



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 300 of 2009 (UR 208/2009)

TITUS OTIENO KOCEYO

EDDIE JATIANG'A AMADI.....APPLICANTS

AND

MATHEW OUMA OSEKO T/A OSEKO & COMPANY ADVOCATES...RESPONDENT

*(Application under rule 5(2)(b) of the Court of Appeal Rules for stay of execution pending the lodging,
hearing and determination of an intended appeal from the ruling of the High Court of Kenya
at Nairobi (Onyancha, J) dated 30th September, 2009*

in

H.C.C. Misc. Appl. Nos. 901 of 2007 (O.S.) Consolidated with
Misc. 934, 935, 936, 937 & 938 of 2007 (O.S.)

RULING OF THE COURT

This application dated 8th October, 2009 is made under **rule 5(2)(b)** of the Court of Appeal Rules. It seeks two prayers; namely:-

1. Stay of execution of the ruling and the orders made by Justice D. A. Onyancha on 30th September, 2009 in H.C. Misc. Application No. 991 of 2007 (O.S.) Consolidated with Misc. Appl. No. 933, 934, 935, 936, 937 and 938 of 2007 pending the hearing and determination of the intended appeal.

2. That the 2nd applicant be released from prison on terms that the court may deem fit to grant pending the hearing and determination of the intended appeal.

There was also a prayer for the costs of the application to be in the intended appeal. The supporting grounds on the face of the application were that the applicant has an arguable appeal; that the intended appeal is not frivolous, that the application has been made without delay that if a stay is not granted the appeal will be rendered nugatory; that the applicant will suffer substantial irreparable loss and damage and that it is in the interest of justice that the execution of the court order be stayed pending the hearing and determination of the intended appeal.

The supporting affidavit to this application is sworn to by **Titus Koceyo** the 1st applicant, an advocate of the High Court of Kenya. So is the 2nd applicant. From the record, **Mohammed Ashraf Sadique** and **Harbans Singh Soor** Plaintiffs in **High Court Civil Application No. 933 of 2007** had a dispute over accounts with their lawyers, **Messrs Oseko & Company Advocates**. The plaintiffs were represented by the applicants herein. In the course of hearing that application, Messrs Oseko & Company Advocates raised a preliminary objection to the applicants' appearance in that matter because the latter had no capacity to practice law on their own as provided by the mandatory provisions

of the Advocates Act. The learned Judge (*D.A. Onyancha, J.*) heard arguments on the preliminary objection by counsel on both sides and wrote a detailed ruling which he delivered on 30th day of September, 2009. In his ruling, the Judge was of the view that the applicants had committed an act of contempt of court and he fined them as follows:-

“1. The 1st applicant to pay a fine of Kshs.300,000/= or in default to serve a sentence of 3 months imprisonment.

2. The 2nd applicant to serve 4 months imprisonment and a fine of Kshs.50,000/= or in default, a further 1month imprisonment.”

This is why the present application was filed in this court to stay the implementation of the sentence. It was fixed for hearing before us on 22nd October, 2009 when **Mr. Mungu**, learned counsel for the applicants submitted that the appeal was arguable because **sections 2 and 9** of the Advocates Act deems the applicants qualified to practice law and that in any case the 2nd applicant was not practicing alone as provided in **section 32** of the Act. He also stated that the 1st applicant had been sentenced to a fine which was in excess of that provided by **section 85** of the Advocates Act.

On the nugatory aspect counsel stated that if an order for stay was not granted, part of the court order was for the Officer In-Charge, Central Police Station to investigate the criminal offences probably committed by the two applicants in contravention of **sections 31(c) and 32, 33, 34, 37 and 39** of the Advocates Act and thereafter charge them accordingly, within a period of 14 days.

Mr. Kurgat, learned counsel for the respondent opposed the application and stated that the jurisdiction of this Court was not properly invoked because the Republic was not enjoined to the same. He submitted that the applicants did not bring themselves within **section 32** of the Advocates Act. He submitted further that **section 9** of the Advocates Act cannot be read in isolation from **sections 2, and 32** of the Advocates Act. Counsel submitted further that the application was fully argued and that since the 2nd applicant had been released from prison by Presidential amnesty, the appeal will not be rendered nugatory.

The principles upon which an order for stay can be granted are well settled. These are that the applicant has to show that he/she has an arguable appeal, or in other words that the intended appeal is not frivolous and that if the application is refused and the eventually succeeds it will be rendered nugatory, see ***Hanishai Devani Limited vs Kenya Commercial Bank Limited - Civil Application No Nai. 128 of 2006 (UR)*** and ***Reliance Bank Limited (In Liquidation) vs Norlake Investments Limited – Civil Application No. Nai. 93 of 2002 (UR)***. Satisfaction of only one of those twin principles will not avail the applicant. In view of what has been submitted before us, in particular the fine imposed upon the 1st applicant which does not appear legal, the intended appeal appears arguable and/or it is not frivolous. However, in view of the submissions that the 2nd applicant who had been sent to prison has been released by the Presidential amnesty which was not seriously contested, and that the fine paid by the 1st applicant can be refunded if the appeal is successful, we are of the view that the nugatory aspect of the intended appeal has not been satisfactorily demonstrated. In the circumstances this application has no merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of November, 2009

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR