



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: O’KUBASU, GITHINJI & DEVERELL, JJ.A.)

CIVIL APPLICATION NO. NAI. 118 OF 2005 (UR. 67/2005)
BETWEEN

- 1. NAJIB BALALA**
- 2. SAM OKELLO**
- 3. SAID ATHMANI**
- 4. AWADH SWALEH**
- 5. DOMINIC LIVE**
- 6. BEN SWAI**
- 7. SAMMY GITAU**
- 8. ALEXANDER MWANGEKA**
- 9. KULDIP SODHI**
- 10. MARY STEVENS**
- 11. SHAMSA MIRAN**
- 12. ABDALLA SALIM**
- 13. RODGER DAINTY**
- 14. SAID NADHIR –**

**(who are all officials and members of the Management Committee of the Mombasa
Branch of Kenya National Chamber of Commerce and Industry
..... APPLICANTS**

AND

- 1. DAVID M. GITHERE**
- 2. LADAN ONDITO RAO**

3. ANDREW MATAZA

4. TITUS G. RUHIU

5. KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY (KNCCI)

6. ABDALL MIRAJ

7. SAID TWAHER

8. EUNICE NJERU

9. HERBERT MWACHALA

10. MERURU SHAH RESPONDENTS

(Application for stay of execution pending the lodging, hearing and

determination of an intended appeal from the ruling and order of the
High Court of Kenya at Mombasa (Mwera J) dated 27

th

April, 2005

in

MISC. APPLI. NO. 20 OF 2004)

RULING OF THE COURT

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This is an application under Rule 5 (2) (b) of the Court of Appeal Rules for the main order:

“1. THAT this Honourable court be pleased to stay execution of the Ruling dated 27th February, 2004 as regards the issue of costs and the consequential orders in Mombasa High Court Miscellaneous Civil Application No. 20 of 2004, Republic versus David Githere & 9 Others Exparte Najib Balala & 13 Others, pending the hearing and determination of the applicant’s intended appeal”.

By a letter dated 6th January, 2004, the Kenya National Chamber of Commerce & Industry (KNCCI) dissolved the management committee of its Mombasa Branch and appointed a task force committee comprising of five members to recruit members and hold elections within 3 months. The 14 applicants who described themselves as officials and members of the management committee of the Mombasa Branch filed Mombasa High Court Misc. **Civil Application No. 20 of 2004** seeking leave to apply by Judicial Review for, inter alia, an order of certiorari to quash the decision of KNCCI. The applicants named ten respondents in the application, the first four being the national officials of KNCCI, the 5th being KNCCI and 6th, 7th, 8th, 9th, 10th, being the members of the task force committee. Leave to apply for Judicial Review was granted by the court but the respondents applied for the setting aside of the leave.

On 27th February, 2004, Maranga, Ag. J. (as he then was) allowed the application and set aside the leave granted with costs to KNCCI. That order effectually terminated the Judicial Review application.

Thereafter KNCCI filed a bill of costs claiming among other things, Shs.3,000,000/= as instruction fees. On 30th April, 2004 the bill of costs was taxed at Shs.15,504,630/= including Shs.1,500,000/= as instructions fees. On 13th May, 2005, the applicants filed a Notice of Objection to taxation under **Rule 11 (3) and 4** of the Advocates Remuneration Order (**Order**) objecting specifically to the sum allowed as instructions fees. The applicants did not, however, file a chamber summons setting out the grounds of objection as stipulated by Rule 11 (2) of the Order. But when the respondent commenced the process of

execution for costs, the applicants filed an application seeking stay of execution pending the determination of the objection to the taxation and obtained an ex parte order of stay. Thereafter, the respondents filed an application dated 25th June, 2004 for discharge of the ex parte orders of stay of execution dated 18th June, 2004 thereby prompting the applicants to withdraw the application for stay of execution on 13th July, 2004. Then on 14th July, 2004, the applicants filed a second application seeking the enlargement of time within which to file an objection to the taxation and a stay of execution pending the hearing of the reference (objection). That application was heard and dismissed by Mwera J on 27th April, 2005. The applicants have filed a Notice of Appeal dated 28th April, 2004 indicating that they intend to appeal against that decision. That is the brief background against which the present application is brought.

The principles for granting an order of stay of proceedings; stay of execution or an order of injunction in this Court pending appeal are well known. Before the Court can exercise its unfettered discretion in favour of the applicants, the applicants have to satisfy the court, among other things, that the intended appeal is arguable; that the appeal is likely to be rendered nugatory unless the order of stay of execution is granted and that the respondents will not suffer undue prejudice if the order of stay is granted.

The application is supported by the affidavit of Sam Okello, the Vice-Chairman of Mombasa Branch of KNCCI. A draft memorandum of Appeal has also been annexed. The applicants intend to appeal against a discretionary order dated 27th April, 2005 dismissing an application for enlargement of time for filing an objection to the taxation. The court in that decision did not award any costs and the decision is not capable of execution. Thus, an application for stay of execution of that decision is misconceived.

However, in the interest of justice, we will treat the application as an application for stay of execution to recover the taxed costs of Shs.1,564,630/= and additional costs pending the hearing and determination of the intended appeal. Regarding the merits of the intended appeal, it is important to emphasise that the applicants intend to appeal against the decision of Mwera J dated 27th April, 2005 dismissing the application for enlargement of time for filing an objection to the taxation. The intended appeal is not against the decision of Maraga J dated 27th February, 2004 awarding the costs or the decision of the taxing officer dated 30th April, 2004 taxing the bill of costs at Shs.1,564,630/=.

By **Rule 11 (4)** of the Order, a judge of the High Court has power to enlarge time in his discretion either for filing the Notice of Objection to taxation or for filing the objection (reference) itself. If an objection is filed and determined, then by **Rule 11 (3)** of the Order, a person aggrieved by such a determination can only appeal to the Court of Appeal with leave of the judge. The Order does not provide for a similar right of appeal to the Court for Appeal against a decision of a judge in an application to enlarge time. The appeal against an order made upon application for enlargement of time under **Rule 11 (4)** of the Order does not seem to be covered by section 75 of the Civil Procedure Act as read with **Order XLII Rule 1 (1)** of the Civil Procedure Rules. Moreover, since the order the applicants intend to appeal against was not made under Civil Procedure Rules, prima facie, the order is not appealable even with leave of the court. Assuming that, on the contrary, the order is appealable with the leave of the court under Rule 1 (2) of Civil Procedure Rules, then by Rule 1 (3) of the Order XLII, an application for leave is required to be made in the first instance to the judge who made the order either informally at the time the order was made or within 14 days from the date of such order. The applicants say that they have made and obtained leave to appeal or that they intend to file an application for extension of time to apply for leave to appeal. Thus, it is doubtful whether the order is appealable at all. It is equally doubtful whether the order is even appealable with leave of the court.

Secondly, in the course of his submission, Mr. Khagram, learned counsel for the applicants, identified some of the arguable points in the intended appeal. They include the ground that there is no decree capable of execution; that the warrants of attachment are a nullity and that respondents except KNCCI are not entitled to costs. With all due respect, those matters do not directly arise from the decision refusing enlargement of time. The intended appeal can only question the manner in which the learned Judge exercised his discretion in declining to enlarge time.

The applicants say that the intended appeal will be rendered nugatory if stay is not granted because it is

unlikely that the costs, if paid, will be recoverable in the event of the appeal succeeding. If the appeal succeeds, the appellate court will not determine the quantum of costs. The appellate court can only enlarge time for filing an objection to taxation in which case the quantum of costs will be determined by a judge of the superior court. It is the applicants who took the respondents to court. The applicants are only aggrieved by the sum allowed as instruction fees. The respondents contend that the rest of the costs were taxed by consent.

That has not been denied. It is apparent that, at least, the 5th respondent (KNCCI) is entitled to some costs. The applicants have not offered to pay the undisputed costs. The assertion of the 5th respondent (KNCCI) that it owns Ufansi House in Nairobi worth Shs. 78 million has not been disputed. In the circumstances it is doubtful that the appeal if successful will be rendered nugatory. Having regard to all the circumstances of the case including applicants' conduct in the superior court we allow the application on terms that the applicants do deposit Shs.1,567,380/= claimed as costs in an interest bearing bank account in the joint names of the respective advocates for the parties within 30 days from the date hereof. Costs in the appeal. And in default, the application shall stand dismissed with costs to the respondents.

Dated and delivered at Nairobi this 16th day of September, 2005.

E. O. O'KUBASU

.....

JUDGE OF APPEAL

E. M. GITHINJI

JUDGE OF APPEAL

W. S. DEVERELL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR