



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: ONYANGO OTIENO, NAMBUYE & KARANJA, JJ.A.

CIVIL APPLICATION NO. NAI 206 OF 2011 (UR 132/2011)

STEPHEN MBUGUA MWAGIRU

ROSEMARY WANJA MWAGIRU APPLICANTS

AND

TATU CITY LIMITED RESPONDENT

BETWEEN

STEPHEN MBUGUA MWAGIRU

ROSEMARY WANJA MWAGIRU.....APPLICANTS

AND

KOFINAF COMPANY LIMITED.....RESPONDENT

(Application for an injunction & stay of further proceedings pending the hearing & determination of an intended

appeal from the ruling of the High Court of Kenya at Nairobi (Apondi, J) dated 22nd July, 2011

in

HC WINDING UP CAUSE NO. 29 OF 2010)

RULING OF THE COURT

When this matter came up for hearing before us on 27th June 2012, both learned counsel, Dr Kamau Kuria and Mr Oraro appearing for the applicants and respondents respectively, consented that Civil Applications No. NAI 206/2011 and NAI 207/2011 be heard together as they both emanated from the same ruling of Muga Apondi, J which was delivered on 22nd July, 2011 and further that the Court prepares one Ruling in respect of both. The applicants in both applications are the same but the respondents are different with the respondent in Civil application No.206/2011 being Tatu city while that in civil application No.207/2011 is Kofinaf company limited. This is the ruling in respect of the two applications which were filed pursuant to **rule 5 (2) (b) of the Court of Appeal Rules**. There are two principal prayers in the applications viz:

1. That the firm of Oraro and Company Advocates be restrained by an order of injunction from acting for the respondent in the High Court Winding Up Cause No. 29 of 2010 pending the hearing and determination of the applicants' intended appeal; and

2. That further proceedings in the said High Court Winding Up Cause No. 29 of 2010 be stayed pending the hearing and determination of the applicants' intended appeal. In respect of first application.

Similar prayers are sought in respect of the second application save for a slight variation in that the prayers in this application relate to **High Court winding up cause No.30 of 2010.**

They are both premised on several grounds on their face and supported by the affidavits of Stephen Mbugua Mwangi who is one of the two applicants. He has appended several annexures to both affidavits. Learned counsel for the applicant addressed us extensively on the twin principles of the arguability of the appeal and the nugatory aspect. He also made reference to several authorities in his list of authorities. It is trite law that for an application of this nature to succeed, the applicant needs to establish that he/she has an arguable appeal and further that if the orders sought are not granted, then the appeal, were it to succeed will be rendered nugatory. We heard very strong submissions on these two principles by learned counsel for the applicants.

When it was his turn to respond, Mr Oraro, learned counsel for the respondent, urged that the application lacked merit both in fact and in law and that the hearing of the same was just an academic exercise. He informed us that he was no longer appearing for the respondent at the High Court, the parties having instructed another counsel out of their own volition. Prayer 1 of the application was, therefore, moot.

He also informed us that the parties had agreed to proceed with the hearing of the matters before the High Court and the same were indeed proceeding and the prayer for stay was, therefore, equally moot.

We were surprised at this turn of events and sought an explanation as to why this disclosure was coming out so late in the hearing. Was it necessary for this Court to sit for two [2] hours and hear an application which was at the end of the day an academic exercise? We felt that in the light of the provisions of **Sections 3A and 3B of the Appellate Jurisdiction Act**, counsel had a duty to assist the Court in ensuring and facilitating the expeditious and efficient disposal of the application instead of engaging in a moot exercise which was not going to add any value to the proceedings before the High Court. We say so because as at the time we heard these applications, Oraro & Company Advocates were no longer on record for the parties in the matter before the High Court. The matter was also proceeding with full participation of all the parties. Had this information been brought to our attention before we started hearing these applications, the Court would definitely have been spared considerable time and other resources which could have been applied to dealing with other matters.

According to Dr Kuria, however, it was necessary for the applications to be heard and orders granted because Mr Oraro could decide to place himself on the record in future and thus cause the injustice the applicants were seeking to prevent. In other words, we were being asked to issue an injunction based on anticipatory future speculative conduct of counsel for the respondent.

In our view, this is not plausible. Temporary injunctions by their own nature are meant to prevent defendants/respondents from defined conduct for a specified or set period of time. They cannot be issued where the defendant/respondent's action is only speculated; where it is not even known whether the defendant/respondent will engage in the conduct in question and if so when he may be inclined to do so.

With respect, the prayers herein were viable when the firm of Oraro and Company advocates was still on record for the respondents in the matters before the High Court and when the applicants, in order to prevent the said firm from further appearing in the case needed the said proceedings to be stopped.

As the situation stands now, the firm of Oraro & Company advocates is no longer on record for the respondent and the matters before the High Court have been proceeding without any impediment.

The intended appeal has not even been filed. Surely, can this Court issue a blanket, indefinite order against the firm of Oraro & Company Advocates just in case some time in the unforeseeable future they might contemplate or attempt to come back on record for the respondents? That, in our considered view is not possible. It would amount to an abuse of the court process and would go against all known principles upon which the granting of temporary injunctions under **Rule 5 (2) (b)** can be allowed. We need not say more. Our considered finding is that in the prevailing circumstances, as clearly submitted by learned counsel for the respondents, this application is moot and lacks merit. We accordingly dismiss the same with costs to the respondents.

Dated and delivered at Nairobi this 28th day of September, 2012.

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR