



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 165 OF 2012

KENYA AIRPORTS AUTHORITY..... APPLICANT

AND

MITU-BELL WELFARE SOCIETY.....1st RESPONDENT

THE HON. THE ATTORNEY GENERAL..... 2nd RESPONDENT

(Application for stay of execution pending the hearing of the appeal against the ruling and order of the High Court of Kenya at Nairobi (Ngugi, J) dated 13th June, 2012

in

H.C. PETITION NO. 164 OF 2011)

RULING OF THE COURT

The application before us is the notice of motion dated 19th June, 2012 which is pronounced to be brought under Rules 5(2)(b) and 42 of the Court of Appeal Rules, Articles 29 and 31 of the Constitution of Kenya and all other enabling provisions of the law. The applicant seeks inter alia the following prayers:-

“2. That the honourable court be pleased to order a stay of execution of the decision of the High Court at Nairobi by Honourable Lady Justice Ngugi on 13th June, 2012 in High court Petition No. 164 of 2011 Nairobi and any subsequent orders issued in furtherance of the said order pending the hearing and determination of this application.

3. That this Honourable Court be pleased to grant a stay of execution of the decision of the High Court at Nairobi by Honourable Lady Justice Ngugi delivered on 13th June, 2012 and any subsequent orders issued in furtherance of the said order pending the lodging, hearing and determination of the intended appeal from High Court Petition No. 164 of 2011, Nairobi.”

The same is premised on the four lengthy grounds set forth on its face and is further supported by the affidavit of Eng. Stephen Gichuki dated 19th June, 2012. The gist of these grounds is that the learned Judge of the High Court (Mumbi Ngugi, J) completely failed to take into account that there was no service of the order the applicant herein is said to have refused to obey. Indeed the applicant contends that there was no affidavit of service placed before the High Court Judge as evidence that service of the court order along with the penal notice had been duly served on the applicant. It is imperative that counsel for the respondents herein do admit that there was no affidavit of service confirming that the said order was served. Learned counsel for the 2nd respondent Mr. Ombwayo actually conceded the application on the issue of service. He conceded that failure to file the affidavit of service to confirm that the person cited had been served with the order in question was fatal.

Learned counsel for the first respondent, Mr. Kinyanjui's argument was that it was not necessary for them to file an affidavit of service and that the fact that the alleged contemnor had filed a replying affidavit to the application and appointed an advocate to represent it in the matter was sufficient proof that the order had been properly served on It.

Second to the issue of service is the contention that the learned Judge of the superior court completely failed to take into account that the alleged act of disobedience was carried out by another organ of the government and not on the directives of the applicant herein.

Mr. Gatonye learned counsel for the applicant submitted that although they have yet to file the appeal, these two grounds form the basis of the intended appeal. He submitted that the applicant does not just have an arguable appeal but a strong one, and the same will be rendered nugatory if the stay orders sought are not granted.

The 1st respondent has opposed this application through the replying affidavit sworn by one Benjamin Kaunda Gishemba who describes himself as the Chairman of Mitu-Bell Welfare Society, the 1st respondent herein.

According to the 1st respondent the court orders were served on the applicant and that explains why it appointed a firm of advocates to represent it in the matter and further, that the said advocates were present in court when the interim orders were extended on the previous occasions. He has deponed that in spite of such knowledge, the 1st applicant went ahead and demolished the 1st respondent's structures. The first respondent strongly submitted that the service was proper in the circumstances and this application should therefore be dismissed if the authority and dignity of the court and the judicial process is to be protected.

Learned counsel for all parties herein made brief submissions in support of their case along the above lines. Learned counsel for the 1st respondent argued that service on the applicant was in accordance with order 5 rule 3(a) of the Civil Procedure Rules. Since the issue of service is the core of the intended appeal, we shall refrain from making a finding at this stage as to whether such service was proper or not and leave that for the court that will hear the said appeal.

For purposes of this application therefore, we shall restrict ourselves to the parameters applied in respect of applications under Rule 5(2)(b) of this Court's Rules.

As rightly submitted by learned counsel for the applicant herein Mr. Gatonye, the law under Rule 5(2) (b) is well settled. This Court clearly elucidated the said principles in the case of **REPUBLIC VS. KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS** (2009) KLR 31 as follows:-

“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5(2)(b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. 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 result or the success could 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 this Court's decisions in the cases of **RELIANCE BANK LTD VS. NORLAKE INVESTMENTS LTD** (2002) 1EA 227 and **GITHUNGURI VS. JIMBA CREDIT CORPORATION LTD & OTHERS** (No. 2) 1988 KLR 828; **WARDPA HOLDINGS LIMITED & OTHERS VS. EMMANUEL WAWERU MATHAI & H.F.C.K** (CIVIL APPL No. 72/2011) (unreported).”

All we need to ask ourselves therefore is whether the applicant herein has satisfied these twin limbs as set out in the above cases. We have considered carefully the facts and circumstances surrounding this case and the law applicable. On the first limb, the issue as to whether service of the order on the applicant was proper or not is in our view a pertinent one for determination in the intended appeal. The issue of service of the order alleged to have been flouted is central. That in our view presents an arguable case before the court that will determine the appeal. The issue as to whether it was the applicant who carried out the demolitions contrary to the court order is also one that is material and one that will call for the

determination of the court in the intended appeal. It is clear therefore that the intended appeal cannot be said to be frivolous. On the nugatory aspect, it is trite law that this Court must weigh and balance the competing claims of both parties and further that each case must be decided on its own peculiar facts. The applicant herein and the 2nd respondent are in agreement that the matter relates to the personal liberty of the Managing Director of the applicant herein. He has been held in contempt by the High Court and all that remains is his mitigation and sentence. If the proceedings before the High Court are therefore not stayed, the said Managing Director might be committed to jail. His right to liberty will have been taken away from him and he will have been confined to prison. If therefore the intended appeal succeeds, it would not be possible for the situation to be reversed. He would therefore suffer untold prejudice and trauma that would be irremediable. It was for this very reason that this Court earlier on gave the applicant temporary reprieve in terms of prayer 2 of his application.

For the foregoing reasons therefore, we are satisfied that the applicant has made out a good case to justify the granting of the orders sought. We therefore allow the notice of motion dated 19th June, 2012 in terms of prayers 3, 4 and 5.

We so order.

DATED and DELIVERED at NAIROBI this 31st day of JULY, 2012.

E.M. GITHINJI

.....
JUDGE OF APPEAL

W. KARANJA

.....
JUDGE OF APPEAL

D.K. MARAGA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR