 5(2)(b)** had been proved. Namely, that they have established that the applicant has an arguable appeal and further that if the stay is not granted, the applicant could be committed to civil jail and that is a situation that could not be reversed even if ultimately her appeal have to succeed.

He therefore urged us to allow this notice of motion and grant the stay orders sought.

On his part, *Mr. Mutua* maintained that the appeal is against the exercise of the discretion of the Judge of the High Court who issued the impugned orders. He urged that the applicant had not demonstrated that the learned Judge had not exercised her discretion judicially and this Court had therefore no basis to interfere with that exercise of discretion by the Judge of the High Court.

We have considered these able submissions of both counsel herein. We have also considered the grounds on the face of the notice of motion and the rival affidavits. This Court has severally restated the principles that need to be satisfied when applying **Rule 5(2)(b)** of the **Court of Appeal Rules**. These Rules are clearly enunciated in the case of **Republic ~VS~ Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31** where this Court held:

***“The law as regards the principles that guide the court in such an application brought pursuant to Rules 5(2)(b) of the Rules are now well settled. .... The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. (See also Reliance Bank Ltd ~VS~ Norlake Investments Ltd [2002] IEA 227).*”**

Needless to say, this is an important case. It deals with the freedom of a citizen who unless stay orders are granted risks losing her liberty.

We agree with *Mr. Nowrojee* that if the appellant is committed to civil jail for failing to raise the Kshs 8.3 Million, it would not be possible to reverse the situation even if her appeal ultimately succeeds. The nugatory aspect has therefore been established. Without going into the merits or otherwise of the intended appeal, we are also convinced that the appeal is not frivolous and it does raise some pertinent issues for decision.

As to whether we have jurisdiction to entertain this application or not under **Rule 5(2)(b)**, our view is that, the issue of jurisdiction was raised as a peripheral issue and the same can only be adequately addressed after serious discourse and submissions of all the parties concerned so that the court would prepare a comprehensive ruling on the same.

As of now, we are contented to state that there is a notice of appeal filed in this matter pursuant to **Rule 75** of the **Court of Appeal Rules** as contemplated by **Rule 5(2)(b)** of the same Rules and the matter is properly before us.

For the foregoing reasons, we are satisfied that the applicant's notice of motion has merit. However, the duration of the stay order should be limited to such a reasonable time as would allow the appeal to be heard on priority basis. We therefore allow the same to the extent that the execution of the order of the High Court made on 19<sup>th</sup> February, 2010 is stayed for six (6) months only. We nonetheless find it necessary to order that **Civil Appeal No. 90 of 2010** be fixed for hearing on priority basis.

Costs of this motion will be in the appeal.

***Dated and Delivered at Nairobi this 25<sup>th</sup> day of May 2012.***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**K. H. RAWAL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**