



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 101 OF 2019

BETWEEN

SHAMI DESHPAL WADHWA

as Legal Representative of the

Estate of DESHPAL OMPRAKASH WADWH.....APPLICANT

AND

1. HABIB ABU MOHAMED

2. ABDALLA MWARIGA MAE

3. IBRAHIMMUKHTAR ABASHEIKH

4. TAUHIDA TAHIR SHEIKH SAID

5. ATTORNEY GENERAL.....RESPONDENTS

(An application for orders staying the further hearing of the main suit and all further proceedings in

in

Malindi ELC Case No. 51 of 2012.)

RULING OF THE COURT

In this Notice of Motion dated 10th May 2019 which is brought under *sections 3 (2), 3A and 3B* of the *Appellate Jurisdictions Act* and *rules 1 (2), 5 (2) (b) and 103* of the *Court of Appeal Rules*, *the applicant, Shami Deshpal Wadhwa*, has sought for orders that, pending the hearing and determination of this application and the intended appeal, the hearing of the defence case in *Malindi ELCC No 51 of 2012* scheduled to be heard on 21st November 2019 be stayed, and that this Court consolidate *Malindi Civil Appeal No. 33 of 2019, Shami Deshpal Wadhwa vs Habib A. Mohamed and 4 others* with *Civil Appeal No. 148 of 2019, Shami Deshpal Wadhwa vs Habib A. Mohamed and 4 others* as the two appeals arise from the same dispute.

The application was brought on the grounds that on 5th February 2019, the applicant had sought the leave of the court to file an additional list of documents in *Malindi ELCC No. 51 of 2012*, and upon grant of leave the list of additional documents filed on 31st January 2019, be deemed as duly filed. It was further contended that upon hearing the parties' arguments, the learned judge expunged the applicant's documents from the record, for reasons that the applicant had not sought the court's leave to file the documents; that thereafter, the applicant filed a Notice of Motion dated 6th March 2019 seeking leave of the court to file the additional documents, and to reopen her case which the court had closed on 5th February 2019, as well as leave to recall one witness.

It was asserted that on 15th October 2019 when the matter came up for hearing, the learned judge ordered that the motion dated 6th March 2019 be dispensed with, to pave way for hearing of the defence's case on 21st November 2019.

The applicant's grievance was that the order dispensing with the application was prejudicial as it denied her an opportunity to be heard, the right to a fair administrative hearing and to a fair trial as enshrined in **Article 47** and **50 (1)** of the **Constitution**, that furthermore, should the defence case proceed to hearing prior to the application for additional documents being heard, the appeal, which the applicant had already filed, would be rendered nugatory.

With regard to the prayer for consolidation of the appeals, it was stated that *Malindi Civil Appeal No. 148 of 2019* on which this application is premised, should be consolidated with *Malindi Civil Appeal No 33 of 2019*, in respect of the order expunging the additional documents since they emanate from the same dispute.

The application was supported by the sworn affidavit of Mohamed Amani Karega, Advocate, on 11th November 2019.

The background to this Motion, in brief is that after the applicant's witnesses in the trial court had testified, the applicant sought to introduce other documents by filing additional documents in court. When the matter came up for hearing, the respondents objected to their filing, prompting the learned judge to expunge them from the record for the reason that leave of the court to file the documents was not obtained. The judge further ordered the defence case to proceed at the next hearing.

In an attempt to remedy the situation, the applicant filed a Notice of Motion dated 6th March 2019 seeking leave for the additional documents to be admitted. Subsequently thereto, the respondents also filed 4 applications, one of which was the 5th respondent's application dated 5th August 2019 seeking orders for his witness testimony to be taken *de bene esse*, on account of the witness' illness. When the case was mentioned on 19th September 2019, the court dispensed with hearing both the applicant's and the 5th respondent's applications.

On 15th October 2019, when the applicant's motion came up for hearing, the respondents' informed the court, that it had already ordered that the remaining applications, including the applicant's motion of 6th March 2019 be dispensed with. The learned judge once again ruled that all outstanding applications be dispensed with in the interest of justice to pave way for the hearing of the defence's case on 21st November 2019.

The applicant was aggrieved that her application was not heard on its merits which has prompted this application before us.

Responding to the motion in their grounds of opposition and replying affidavits sworn on 10th December 2019, the 1st and 2nd respondents deponed, in relevant part, that the applicant's motion to reopen their case was an afterthought since the defence's case had since commenced; that there is nothing to show that the additional documents sought to be filed could not have been obtained earlier; that the documents sought to be produced will prejudice the respondents' case and that the applicant's application was tantamount to conducting piecemeal litigation. It was further deponed that the applicant's actions were meant to further delay the

trial which has been pending for the last seven years.

Ibrahim Mukhtar Abasheikh, the 3rd respondent, also swore a replying affidavit on 2nd December 2019 wherein he reiterated that the applicant's motion is merely a means by which to delay the proceedings in the trial court, and that if allowed, it is the respondents that stood to suffer irreparable harm. It was further averred that on 15th October 2019, after the lower court dispensed with the applicant's application for admission of additional documents, it ordered the defence's case to proceed to hearing; that the defence case commenced, on 21st November 2019 when **Mary Ndale Kai, DWI**, a retired Registrar of Lands testified as the first defence witness.

The 5th respondent, the Office of the Attorney General, also filed grounds of opposition, though it did not attend the hearing of the application. It nevertheless objected to the application, and urged us to decline to grant the orders sought as this would only delay the hearing and determination of the suit in the trial court.

Urging that the application be granted, **Mr. Karega**, learned counsel for the applicant, submitted before us that, the appeal was arguable as on 15th October 2019 the trial court had ordered that the applicant's motion of 6th March 2019 be dispensed without the applicant having been heard, which was a breach of the applicant's right to a fair hearing.

With respect to whether the appeal would be rendered nugatory in the event it were to succeed, it was argued that in the event the trial court were to proceed to hear the defence's case, the applicant would have been denied an opportunity to include the additional documents as part of its case, which would render the appeal nugatory, if it were successful.

With regard to the consolidation of Civil Appeals 148 of 2018 and 33 of 2019, it was submitted that hearing the appeals together would be more efficacious and would make better use of this Court's time.

Mr. Kariuki, learned counsel for the 1st and 2nd respondents and holding brief for Mr. Matiti adopted the grounds of opposition and replying affidavit filed on behalf of the 1st and 2nd respondents. Counsel submitted that the orders sought were not merited, as the additional documents were filed without leave of the court after the applicant had closed her case; that the court considered the applicant's oral application to file the additional documents and had already ruled on the issue; that this application was therefore frivolous, and an attempt to delay the conclusion of the suit in the trial court.

Mr. Mbura, holding brief for Mr. Kilonzo for the 3rd and 4th respondents also stated that the application lacked merit. Counsel outlined the chronology of events as they had transpired during the proceedings, and concluded that the learned judge rightly exercised his discretion to dispense with the applications in the interest of justice. Counsel went on to assert that granting orders staying the proceedings would only serve to prejudice the respondents who are keen to have the suit heard and determined. Counsel did not object to the consolidation of the appeals.

In a brief rejoinder, Mr Karega stated that the applicant has a right to be heard and the trial court was wrong to dispense with the motion without hearing the applicant; that it was essential that a balance be drawn between expeditious disposal of cases and the right to fair hearing.

We have considered the pleadings and the submissions of the parties. In the case of **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others**, Civil Application No. NAI. 31/2012, this Court stated, *inter alia*:

“That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not

constitute an appeal from the judge's discretion to this Court." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."

It is therefore well established that, two principles guide the court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Secondly, that unless he is granted a stay of execution or injunction, as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under *rule 5 (2) (b)*, the Court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See *Ruben & Others vs Nderitu & Another (1989) KLR 459*.

As to whether the appeal is arguable, the applicant's complaint is that the trial court dispensed with its Notice of Motion dated 6th March 2019 without affording her an opportunity to be heard. The respondents contend that the applicant was heard before the additional documents filed in court were expunged from the record, and that in any event the defence's case had already commenced with the hearing of the testimony of the 5th respondent's witness.

Whether the applicant's motion was heard before the learned judge dispensed with it is, in our view, arguable.

On whether the appeal would be rendered nugatory in the event it is successful, we would have had no hesitation in concluding that the appeal would be rendered nugatory, if the defence's case were to commence before the appeal on whether or not the learned judge rightly dispensed with the applicant's application was heard and determined. But having said that, the proceedings of the trial court of 21st December 2019 annexed to the 3rd respondent's affidavit show that the defence's case has since commenced, with the testimony of Mary Ndale Kai, DW1, a retired Registrar of Lands on behalf of the 5th respondent. It becomes clear that the defence's case having commenced, would render the applicant's motion as having been overtaken by events.

As such, the second limb having failed, the application to stay the proceedings in the trial court is disallowed and is hereby dismissed.

With respect to the prayer to consolidate the two appeals, there being no objection from the respondents, and in the interest of expediting their hearing and determination, it would be prudent to consolidate them, more particularly because they arise from the same dispute.

Accordingly, we make the following orders;

1. The Notice of Motion dated 10th May 2019 is dismissed.
2. Civil Appeals Nos. Malindi Civil Appeal No. 33 of 2019, Shami Deshpal Wadhwa vs Habib A. Mohamed and 4 others and Malindi Civil Appeal No. 148 of 2019, Shami Deshpal Wadhwa vs Habib A. Mohamed and 4 others be and are hereby consolidated with Malindi Civil Appeal No. 33 of 2019 being the lead file.
3. The respondents shall have the costs of the motion.

It is so ordered

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR



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