



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KIAGE, M'INOTI & MURGOR, J.J.A)

CIVIL APPLICATION NO. 46 OF 2020

BETWEEN

COUNTY GOVERNMENT OF KWALE.....APPLICANT

AND

JOHN NYAMONGO NYAKONGO T/A H.R. GANIJEE & SONS.....RESPONDENT

(Being application for stay of proceedings in HCCC No. 96 of 2015 against the ruling

and consequential orders of the High Court at Mombasa (P.J. Otieno, J)

delivered on 3rd October 2018 in

HCCC No. 96 of 2015)

RULING OF THE COURT

By way of a Notice of Motion dated 16th June 2020, ***the applicant, The County Government of Kwale*** sought stay of proceedings in *HCCC No. 96 of 2015* against a ruling and order of the High Court at Mombasa (*P.J. Otieno, J*), delivered on 3rd December 2018, pending the hearing and determination of this application and the intended appeal. The motion was premised on the grounds that in a ruling dated 16th February 2018 in response to the applicant's preliminary objection to the respondent's plaint filed on 27th July 2015, the High Court struck out the suit having determined that it was statute barred, and therefore the court lacked jurisdiction to hear it.

Thereafter, by a Notice of Motion dated 19th March 2018, ***the respondent, John Nyamongo Nyakongo t/a H.R. Ganijee & Sons*** filed an application dated 19th March 2018 seeking review of the trial court's decision, and on 3rd October 2018, the court allowed the application, set aside its order striking out the suit and reinstated it for the reason that an extant letter dated 9th March 2015 from the Transition Authority had acknowledged of the respondent's debt, thereby causing time to start running from the date of the impugned letter.

The applicant was aggrieved by that decision and has sought a stay of the proceedings in the suit to enable it appeal against the decision on grounds that the trial court fell into error when it reinstated the

suit on the basis of the

Transition Authority's letter, without taking into account that the impugned letter was authored by a third party and therefore was incapable of binding the applicant; and further, that the learned judge failed to appreciate that the application did not comply with the mandatory requirements of **order 45 rule 1** of the **Civil Procedure rules** or **section 80** of the **Civil Procedure Act**, since the respondent did not satisfy the threshold requirements for review because the impugned document was at all times available to him.

The affidavit in support sworn by the applicant's Director of Legal Services, **M. K. Dzumo**, and written submissions filed on the applicant's behalf by their advocates, to a large extent reiterated the grounds set out in the application.

The respondent filed a replying affidavit and written submissions wherein he averred that the intended appeal was not arguable because the application for review drew the attention of the court to the fact that the letter dated 9th March 2015 acknowledged the debt, thereby enlarging the time for filing of the suit; that the court having appreciated that there was an apparent error on the face of the record, found that the suit was not statute barred, and in so finding rightly reinstated it; that therefore the intended appeal lacked merit.

On whether the appeal would be rendered nugatory, the respondent merely asserted that he has already obtained an interlocutory judgment against the International Governmental Relations Technical Committee, which he was in the process of executing and that he would be subjected to immense suffering in the event the proceedings were stayed.

In determining an application under **rule 5 (2) (b)** of this Court's rules, it is 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. See the case of **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012**. We would also add that when determining applications under **rule 5 (2) (b)**, the court exercises a distinct jurisdiction which does not constitute an appeal from the trial judge's discretion. See **Ruben & Others vs Nderitu & Another (1989) KLR 459**.

With respect to whether the intended appeal is arguable, the applicant's grievance is that despite the suit having been struck out for want of jurisdiction, the trial court reinstated it after concluding that the Transitional Authority's letter of 9th March 2015, which at all times was available for the respondent, amounted to an acknowledgment of the respondent's debt; that for this reason, the application did not comply with the mandatory requirements of **order 45 rule 1** of the **Civil Procedure rules** or **section 80** of the **Civil Procedure Act**, as it did not satisfy the threshold requirements for review.

After considering the grounds of the intended appeal, we are persuaded that it is indeed arguable, since it raises, among others, the question whether review could be granted on the basis of information which all along was within the respondent's knowledge and information.

As to whether the intended appeal will be rendered nugatory in the event that the trial were to proceed and a judgment rendered, it is not lost on us that the dispute in the intended appeal turns on whether the High Court has jurisdiction to hear the dispute given that it had initially found that it was statute barred. As a consequence of reinstatement of the suit, it cannot be gainsaid that the trial will commence notwithstanding the outstanding uncertainty of whether or not the trial court has jurisdiction to hear and determine it. We are satisfied that since the jurisdictional question is a fundamental prerequisite, it ought to be determined prior to commencement of the trial, as its commencement without determination of the issue, would in effect render the intended appeal nugatory, particularly in the event it were to succeed.

In sum, the two limbs having been satisfied, we find that the motion dated 16th June 2020 is merited, and is allowed. Costs to abide by the intended appeal.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of December, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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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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