



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL APPLICATION NO. 161 OF 2017

BETWEEN

O.P. NGOGE T/A

O.P. NGOGE & ASSOCIATES ADVOCATES.....APPLICANT

AND

W.M. MUIRUR.....1ST RESPONDENT

THE HON. ATTORNEY - GENERAL.....2ND RESPONDENT

(An Application for stay of further proceedings and/or an application for enforcement of Fundamental Human Rights and the Constitution against the Ruling of the

High Court (R. Mwongo, J) on 22nd June 2017

in Nairobi High Court Civil Suit No.813 Of 2007))

RULING OF THE COURT

By a Notice of Motion dated 16th July 2017, *the applicant, O.P. Ngoge T/A O.P. Ngoge & Associates Advocates* seeks for orders of stay of proceedings against the directions and orders of the High Court (*Mwongo, J*) of 22nd June 2017 pending determination of an intended Appeal, or in the alternative, that the ruling be declared unconstitutional null and void and the same be permanently stayed pending the hearing and determination of the intended appeal.

The motion was brought on the grounds that the learned judge wrongly removed the Attorney-General as a party to the High Court proceedings, and in so doing, technically dismissed the applicant's Constitutional petition dated 22nd February 2017 which is yet to be heard and determined, which was contrary to the rules of natural justice and fair trial thus placing the applicant on an unequal footing with the respondents in the suit; that the learned judge determined the applicant's Constitutional petition under the Civil Procedure rules which undermined and curtailed the application of *Articles 10, 22, 23, and 258* of the *Constitution*. The judge was further faulted for framing irrelevant issues for determination which were at variance with the issues that were filed.

The application was supported by a sworn affidavit of the applicant of 16th July 2017 and a further affidavit of 1st November 2018 which to a large extent reiterated the contents of the motion.

As a brief background, by a plaint dated 4th December 2007, the 1st respondent filed a claim for defamation against the applicant. In response the applicant filed a defence dated 7th February 2008, and subsequently thereto, also filed as a Counterclaim by way of a Constitutional Petition under **Article 22** of the **Constitution** alleging violations of his rights by the 1st respondent and the Attorney General who was named as a party to the counterclaim. In opposition to counterclaim, the 1st respondent filed a Preliminary Objection and Grounds of Opposition asserting that the pleading the applicant had filed were improperly lodged in the defamation suit, indicating instead, that the petition would be better instituted as a separate suit in the Constitutional division.

By way of directions, the learned judge held, *inter alia*, that the Counterclaim petition could be canvassed during the main hearing when evidence could be called and the facts interrogated. The judge declined joinder of Hon. Attorney General for the reason that it was not demonstrated that the Attorney General was vicariously liable or that the office's participation was necessary in the suit. The court also ordered that Civil suit numbers 670, 671, 672, 673 and 679 of 2006 referred in the counterclaim be heard together with suit for the defamation and the Constitutional counterclaim.

Ultimately, the court then issued the following directions;

"a) The counterclaim as filed is hereby admitted.

b) The plaintiff may file a response to the counterclaim in respect of those matters alleging constitutional breaches.

c) The main suit shall be set down for expeditious hearing following the parties' compliance with order 11 of the Civil Procedures Rules, and taking in to account the fact that this court has jurisdiction to deal with constitutional issues arising within a defamation suit.

d) Compliance shall include agreeing all documents filed for hearing including witness statements and bundles of documents."

It is this order that aggrieved the applicant prompting the intended appeal, and this motion for stay of proceedings in the High Court.

In a replying affidavit sworn on 22nd January 2018, the 1st respondent deponed that the appeal was not arguable because the applicant had not made a formal application to join the Attorney General as required by law.

Moreover, that hearing a Constitutional Petition as a Preliminary Objection was not provided for in the applicable laws and there was no evidence showing that the applicant would not be accorded fair hearing on an equal footing with the 1st respondent in the High Court.

The 1st respondent further deponed that the intended appeal would not be rendered nugatory since, no hearing date had been taken, and in any event no injustice will be occasioned by the High Court proceeding as the applicant will participate in the proceedings; that a stay of proceedings will only prolong and delay the hearing and determination of suit which is contrary to the principle of expeditious disposal of disputes pending before the court.

At the outset it is observed that, this being an application under **rule 5 (2) (b)** of this Court's rules our mandate is limited to ordering "... a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just." Any orders beyond those stipulated would contravene the remit granted to us under **rule 5 (2) (b)**. The additional order sought to declare the ruling unconstitutional null and void at this stage is not encompassed by **rule 5 (2) (b)** and we therefore decline the invitation to

consider it.

That said, the threshold requirements to be satisfied under *rule 5 (2) (b)* as exemplified in the case of ***Republic vs Kenya Anti Corruption Commission & 2 others [2009] eKLR***, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

On the first limb, the applicant has complained that the learned judge framed irrelevant issues for determination, and avoided handing down a ruling on the Preliminary Objections raised, the court preferring instead to give directions for the hearing of the 1st respondent’s defamation suit and the applicant’s Constitutional counterclaim to the effect that they be disposed of together under the Civil Procedure rules, in total disregard of **Article 22 of the Constitution**. The applicant further complained that the judge failed to uphold and promote the national values and supremacy of the Constitution over all statutory laws and rules made thereunder.

Notwithstanding that the learned judge directed that the defamation and Constitutional counterclaim be heard and determined together, which seems to be what the applicant was seeking when it filed the Constitutional claim in the defamation suit, we nevertheless take the view arising from the peculiar circumstances of the case, that the intended appeal may be arguable.

Regarding the nugatory aspect, the applicant has not set out any reasons as how the appeal would be rendered nugatory in the event the suit in the High Court were to proceed and the appeal succeeded. We agree with the respondent that no prejudice will be occasioned, as it will have a fair opportunity to be heard and it can still appeal against the trial court’s decision following final determination of the suit. More particularly, it is observed that the dispute is very old as it dates back to 2007. As a consequence, it should really be finalized timeously and without further delay.

Having found that the applicant has not established the twin principles, necessary for a *rule 5(2) (b)* application, the motion dated 16th July 2017 is not merited. Costs to abide by the outcome of the intended appeal.

It is so ordered

Dated and delivered at Nairobi this 4th day of June, 2021.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR



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