



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 25 OF 2007 (20/2007 UR)

JAMES MWARARI GATOME1ST APPLICANT

PATRICK R. KIBUCHI2ND APPLICANT

S. P. NJAGI3RD APPLICANT

PATRICK M. LYNUS.....4TH APPLICANT

L. M. M'MBWI5TH APPLICANT

J. M. NDERITU6TH APPLICANT

JASON KABURO7TH APPLICANT

IBRAHIM ISAAK JARI (ALL T/A GATOME & ASSOCIATES.....8TH APPLICANT

AND

REPUBLICRESPONDENT

(An application for stay of execution of the orders of the High Court of

Kenya at Nairobi delivered by (Wendoh J.) Dated 18th December, 2006

in H.C. Misc. C. No. 1337 of 2005)

RULING OF THE COURT

Until his suspension by the Land Surveyors Board on 14th July 2005, **J. M. Gatome**, the 1st applicant, was practicing as Land Surveyor under the firm name of Gatome & Associates in his main Nairobi office with branches in Karatina, Embu and other major towns in Kenya.

He had assistants who worked under him either in his Nairobi office or other towns in Kenya. One of them was known as **Mr. Peter Munyiri**. Various complaints were raised about the conduct of Mr. Munyiri and one Kaburo and sent to the Anti-corruption Commission and Land Surveyors Board – herein “**the Board**”. This necessitated that the applicant be summoned before the Board at Nairobi on 14th July

2005 to answer a few questions regarding the conduct of these assistants. The applicant does not appear to have answered these questions satisfactorily. This led to his suspension from practice for six months. The order also affected all his assistants, who are the 2nd to 8th Applicants herein.

In an application filed in the High Court by way of Judicial Review by a Notice of Motion dated 28th September 2005, the applicant sought orders of certiorari to call into the High Court and to quash the Board's decision and also an order of prohibition to prohibit the Board from executing its decision on the grounds that rules of natural justice had been flouted and that he was not accorded a fair hearing.

R.P.V. Wendoh J. who heard this application in the superior court, only dealt with the prayer for certiorari which after she considered the submissions made before her by counsel for all the applicants and the Board, thought she could not exercise her discretion in favour of the applicant; hence she, on 18th December 2006, dismissed the application with costs to the respondent.

After this ruling was delivered, the applicant and his assistants filed a Notice of Appeal to the High Court on 29th December 2006 and soon thereafter, they, by Notice of Motion dated 8th February 2007, – under **rule 5(2)(b)** of the Court of Appeal Rules asked for the following reliefs:-

(1) THAT the Honourable Court be pleased to grant an order of stay of execution of the orders and judgment of the superior court delivered on 18th December 2006 by Her Ladyship Hon. Justice Roselyn Wendoh.

(a) THAT this Honourable Court be pleased to grant an order of stay of the respondent's decision made on 14th July 2005 pending the hearing and determination of the intended Appeal.

(b)

(c) THAT the costs of this application do abide the outcome of the intended Appeal.

We have left out prayer (b) because it is a repetition of prayer (a) above. This application was supported by the brief grounds stated therein; namely that the applicants had already filed and served a Notice of Appeal arising out of the superior court's decision of 18th December 2006, that they will suffer irreparable and substantial loss if the respondent implements its decision of 14th July 2005 in that by the time the appeal is heard and decided the applicants will have already served the suspension period of six months which will render the said appeal nugatory and reduce all the arguments for or against the Appeal to become of an academic exercise; and that the intended Appeal (as can be seen on the draft Memorandum of Appeal) raises several triable issues which need to be decided by this Court, that is that the intended Appeal is not frivolous and is not intended to waste any judicial time.

There was a supporting affidavit deposed to by the first applicant who states that the applicants were not satisfied with the judgment of the superior court and that an appeal had not yet been filed because an application had been made for typed proceedings of the superior court case but the same had not been supplied to them.

He deposed and verily believes that unless a stay of the implementation of the respondent's decision is granted and the superior court's decision held in abeyance he and his co-applicants will suffer irreparable damage and loss in that possibly by the time the Appeal will have been disposed of they will have served the entire suspension period of six months and as a result the intended appeal shall be rendered nugatory.

