



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL MISC APPL NO. 330 OF 2000

NYAMOGO & NYAMOGO ADVOCATESAPPLICANT

AND

MOSES KIPKOLUM KOGORESPONDENT

(An application for stay of execution pending an appeal from the ruling & order of the High Court of Kenya at Nairobi (Ang'awa J) dated 12th October, 2000

in

H.C.C.S. NO. 1036 OF 2000 (O.S.)

RULING OF THE COURT

Nyamodi Willys Nyamogo , practising as Nyamogo and Nyamogo Advocates, the applicant, applies under rule 5 (2) (b) of the Court of Appeal Rules , for stay of execution of the ruling and order of the superior court in its Civil Case No. 1036 of 2000 (O.S) given on 12th October 2000, in which that court ordered him to pay over to Moses Kipkolum Kogo, the respondent, KShs.120,000/- being part of an amount of money which the court thought should have but was not paid over to the respondent pursuant to the decree in Nairobi High Court Civil Case No. 4925 of 1989, in which the respondent was the decree holder.

The respondent as plaintiff in Civil Suit No. 4925 of 1989, engaged the applicant as his counsel in that suit to take over the conduct of the suit from another firm of advocates, which firm had also taken over the conduct of the case from another firm of advocates. In that suit the respondent made a claim for special and general damages for injuries sustained in a road traffic accident. The superior court found for the respondent and awarded him KShs.950,526/- which was inclusive of costs. The respondent was aggrieved on quantum and his appeal to this Court, to wit, Civil Appeal No. 74 of 1998, was dismissed for want of merit. But thereafter a dispute arose between the respondent and the applicant regarding advocate-client costs.

On the application of the applicant, under Misc. Civil Application No. 420 of 1999, his bill was on 8th November, 1999, taxed at KShs.146,769/- for the proceedings in the High Court; and on 24th March, 2000, his bill for the appellate proceedings was taxed in the sum of KShs.100,000/- under Misc. Civil Application No. 28 of 2000. Certificates of taxation were thereafter issued in that regard.

The applicant was, on 26th March, 1999, paid the whole of the decretal sum in Civil Suit No. 4925 of 1989, and by order of the superior court at the instance of the respondent the applicant paid the former

KShs.425,357.20 as part of the decretal sum in that case; and a further sum of KShs.73,717.80 was ordered to be deposited in court as fees for the two previous firms of advocates which acted for the respondent.

The balance was to be paid after the taxation of the applicant's bill of costs. However, after taxation as aforesaid, the applicant did not pay over the balance arguing that his bill exceeded the amount of money the respondent owed him in fees. The respondent was, therefore, forced to file High Court Civil Suit No. 1036 of 2000 (O.S.) for an account and payment to him of the balance of the decretal sum in Civil Suit No. 4925 of 1989. That case was heard by Ang'awa, J. who on 28th September, 2000 decreed that KShs.120,000/- was due and owing to the respondent herein with interest at 12% per annum from the date of that suit.

In her judgment the learned Judge observed that notwithstanding that the applicant's bill in Civil Appeal No. 74 of 1998 was taxed at KShs.100,000/- his claim against the respondent of KShs.239,000/- was improper and amounted to a double-claim. She, therefore, disallowed KShs.139,000/-.

This is the amount which the applicant contends the learned Judge improperly awarded to the respondent. But for some reason the applicant did not appeal against the judgment and instead filed a motion before the same court under Order XLIV rule 1 of the Civil Procedure Rules , seeking, inter alia, an order for review of that judgment, on the ground that there were errors on the face of the record.

In his affidavit in support of that application, the applicant depones that in his bill of costs which he filed in Civil Suit No. 4925 of 1989, he had claimed KShs.385,969/- out of which the respondent had only paid KShs.285,969/-, leaving a balance of KShs.100,000/- which should have been paid to him, and that had Ang'awa J. taken into account the fact that his firm was entitled to the party and party costs in that suit she would not have found for the respondent herein. He also deponed that in his understanding the learned Judge in effect vacated the certificates of taxation we referred to earlier.

The respondent seems to have also been dissatisfied with the same judgment more specifically the part in which the court held that KShs.73,717.80 was due and payable to his former advocates and not to himself. He, therefore, also wanted the judgment reviewed on that limited aspect and on the issue of out of pocket expenses arising from the several trips he made to the applicant's chambers to claim from him the balance of the decretal sum, which apparently the trial Judge had disallowed. Ang'awa J. declined the applicant's request on the ground that the applicant did not clearly present his case to show he was owed money. It is against that ruling that the applicant intends to appeal.

The jurisdiction of the Court under rule 5 (2) (b) , aforesaid, is specific. It is discretionary and is exercised on the basis of two general principles. First, an applicant is obliged to show that his appeal or intended appeal is arguable. Secondly, that unless the Court grants him the order or orders sought, his said appeal or intended appeal, if successful, will be rendered nugatory. The jurisdiction of the court being discretionary as we have stated must be exercised on the basis of evidence and sound legal principles.

We heard the applicant on the two general principles we have enunciated. He was unable to show us any arguable points he intends to raise in his intended appeal against the ruling of the Court below.

The costs due to the applicant from the respondent were taxed. Neither the applicant nor the respondent has so far taken any steps to challenge the taxations. Neither party can properly raise an issue regarding the propriety of the taxations in the intended appeal as that was not an issue before the trial court. The applicant appears to us to want to retain more money than he was allowed by the taxing officer without showing any basis for doing so. He also appears to suggest that he was entitled to a share of the party and party costs; and also that he was entitled to recover from the decretal sum part of the instruction fees of KShs.50,000/- the respondent was supposed to pay him but which he failed to do except for KShs.10,000/-. All these are arguments the applicant would have and might have raised in taxation proceedings before the taxing officer, and which as we said earlier might not, prima facie , be the subject matter of the applicant's intended appeal. The original suit against the applicant was mainly for an account. The account was given which the trial Judge looked at and from it found that the respondent was

entitled to KShs.120,000/-, which she then ordered that it be paid over to the respondent. In our view, the intended appeal will mainly be concerned with the correctness or otherwise of the trial Judge's arithmetical calculations of the account between the applicant and the respondent. The applicant having failed to show us where and how the trial Judge erred in declining to review her judgment we are unable to find any arguable point in his intended appeal.

Having come to the foregoing conclusion we find no necessity of considering the second limb of the applicant's application, namely, whether unless the stay sought is granted, the applicant's intended appeal if successful, will be rendered nugatory.

In the result, we decline to grant to the applicant the order of stay and dismiss his application with costs assessed at KShs.5,000/-. The interim order of stay we granted on 27th November, 2000 is hereby vacated and the KShs.120,000/- deposited in the High Court pursuant to that order shall be released to the respondent forthwith.

Dated and delivered at Nairobi this 20th day of December, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR