IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. NAI 77 OF 2003 (UR. 40/03)

JUDICIAL COMMISSION OF INQUIRLY INTO THE

GOLDENBERG AFFAIR & OTHERS …….APPELLANTS

VERSUS

JOB KILACH…….…….....…RESPONDENT

JUDGMENT

1. Rule 74(4) of the Court of Appeal Rules (cap 9 Sub leg) does not require that one must obtain leave to appeal or a certificate that a point of law of general importance is involved, before one files a notice of appeal.

2. With respect to applications for leave to apply for prerogative orders the only procedure provided under order LIII rules 1 and 2 is that the application shall be made ex pate to a judge in chambers.

3. No leave required to appeal from an ex parte order which grants or refuses leve to apply for any of the prerogative orders set out in order LIII of the Civil Procedure Rules (cap 21 sub leg).

4. The court was not convinced in this case that because the trial judge made ex parte orders then the only route open to the applicants was to go before that judge and ask him to set aside the orders. That was one way open to the applicants.

5. Section 8(5) of the Law Reform Act (cap 26) provides a statutory right to appeal from an order made by a High Court under order LIII of the Civil procedure Rules (cap 21 sub leg).

6. In the circumstances of this case the exercise of the option to appeal was the more appropriate one for expediency.

7. In Kenya, the same rules apply to ex parte injunctions as in Anton Piller orders. Such orders can be made ex parte, not because the rules provide so but because of the urgency of the matter.

8. The court could not envisage a situation where a party would be allowed to go to the court of Appeal before going to the judge who made the ex parte order for an injunction with a view to persuading him to set aside the order.

9. A party who asks the Court of Appeal for an order of stay of execution, or for an injuction, or for stay of any further proceedings must satisfy the court that:

(i) the appeal or intended appeal is an arguable one and not frivolous;

(ii) unless the court grants the stay or injunction, the appeal or intended appeal would be rendered nugatory if successful.

10. There need not be a chain of arguable points to sustain an application under rule 5(2) of the Court of Appeal Rules (cap 9 sub leg). Even one arguable point is sufficient.

11. An appeal can be rendered nugatory by a question of fact and not law. That being so, that issue must be considered in the circumstances of each particular case.

12. (Obiter) A commission such as the Judicial Commission of Inquiry into the Goldenberg Affair is a tribunal inferior to the High Court. Such it is amenable to judicial review jurisdiction of the High Court and hence to the Court of Appeal on appeal.

SUMMARY OF FACTS

The respondent was one of the persons who had been charged with criminal offences arising out of the "Goldenberg Affair." He made allegations that Mr. Justice Bosire and Mr. Waweru Gantonye would not be objective and impartial in carrying out their mandate in the Golden Commission of Inquiry.

The respondent went to the High Court seeking orders of prohibition which were to be heard ex parte. Mr. Jusitice Mbito granted the orders with the effect that the commission were unable to carry on with their mandate and had to adjourn. The applicants then went to the Court of Appeal under rule 5(2) (b) of the Court of appeal rules (cap 9 sub leg) seeking to stay the orders of the High Court. The respondent contended that under rule 5 (2) (b) no appeal lies to the Court of Appeal or that an appeal can only lie to the Court of Appeal with leave either of the superior court or the court of first instance. According to the respondent since an order granting leave is merely an interlocutory order in the process of seeking a prerogative order (mandamus, prohibition or certiorari) an appeal can only lie from such an order with leave.

Appeal

Leave to appeal – whether one must obtain leave to appeal before filing a notice of appeal – rule 74(4) of the Court of Appeal rules (cap 9 sub leg). Leave to appeal – applications for leave to apply for prerogative orders – procedure for making the applications whether leave is required to appeal from ex parte orders with respect to prerogative orders – order LIII of the Civil Procedure Rules (cap 21 sub leg)-

CIVIL PRACTICE AND PROCEDURE

Setting aside – ex parte orders with respect to prerogative orders – order LIII of the Civil Procedure Rules (cap 21 sub leg) – how such orders may be set aside. Stay – stay of execution and stay of further proceedings – what a party needs to establish before such stay is awarded – rule 5(2) of the Court of Appeal Rules (cap 9 sub leg).

INJUNCTION

Ex parte injunction – rationale for awarding an ex parte injunction whether an aggrieved party can appeal against an ex parte injunction directly to the Court of Appeal. Judicial Commissions of Inquiry – status of such tribunals – whether the tribunals are amenable to judicial review jurisdiction.

The notice on motion before us is one under Rule 5(2)(b) of the Court's rules, hereinafter called "the rules". The motion is brought by a total of four applicants, namely the Judicial Commission of Inquiry Into the Goldenberg Affair, the 1st Respondent, the Hon. Mr. Justice S. E. O. Bosire, the 2nd Respondent, Waweru Gatonye, the 3rd Respondent, and the Attorney General, the 4th Respondent. In their said motion, all the respondents are asking us for two basic orders, namely:

"A. THAT pending the lodging hearing and determination of the Applicants' intended appeal, the

execution of the orders of Hon. Mbito, J. in High Court Miscellaneous Civil Application No. 304 of 2003 given on the 28th March, 2003 be stayed; and

B. THAT pending the lodging hearing and determination of the Applicants' intended appeal, there be a stay of any further proceedings in the Superior Court in High Court Miscellaneous Application No. 304 of 2003".

There is a third prayer for such further or consequential orders as the Court may deem just and fit, but that is really not a substantive prayer as in the case of prayers "A and B" above. All these prayers are sought by the applicants against one Job Kilach, the Respondent hereinafter. How does the matter arise?

Very briefly, it is that since the early 1990s, this nation has been haunted by an alleged financial scandal of grievous proportions and which has notoriously acquired the title of ***"The Goldenberg Affair".*** The very courts themselves have, day in and day out, tackled various aspects of the "Affair", criminal, civil and otherwise. It would appear that none of these cases has been conclusively determined one way or the other.

So on the 24th February, 2003, His Excellency the President, acting under and in accordance with the provisions of the Commissions of Inquiry Act, Cap 102 and vide Gazette Notice No. 1237 of even date, appointed:

"A JUDICIAL COMMISSION to inquire into allegations of irregular payments of export compensation by the Ministry of Finance to Goldenberg International Limited popularly known as the "Goldernberg Affair" and into payments made by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims and other related matters".

The terms of reference of the Judicial Commission of Inquiry were then set out and the Hon. Mr. Justice Samuel Elkana Onderi Bosire, a respected member of this Court, was appointed to chair the Commission.

As we have seen Mr. Justice Bosire is the 2nd Applicant in the motion. Among the counsel appointed to assist the Commission in the task of gathering and presenting evidence before the Commission was Waweru Gatonye; he is the 3rd Applicant herein. The very Commission itself is the Applicant. We only need to add that as is the usual practice in such matters, the Attorney General of the Republic is acting as ***"amicus curiae" t***o the Commission and as the Comission is basically a creation of the Government, the Attorney General, apart from being the 4th Applicant, represented all the applicants in the proceedings before us.

And how does Mr. Kilach come to be the Respondent to the proceedings? He was one of the persons whom the Attorney General had charged with, in the Court of the Chief Magistrate, Nairobi, some criminal offences arising out of the "Goldenberg Affair" and the charges against him form part of the criminal cases which have interminably dragged on in the courts and which His Excellency the President must have intended to bring to some conclusion by the appointment of the Commission of Inquiry. The next stage in this saga is that on 18th March, 2003, some three weeks or so after the Commission was instituted one A. W. Omolo, of A. W. Omolo & Company Advocates & Commissioners for Oaths, acting on behalf of the Respondent, wrote to the 4th Respondent in the following terms:

"Dear Sir

Re: The Composition of The Commission of Inquiry into the Goldenberg "Affair"

We refer to the above matter and wish to address you as follows on behalf of Mr. Job Kilach, a former employee of the Central Bank of Kenya and then a senior Manager in the Exchange Control Department. As you are aware, Mr. Kilach is an accused person in CM.Cr.Case No. 4053 of 1994, one of the `Goldenberg' related cases in which the Central Bank of Kenya is a complainant.

It has come to our attention that the said Central Bank of Kenya has in its employment since 1996

when Mr. Micah Cheserem was Governor, one Mr. Donald Bosire, who is the son of the Hon. Mr. Justice Samwel Onderi Bosire, J.A., the Chairman of the above captioned Judicial Commission of Inquiry. Mr. Donald Bosire is currently a Banking Officer One in the Chief Banking Manager's Department.

Given the fact that Central Bank of Kenya is a complainant in the criminal case facing our client and further that the Central Bank of Kenya features prominently in the terms of reference of the Commission of Inquiry, we feel that it is inappropriate and undesirable for Justice Bosire, J.A. to, with respect, sit as Chairman or even Commissioner in the said Commission of Inquiry.

By so sitting, we are of the opinion, that the test of `bais' set out in the case of R v. Bow Street Stipendiary Magistrate, ex – parte Urgate Pinochet [1999] All E.R. will not have been passed and it cannot be said, justice is not only done but seen to be done'. In this regard, we enclose herewith copies of comments made in the United States on the issue of conflict of interest.

We are also instructed that Mr. Waweru Gatonye, an Assisting Counsel to the Commission, has acted and continues to act for the Central Bank of Kenya in the various civil litigations involving or dealing with `Goldenberg' and Exchange Bank. Given this state of affairs, we are apprehensive that Mr. Gatonye will be biased in his role in the Commission as he may consciously or unconsciously advance the case of the Central Bank of Kenya at the Commission's sittings rather than objectively assist the Commission to conduct an unbiased enquiry. On the foregoing premises, our client's instructions are that we demand, which we hereby do, the removal of both Hon. Mr. Justice Bosire, J.A. and Mr. Waweru Gatonye, from the composition of the Commission. In our opinion, neither of the two passes the "basis" test set out in the foregoing. If our demand were granted, then our client would be ready and willing to give his full co-operation to the Commission of Inquiry. As regards the whole setting up and appointment of the Judicial Commission of Inquiry, our client instructs us to draw your attention to his Civil Appeal No. 134 of 2002 pending in the Court of Appeal in which you are named as the principal Respondent. This appeal relates to matters arising from the `Goldenberg Affair'.

Our instructions are therefore to formally request that you advice (sic) the Commission stays its operations until such time that the Court of Appeal makes its decision one way or the other as regards the pending appeal or alternatively, that you concede the said appeal.

We trust that you shall take our client's concerns seriously and advise the Government and all parties concerned accordingly and expeditiously on the same.

Yours faithfully,

……".

The letter was copied to, amongst others, the 2nd and 3rd Respondents. They all received it on 21st March, 2003. We have found it necessary to quote the whole of this letter because it succinctly encapsulates, in a summarized version, the dispute between the parties in the High Court and before us. We do not know if any, and what, consultations were held amongst the parties to whom this letter was addressed. What is clear to us is that the 1st to 3rd Applicants proceeded with their mandate and on 31st March, 2003, it held its first meeting for the purpose of carrying out its mandate.

But prior to that, the 4th Respondent had written in reply to the Advocates for the Respondent. The letter, a copy of which was handed to us during the proceedings, was dated 26th March, 2003 and was in the following terms:

"I refer to your letter of 18th March, 2003 received on 21st March, 2003 in which you are challenging the appointment of Hon. Justice Samuel Onderi Bosire and Mr. Waweru Gatonye as Chairman and Assisting Counsel respectively of the Judicial Commission of Inquiry into the Goldenberg Affair.

> His Excellency the President in appointing the said persons to their respective positions had confidence in their abilities, professionalism and integrity. I also share the confidence reposed in them by His Excellency the President that they have the requisite experience to be able to discharge their duties objectively and impartially without regard to the matters complained, whether true or not.
>
> Please bear in mind that the nature of the inquiry is not adversarial. In the premises, I cannot advise the President to revoke the said appointments. If you still feel aggrieved, then you may wish to bring it to the attention of the Bosire Commission as is normally done when one wants a Magistrate, or Judge to disqualify himself/herself from hearing a case. By a copy of this letter I am informing them of the contents of you letter. With best regards.
>
> Yours
>
> Attorney General".

Thus the battle-lines were drawn between the parties. The Respondent was alleging that Mr. Justice Bosire and Mr. Waweru Gatonye would not, in the circumstances narrated in his letter to the 4th Respondent, be objective and impartial in carrying out their mandate, whether the proceedings of the Commission of Inquiry be adversarial or not. The 4th Applicant who represents all the applicants was contending that because of their abilities, professionalism and integrity the 2nd and 3rd Respondents would be able to impartially discharge the terms of their commission.

No wonder then that a stalemate having been thus reached the Respondent sought relief in the High Court. We said at the beginning of this ruling that the Goldenberg Affair has haunted this nation and its courts since the early 1990s. Like every-one else, we really wish that the "Affair" could be speedily solved. But we in Kenya pride ourselves that we are a democratic nation and we operate democratic institutions. Democracy, as is well known, is normally a messy, and often times, a very frustrating, way of governance. In this respect, dictatorships are more efficient and if the Judges and Magistrates running these courts were allowed to operate as dictators, we would have simply told Mr. Kilach:

> "You and your kind have bothered us more than enough. You now must shut up and accept what has been given to you".

Unfortunately for us, and probably for the nation, we cannot do that. The Respondent went to the High Court. The High Court was under a duty to hear him. Mr. Justice Mbito heard him on his application by way of Chamber Summons under Order 53 Rule 1 of the Civil Procedure Rules. In the summons, which was and had to be ex-parte as required by the provisions of Order 53, the Respondent asked Mbito, J. for the following orders:

> "1. ……
>
> 2. THAT the Applicant [Respondent] be given leave to apply for Judicial Review seeking the orders as set out in the Applicant's Statutory Statement in respect of the continued or further sitting of Hon. Mr. Justice S. Bosire, J.A. as Chairman of the 1st Respondent and in respect of Mr. Waweru Gatonye further acting as Assisting Counsel to the said 1st Respondent.
>
> 3. THAT the Applicant be given leave to apply for Judicial Review seeking the Orders as set out in the Applicant's Statutory Statement in respect of the continued or further sitting of the Judicial Commission of Inquiry into the Goldenberg Affair as presently constituted or from taking or continuing to take evidence or howsoever otherwise proceeding with its inquiry into the Goldenberg Affair;
>
> 4. THAT the grant of leave do operate as a stay of any further sitting of the Hon. Mr. Justice S. Bosire, J.A. as Chairman of the Commission of Inquiry into the Goldenberg Affair and a stay of any further acting by Mr. Waweru Gatoneye as Assisting Counsel to the Commission;

5. THAT the grant of leave do operate as a stay of any continued or further sitting of the Judicial Commission of Inquiry into the Goldenberg Affair and as presently constituted or from taking or continuing to take evidence or howsoever otherwise proceeding with its inquiry into the Goldenberg Affair.

6. …..

7. …...".

The Order specified in the statutory statement accompanying the Chamber Summons was one of prohibition. In simple language what Mr. Justice Mbito was being asked to do was to stop Mr. Justice Bosire from being the Chairman and sitting on the proceedings of the 1st Applicant, stopping Mr. Waweru Gatonye from being and acting as an Assisting Counsel to the 1st Applicant itself from going on with its mandate unless Mr. Justice Bosire and Mr. Waweru Gatonye were excluded from the operations of the 1st Applicant. The orders of stay in paragraphs (4) and (5) of the summons meant that if Mr. Justice Mbito granted to the Respondent leave (i.e. permission) to apply for an order of prohibition, then in that event the grant of the leave or permission was to act as a stay, i.e. that Mr. Justice Bosire would not act as Chairman or sit on the 1st Applicant Mr. Waweru Gatonye was stopped from proceeding any further as an Assisting Counsel and the 1st Applicant itself was stopped from further proceedings with its mandate until the Respondent's case in the High Court was filed heard and determined.

Mr. Justice Mbito granted the orders we have set out in paragraphs 2, 3, 4 and 5 with the result that when the Commission convened on 31st March, 2003, they were unable to carry on with their mandate and had to adjourn. We are told they adjourned to 15th April, 2003 by which time they hoped that Mr. Justice Mbito's orders would have been "either stayed or set aside". The Applicants have come before us for the purpose of staying the orders and as we stated earlier, they come before us under rule 5(2)(b) of the rules. What do the provisions of that over-worked rule state? The provisions state:

"5(2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may –

(a) ……

(b) In any civil proceedings, where notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further proceedings".

We set out this rule because in his submissions before us on behalf of the Respondent, learned counsel Mr. Nowrojee contended that while the only requirement under rule 5(2)(b) which gives the Court jurisdiction to hear an application for stay of execution, for an injunction or for a stay of further proceedings is the lodgment of the notice of appeal, yet if it be known, for example, that no appeal lies to the Court or that an appeal can only lie to the Court with the leave either of the superior court or the Court itself, then in such a situation, it would be pointless to grant an order of stay even if a notice of appeal has been lodged. We do not know and we do not wish to deal with the situation where there is no right of appeal to the Court. In such a situation, we would think the filing of a notice of appeal would be a futile exercise since it is known right from the beginning that no appeal can be brought. But the position must be different where an appeal can only be brought with leave. Rule 74(4) deals exactly with such a situation; that rule states:

"When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal".

This rule clearly deals with two situations, namely:

(i) where leave to appeal is necessary; or

(ii) where a certificate that a point of law of general public importance is involved.

In either case, it is not required that before one files a notice of appeal, one must have obtained the leave or the certificate. One can file the notice of appeal and thereafter obtain the leave or the certificate as the case may be. Mr. Nowrojee did not show us any authority from this Court or from anywhere else where it has been decided that the obtaining of leave or a certificate is a condition precedent to the filing of a notice of appeal. We are not ourselves aware of any such authority and we would be surprised if there were to be one for such a decision would be clearly contrary to the plain meaning of the words in rule 74(4) of the rules. But as we shall show in a moment, we do not think that leave to appeal is required in order to appeal from an ex-parte order granting or refusing leave to apply for any of the prerogative orders set out in Order 53. We are satisfied that the obtaining of leave is not a condition-precedent to the filing of a notice of appeal. The applicants filed their notice of appeal on 31st March, 2003 and as that is the only condition precedent to the exercise of our discretion, we reject the Respondent's contention that the notice of motion before us is incompetent and premature. The motion is clearly competent.

Nor are we convinced that because the orders of Mbito J. were made ex parte the only route open to the applicants was to go before that Judge and ask him, under his inherent powers, to set aside the grant of leave. That was one way open to the applicants. We are perfectly mindful of what was said by the Court of Appeal in England in the case of R v. Secretary of State Ex-Parte Harbage [1987] 1 All E.R. 324 where it was held:

> "The appropriate procedure for challenging leave granted ex parte under RSC. Ord. 53 r. 3 to apply for judicial review was either by an application under the inherent jurisdiction of the court to the judge who granted the leave or by way of an appeal under the general appellate jurisdiction conferred by section 16(1) of the Supreme Court Act, 1981. Accordingly, having regard to the availability of those remedies, the grant of such leave could not be challenged on an application for discovery in the judicial review proceedings or on an appeal against the order for discovery and it was, therefore, not open to the court in the present proceedings to set aside the order giving leave to apply for judicial review".

It is obvious from this passage that in England, there was a statutory right [section 16 (1) of the Supreme Court Act, 1981] to appeal against an order granting or refusing to grant leave. In contending before us that the applicants required leave to appeal, Mr. Nowrojee submitted that an ex-parte order granting leave is an interlocutory order within the judicial review process and is not itself an order such as mandamus prohibition or certiorari which are the final orders in a judicial review process and hence the wording "prerogative Orders" in Order 53 rule 1 (ee) of the Civil Procedure Rules. According to Mr. Nowrojee, since an order granting leave is merely an interlocutory order in the process of seeking a prerogative order (mandamus, prohibition or certiorari) an appeal can only lie from such an order with leave.

We think this contention is not even supportable in England. As we have seen from Expart Harbage, there is a statutory right of appeal in England. In Kenya ***section 8(5)*** of the Law Reform Act, Cap 26 specifically provides:

> "8(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal".

We think this is sufficient authority for an appeal from "an order" made by the High Court under Order 53 of the Civil Procedure Rules. It is to be noted the section simply says "an order" not "prerogative order" or any such qualifications. So the right of appeal is statutorily available in Kenya as it is available in England.

We are equally mindful of the words of ***MAY, L.J.*** in the same case of Ex-parte HARBAGE. He is recorded as saying:

> "The next point to make is that although an appeal does lie to this court against an ex-parte order made by a judge of the High Court by virtue of S.16(1) of the Supreme Court Act, 1981,

nevertheless in his judgment in that case Sir Donaldson MR [1983] 3 All E.R. 589 at p. 593 said: "As I have said, ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession whether or not it assists his application, this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given the opportunity to review his provisional order in the light of the evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case, it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex-parte order without first giving the judge who made it or, if he was not available, another High Court, Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision".

(Underling added).

We wish to make some comments with respect to the remarks of Sir Donaldson, M.R. quoted above. First we note that the ex parte order before Sir Donaldson was an Anton Piller order. Such orders can be made ex parte, not because the rules provide that they be made ex parte but because of the urgency of the matter. The same situation applies in our ex parte injunctions and like Sir Donaldson, we cannot think of a situation where a party would be allowed to come to this Court before going to the judge who made the ex parte order for an injunction with a view to persuading him to set aside the order. The usual practice in dealing with applications for interlocutory injunctions, whether they be Anton Piller injunctions or what else, is to hear such applications inter-partes. Ex parte orders are granted only in exceptional circumstances. But with respect to applications for leave to apply for prerogative orders, the rules of Order 53 provide:

"53(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for such leave as aforesaid SHALL BE made ex parte to a judge in chambers, and …….".

So that the only procedure provided under the rules for making an application for leave to apply for a prerogative order is that the application:

"… shall be made ex parte to a judge in chambers ….".

That is a totally different situation from other applications where the normal practice is to make the application inter partes unless there be some special reason for making the application ex parte. Lord Justice May, in ex parte Harbage quoted the remarks of Sir John Donaldson in Wea Records Ltd v Visions Channel 4 Ltd & Others [1983] 2 All E.R. 589 without appreciating that Sir John Donaldson was not dealing with an application for leave to apply for prerogative orders; Sir John Donaldson was dealing with an application for an Anton Piller injunction.

Ole Keiwua J. (as he then was) dealt with the matter in Mike J. C. Mills & Another v the Kenya Posts & Telecommunications, H.C. Misc. Application No. 1013 of 1996 (unreported) but that learned Judge also appears not to have noticed the distinction between the two cases dealt with by Sir John Donaldson and Lord Justice May. We think that in Kenya, at any rate, the law gives these applicants the right to appeal and we are not convinced that that right can be taken away from them by simply telling them:

"This is merely an ex parte order. Go back to the High Court and have the matter sorted out there".

The law gives the applicants the option to come to this Court by way of an appeal. They cannot be punished for exercising that option. In the particular circumstances of this case, we think the exercise of their option to appeal was the more appropriate one because as we have said the subject matter of the dispute has dragged on since the early 1990s. If the applicants had opted for asking Mbito J. to set aside

his order granting leave and if he had refused, the applicants might still have been obliged to come to this Court. This aspect of the Respondent's argument must also fail.

Having dealt with the preliminary matters which Mr. Nowrojee had wanted to argue as preliminary objections but which we ordered him to argue within the motion itself, we can now pass on to the merits of the motion itself.

It is now old hat and needs no repeating that a party who asks this Court for an order of stay of execution, or for an injunction, or for stay of any further proceedings must satisfy the Court on two points, namely:

1. That his appeal or intended appeal is an arguable and not a frivolous one; and

2. That unless the Court grants the stay of execution, the injunction or the stay of a further proceedings the appeal or the intended appeal, were it to be successful after hearing, that success would have been rendered nugatory.

Dr. Khaminwa for the applicants attempted to add a third requirement of an appellant or intending appellant suffering an irreparable loss or damage if the order sought is not granted but we are not aware of any such requirement. We only need to add that an applicant such as these applicants must satisfy us on both limbs of the requirements.

Have the applicants shown to us an arguable appeal or is their intended appeal merely a frivolous one?

We think the applicants have shown to us some arguable points in their intended appeal. First they intend to show in their proposed appeal that even if it be true that the son of Mr. Justice Bosire is an employee of the Central Bank, or that Mr. Gatonye has previously acted for that Bank, those are not such terribly important factors as to warrant the crippling of the operations of the Commission by an order of stay as Mbito J. did. The Respondent, on the other hand and relying on the decision of R v Bow Street Stipendiary Magistrate ex parte Urgate Pinochet quoted in his letter the contents of which we have already reproduced, contends that the relationship of son and father is such that the Judge ought not to sit. We think this, even if it were the only point, is an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating on appeal and is not a frivolous one. There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5(2); there need not be a chain of arguable points to sustain an application.

Will the appeal be rendered nugatory unless we were to grant a stay of at least some of the orders made by Mbito J?

As at present, the Commission cannot operate at all. Even if Mr. Justice Bosire, JA and Mr. Waweru Gatonye were to be minded to disqualify themselves, they cannot do so because they cannot sit all. As we have said previously, for example, in Reliance Bank (In LIquidation) v Norlake Investments Ltd, Civil Application No. Nai. 93 of 2002 (unreported) what would render an appeal nugatory is a question of fact, not law and that being so, that issue must be considered in the circumstances of each particular case. In the circumstances of one case the burden of an immediate payment of a large sum of money might be too heavy to bear for an applicant and it may be more prudent to ask the decree-holder to wait for its money until after the hearing and determination of the appeal – see Oraro & Rachier Advocates Co-operative Bank of Kenya, Civil Application No. Nai. 358 of 1999 (unreported); Kenya Breweries Ltd v Kiambu Geeneral Transport Agency Ltd, civil Application No. 100 of 2000 (unreported). In another case, the Court can take into account the fact that even though the applicant can pay without necessarily running out of all resources, yet the money to be so paid is from the public coffers and it may well be necessary to ask the decree-holder to wait the outcome of the appeal – see for example Attorney General v Equip Agencies, Civil Application No. Nai. 432 of 2001 (unreported). The circumstances must be as varied as the cases themselves.

In the application before us the operations of the Commission have been wholly grounded and we cannot

be oblivious and insensitive to the fact that the Commission has attracted a considerable public interest due to the nature of the matter it was appointed to inquire into. But more serious still, even if Mr. Justice Bosire, JA and Mr. Waweru Gatonye were to be minded to "recuse themselves", if we may be permitted to use that American expression and thus let the Commission resume its mandate, the two gentlemen cannot do so because the Commission cannot just sit. The 1st Applicant has never been given an opportunity itself to deal with the complaints of the Respondent during its formal sittings. Taking into account all these facts, we think the order of stay of the Commission's operations granted by Mbito J. unless stayed, will render the eventual success of the intended appeal nugatory, and an immediate stay of it is necessary.

What orders should we make on the motion?

It was largely agreed before us that a commission such as the 1st Respondent is a tribunal inferior to the High Court and as such is amenable to judicial review jurisdiction of the High Court and hence to this Court on an appeal. The High Court would be entitled to give it directions and when the matter comes before us as it has come, we are also entitled to give it directions. We have already pointed out that the Commission itself has never been given a chance to formally deal with the complaints raised against some of its members by the Respondent. We think the Commission ought to be given that opportunity.

Accordingly, we are inclined to and we do make the following orders:

1. We are satisfied that the learned Judge was right in granting leave to the Respondent to apply for an order of prohibition. The complaints raised by the Respondent against some members of the Commission, are prima facie, serious and we see no reason to stay the order granting leave to apply.

2. We are equally satisfied that the Commission itself must be given an opportunity to deal with the complaints raised by the Respondent against some of its members.

Accordingly, we order a stay of Mbito J's orders directing that the leave granted should act as a stay of the sittings and other operations of the Commission. The consequence of this order is that the Commission is directed to resume its sittings and other operations as soon as is reasonably practicable. The Commission is further directed that at its first sitting pursuant to this order it must accord to the Respondent the chance to ventilate his complaints against its two members and thereafter the Commission must consider those complaints and give its ruling thereon.

3. We were told that following the grant of leave to apply for an order of prohibition, the Respondent filed his notice of motion in the High Court and the same is set for hearing on 9th April, 2003. It would not be right for the two matters to be heard simultaneously by the High Court and the Commission. Accordingly, we order a stay of any further proceedings in the High Court until after the hearing and determination of the Respondent's complaints by the Commission, i.e. the 1st Applicant.

We believe these orders should take care of the situation presented to us.

On costs, we order that the same shall abide the outcome of the intended appeal. These, then, shall be our orders on the motion dated and lodged in this Court on 31st day of March, 2003.