In his view their intended appeal raises triable issues and it is only fair and just that they be given an opportunity to be heard in court and the order sought herein will not in any way prejudice the respondent.

The deponent to the supporting affidavit states further that he and his co-applicants are all Land Surveyors whose "**daily bread**" is earned through the practicing of their profession and he verily believes

that the period of six months will deal them a great blow.

In the draft Memorandum of Appeal the intended appellants partly complain about the inclusion of some of the complainants against them in the panel of the Board which deliberated over the complaints lodged against them.

Among the complainants were Muriithi Mugo and I. N. Mwathane and one of them, Mwathane, was in fact appointed a prosecutor at the Board to conduct the disciplinary case against the first applicant.

When counsel addressed us on this application on 21st April 2008, Mr. Karanja for the applicant referred to this issue and said:-

“There is an arguable appeal. If the sentence is fully served the appeal will be rendered nugatory. Some persons who sat on the Board were complainants directly involved in the proceedings and they ruled against the applicants”.

Though in his submission Mr. Njoroge, counsel for the respondent raised the issue of a wrong Notice of Appeal filed in this Court, he nevertheless conceded that there was an arguable point in the intended appeal.

The ***case of RELIANCE BANK LIMITED (In liquidation) V. NORLAKE INVESTMENTS LIMITED Civil Application No. Nai. 93 of 2002 – unreported***; sets out the principles to guide the court in applications under ***rule 5(2)(b)*** of the Court of Appeal Rules. The Court rendered itself thus:-

“Hitherto this Court has consistently maintained that for an application under rule 5(2)(b) to succeed, the applicant must satisfy the Court on two matters namely

- 1. That the appeal or the intended appeal is an arguable one , that is that it is not a frivolous appeal,***
- 2. That if an order of stay or injunction as the case may be, is not granted, the appeal, or the intended appeal were it to succeed would have been rendered nugatory by the refusal to grant the stay or injunction.***

In her ruling erroneously titled “judgment” the learned superior court Judge stated partly thus:-

“The applicants challenge the inclusion of Muriithi Mugo and I. N. Mwathane in the Board when they heard the disciplinary proceedings against the applicant. In fact Mwathane acted as the prosecutor. As observed above Approved Assistants have no standing of their own. They can only voice their grievances through the licensed surveyor. They are directly under the control of a licensed surveyor. My understanding of this is that the complaints of Approved Assistants contained in the letter of 27th March 2003 automatically became complaints emanating from the licensed surveyors under whom the Approved Assistants practiced”.

She then referred to the case of ***R. v. RAND (1966) L.R. 1QB 230*** where she quoted Blackburn J as saying:-

“Any direct primary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.

This is the principle commonly expressed as “***no man may be a Judge in his own case***” (*Nemo Judex in sua causa*).

Then she continued:

“In such a case it is irrelevant that there was real likelihood of bias but if any person would think that there was a real likelihood of bias, then the person should not sit. In my considered view both

Muriithi Mugo and Mwathane had an interest in the disciplinary proceedings before the Board against the applicant and they should not have taken part".

(underlining supplied)

Having come to that conclusion it is arguable whether or not the learned Judge was right in concluding that even if the two complainants did not sit in that meeting it would make no difference.

Together with this is the question of whether a disciplinary sentence meted out to the 1st applicant by the Board could properly have affected the other seven applicants whose conduct was not being questioned at that Board.

These are clearly arguable points in the intended appeal to be filed before this Court, if it will, and that if the sentence is allowed to be served before the intended appeal is heard and it succeeds then it would render the appeal and these arguments nugatory.

In the circumstances, it is our view that this is a proper case for the grant of an order of stay of execution of the six months' suspension against the applicants. Accordingly we grant the stay prayed for to remain in force until the hearing and the determination of the intended appeal. Costs of this application to abide the outcome of the intended appeal. These shall be our orders.

Dated and delivered at Nairobi this 9th day of May, 2008

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR