IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 22 OF 2008

BETWEEN

PETER O. NGOGE T/A O.P. NGOGE & ASSOCIATES ....…….... APPLICANT

AND

PROF. WASHINGTON OKUMU JALANGO ……..… RESPONDENT

(Application for injunction and stay of execution as against the ruling and order of the High Court of Kenya at Nairobi (Nambuye, J.) dated 15th February, 2008

in

H.C.MISC.CIVIL APPLICATION NO. 259 OF 2007)

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RULING OF THE COURT

We have before us an application by way of notice of motion expressed as having been brought:-

"Under the inherent Jurisdiction rule 1(3) of the Court of Appeal Rules, Section 3 of the Judicature Act and Rule 5, 2(b) of the Court of Appeal Rules."

The applicant, ***Peter O. Ngoge*** T/A O.P. Ngoge & Associates seeks the following orders:-

"(1) THAT the Honourable Court be pleased to stay execution of the Ruling and orders of the Honourable Lady Justice R.N. Nambuye given on the 15th February, 2008 pending the hearing and determination of the applicants intended appeal which is arguable but which may be rendered nugatory and reduced to a mere academic exercise if the prayers sought herein are not granted."

*(2) THAT a mandatory injunction be issued compelling the Respondent herein to honour and perform the terms of the parties consent as recorded and signed by the parties before the Deputy Registrar in the superior court by paying the applicant forthwith the sum of **Kshs.1,297,939** being the amount in the certificate of Taxation which the respondent freely consented and agreed to pay the applicant advocate as his professional legal fees before the Deputy Registrar of the High Court on the 3rd August, 2007 following legal services rendered in advance to the Respondent herein in Nairobi H.C Civil Suit No. 649*

of 2005 by the Applicant and which consent has to date not been challenged by the Respondent under ***Rule 11(2)*** *of the Advocates Remuneration order or at all.*

(3) THAT in default, the applicant herein be allowed in the interest of justice to levy execution proceedings against the Respondent for ***Kshs.1,297,939*** *as appears in the Certificate of Taxation issued on the 8th August, 2008 by the superior court.*

(4) THAT the costs hereof be born (sic) by the respondent."

The application which was supported by the applicant's affidavit is brought on the following grounds:-

(1) THAT the applicants Bill of Costs dated 3rd day of May, 2007 lodged in the superior court by the Applicant on the 3rd May, 2007 was taxed by consent and Agreement of the respondent herein on 3rd August, 2007 before the Deputy Registrar of the High Court at Nairobi and allowed in the sum of ***Kshs.1,297,939/=****.*

(2) THAT upon being served with the Bill of Costs and Notice of Taxation the Respondent appointed an Advocate and was represented by the firm of Rombo & Co., Advocates who are still on record herein for him.

(3) THAT the Deputy Registrar of the High Court issued a certificate of taxation on the 8th August, 2007.

(4) THAT the respondent has to date neither objected to the taxed amount or filed a reference under Rule 11 and 12 of the Advocates remuneration rules to challenge the said certificate of Taxation which arose out of a consent of the parties before the Deputy Registrar of the High Court of Kenya.

(5) THAT the certificate of Taxation has not been set aside or altered and the learned judge was under obligation to adopt it under section 51 of the Advocates Act as a judgment of the superior court.

(6) THAT the respondent does not dispute the fact that he retained the applicant advocate to render legal services for him in Nairobi H.C.Civil Suit No. 649 of 2005 and consented in writing before the Deputy Registrar to pay the applicant the sum of ***KShs.1,297,939/=*** *for legal services already rendered by the applicant in the said case as particularized in the Bill of Costs.*

(7) THAT in the premises and with due respect the applicant categorically states that the learned judge was dishonest and biased in dismissing the applicants application dated 22nd August, 2007 brought under section 51(2) of the Advocates Act, on skewed irrelevant and evasive grounds never raised by the parties.

(8) THAT the learned Judge also discriminated against the applicant contrary to section 82 of the constitution by deliberately refusing to be bound by the High Court decisions set out in her ruling whose facts and circumstances are similar to the facts and circumstances of the applicant's case.

(9) THAT the decision of the Hon. Lady Justice Nambuye is with due respect dishonest on some issues, skewed, discriminates against the applicant delving on irrelevant issues not raised by the parties and was intended deliberately to deprive the applicant of his consented legal fees which had been agreed upon by the parties and further intended to buy more time for the respondent and to punish the applicant for reasons unknown to the applicant.

(10) THAT the learned judge had not been called upon to review or set-aside the certificate of taxation and was dishonest and biased and partial in saying that the legal services were not rendered or that the amount in the certificate of taxation was on the high side and not commensurate which (sic) legal services rendered Suo moto which conduct amounts to abuse of judicial office contrary to section 77 of the Constitution.

(11) THAT the learned judge clearly shows in her Ruling that she is jealous of the legal fees the respondent consented to pay the applicant and that the learned judge is out to deny the applicant his right to earn livelihood or to operate his small time law firm in violations of section 73 and 74 of the constitution which conduct amounts to abuse of judicial office.

(12) THAT the respondent has not been aggrieved by his consent and has never challenged the certificate of taxation. The learned judge is not allowed to abuse his (sic) judicial office by challenging the certificate of taxation on behalf of the respondent on her own motion and when what was before her was not an application for review under Rule 11(2) of the Advocates Remuneration order.

(13) THAT the consent of the parties is a true reflection and appreciation by the parties of the nature and extent of legal services rendered by the applicant and the learned Judge is stopped (sic) Suo Moto from saying that no legal services were rendered or that the amount in the certificate of taxation was too high.

(14) THAT the decision of the learned judge clearly shows that the learned judge has no respect for the rule of law and procedure laid in the advocate remuneration order the applicant and could be having some hidden grudges against the applicant which the applicant is yet to investigate and establish.

(15) THAT the intended appeal will obviously be rendered nugatory and unenforceable if the respondent dies or is declared bankrupt or absconds the jurisdiction of this Honourable Court before the appeal is heard and determined unless this application is allowed as a matter of urgency and the applicant stands to suffer irreparable loss taking into account the fact that the applicant had invested all his monies in financing the respondent cases which monies may not be recovered because of the deliberate skewed decision of the learned Judge intended to hurt the applicant advocate and to subject the applicant to slavery and misery.

(16) THAT the decision of the learned judge is against the United Nations Basic Principles on the independence of the Judiciary endorsed by the General Assembly in the late 1985. The principle of an independent Judiciary is also enshrined in the Universal Declarations of Human Rights and section 77 of the constitution of the Republic of Kenya and they were all violated in his (sic) Ruling.

(17) THAT the decision of the learned judge is highly prejudicial to the applicant and amounts to a gross abuse of the Rule of Law. It also prejudices the Civil Suit in case they are filed as the impression created upon going through the ruling is that the certificate of taxation has been set-aside as being on a high side and not commensurate with legal services rendered by the applicant to the respondent. The ruling is also suggesting that the applicant was being fraudulent for requesting the court to adopt the parties consent as a judgment of the superior court.

When the application came up for hearing on *15th July, 2010* it was only the applicant who appeared and so we allowed him to address us. In his submissions, the applicant more or less repeated what was contained in his 17 grounds in support of the application. It was the applicant's contention that his intended appeal is arguable in that the learned judge had proceeded with the matter before her as if it was a reference. The other arguable point to be raised in the intended appeal was that while the learned judge found that there was a dispute on the retainer, she later ruled that there was no dispute.

On the nugatory aspect of the matter, it was the applicant's submission that the intended appeal would be rendered nugatory if any of the parties i.e. the applicant and the respondent dies. The applicant further submitted that the respondent being an international professor was likely to abscond before the appeal is heard.

The background facts of this application are that the applicant herein filed two applications in the superior court being **HCCC Misc Application No. 259 of 2007** and **HCCC Misc Application No. 260 of 2007.** After hearing the parties, the learned judge wrote what she called "*Joint Ruling*". In the said *"Joint Ruling",* the learned judge stated inter alia:

"The decision to write a joint ruling is solely on the basis of the Court's discretion after perusing both records and noting that:-

(1) Both applications are dated and filed the same date.

(2) The applicant in both is the same.

(3) The respondent in both is the same.

(4) Both bills of taxation sought to be relied upon were taxed by consent in both cases.

(5) Grounds in support for request for adoption save for the peculiarity of the bill in so far as it arises from a different proceeding are the same.

(6) Case law relied upon is the same.

(7) The grounds relied upon in support of the opposition to each with the exception of reference to the proceedings from which each arises are the same.

(8) It is prudent to save on time and duplicity of arguments to write a joint ruling but with care to mention distinctly what relates to each file and then make a distinct finding on account of each in the courts final orders."

In **Misc. Application No.259 of 2007**, the applicant sought the following prayers:-

"(1) That the advocate/client costs herein as taxed by consent on the 3rd August, 2007 and allowed as against the Respondent in the sum of KShs.1,297,939/= be made a judgment of the Honourable Court.

(2) That the Honourable Court do order that the said taxed costs be paid with interests pursuant to Rule 7 of the Advocates Remuneration Order.

(3) That the costs of this application be awarded to the advocate/applicant."

And in **Misc. Application No. 260 of 2007** the prayers sought were as follows:-

"(1) That advocate/client costs herein as taxed by consent on the 3rd August, 2007 and allowed as against the respondent in the sum of KShs.1,568,479.00 be made a judgment of the Honourable Court.

(2) That the Honourable Court do order that the said taxed costs be paid with interests pursuant to rule 7 of the Advocates Remuneration Order.

(3) That the costs of this Misc.Application be awarded to the advocate/applicant."

The learned judge meticulously considered both applications and in the end came to the following conclusion:-

"Applying the two options open to this Court in resolving the disputes herein, the Court makes the following findings:-

(1) Since the bill in Nairobi Misc.Application No. 259/2007 of Kshs.1,297,939/= relates to services rendered in the prosecution of an interlocutory application, the client feels that the extend (sic) of the retainer is questionable, the proper proceedings through which these grievances can be ventilated and defended through a civil suit. The Court therefore declines to enter summary judgment for the applicant and gives direction that the Counsel do file a civil suit to recover the said costs as they need to be justified.

(2) Likewise in Misc.Application No. 260/07, since the bill of 1,568,479.00 relates to preparation and presentation of an application for contempt which appears not to have been argued as the same is not accompanied with a ruling or orders emanating therefrom, justice demands that since the client disputes on the extend (sic) of the retainer it is proper that directions be given that the Counsel do file a civil suit to claim the fees indicated as circumstances displayed herein demand that the client be allowed to ventilate the grievances in a civil suit and that this is a proper case where the Counsel should be called upon to justify his bill.

(3) In making finding 1 and 2 above this Court has tapped on the authority bestowed upon it in Section 51(2) of Cap. 16 Laws of Kenya to the effect that the Court may make such order in relation thereto as it thinks fit.

(4) Further that the Court is strengthened by the fact that summary judgment is only allowable where the retainer is not disputed. Herein although the entire retainer is not disputed the dispute over the extent of the retainer is sufficient to take the two bills outside the perimeter allowed for entry of summary judgment. (it is obvious that the amount seems to be on the high side in view of the nature and extent of the services rendered.)

(5) The respondent was justified in questioning the commensurability of the bills taxed as compared to the services rendered and so he will have costs of both applications in Nai.Misc.Application No. 259/07 and 260/06."

Being aggrieved by the foregoing, the applicant filed a notice of appeal indicating his intention to appeal against the findings of the learned judge. But before the appeal is finally determined, the applicant seeks the orders that we have set out at the commencement of this ruling.

The dispute herein relates to advocate/client costs which the applicant claims from the respondent. In the first application, the amount claimed is **KShs.1,297,939/=** while in the second application the amount claimed is **KShs.1,568,479/=**.

Although the application was expressed as having been brought under various rules and sections of the law, we are satisfied that the two applications **– Civil Application No. Nai. 22 of 2008 and Civil Application No. Nai. 23 of 2008** were brought under ***rule 5(2)(b)*** of this Court's Rules. That being so, the two conditions to be satisfied by an applicant are first, that he has an arguable appeal, in other words, the appeal is not frivolous and second, if a stay is not granted the appeal, if successful would be rendered nugatory. These are settled principles and if any authority is required, it is readily available in ***RUBEN & 9 OTHERS V. NDERITO & ANOTHER*** [1989] KLR 459 in which this Court said:_

"In dealing with rule 5(2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory. See STANLEY MUNGA GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. Civil Application Nai. 161 of 1988."

We have agonized over the two applications and our view is that the intended appeals may well be arguable, or put another way, they are not frivolous. As for the nugatory aspect, we are not persuaded that their eventual success would be rendered nugatory if we declined to grant the prayers sought. The respondent is one, ***Prof. Washington Okumu Jalango***, a former client of the applicant. We were told that the intended appeals would be rendered nugatory in the event that either the applicant or the respondent dies. That is a novel basis upon which applications under ***rule 5(2)(b)*** should be considered. It does not take the applicant's case any further. If we were to accept death, or the possibility of it, as a condition for

granting a stay or injunction, then all applications between human beings will be allowed as a matter of course since human beings are appointed once to die**!** No other basis has been advanced to make a finding to the contrary.

That being our view of the matter, applications are bound to fail and we so order. This ruling shall apply to this application and Civil Application No. Nai. 23 of 2008. Costs of both applications shall abide the outcome of the appeal.

Dated and delivered at NAIROBI this 22nd day of October, 2010.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR