REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI 16 OF 2014 (UR 11/2014)

BETWEEN

NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED……..1ST APPLICANT

MT KENYA MATATU OWNERS ASSOCIATION……..2ND APPLICANT

CHANIA TRAVELLERSCO-OPERATIVE SACCO LIMITED……..3RD APPLICANT

INDIMA (NJE) CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LIMITED……..4TH APPLICANT

KUKENA SAVINGS AND CREDIT SOCIEITY LIMITED ……..5TH APPLICANT

THIKA ROAD TRANSPORTERS SACCO LIMITED ……..6TH APPLICANT

THIKA TRAVELLERS CHOICE SACCO LIMITED……..7TH APPLICANT

RUNA TRAVELLERS CHOICE SACCO LTD……..8th APPLICANT

NARUGI DEVELOPMENT SACCO LTD……..9TH APPLICANT

KANGEMA TRAVELERS CO-OPERATIVE SACCO LIMITED……..10TH APPLICANT

NANYUKI EXPRESS CABS SERVICES SACCO……..11TH APPLICANT

NUCLEAR INVESTMENTS LTD……..12TH APPLICANT

MURANGA SHUTTLE SERVICES LTD……..13TH APPLICANT

MUIGANA SACCO LTD……..14TH APPLICANT

NAMUKIKA SACCO LTD……..15TH APPLICANT

NENO SACCO LTD……16TH APPLICANT

MERU NISSAN OPERATORS SACCO SOCIETY LIMITED……17TH APPLICANT

MTN SACCO LTD……18TH APPLICANT

NTK TRAVEL SERVICES

MULTI PURPOSE CO-OPERATIVE SACCO…..19TH APPLICANT

KIAMBU MARAFIKI MATATU SACCO LTD…….20TH APPLICANT

KAKA TRAVELLERS CO-OPERATIVE SACCO LTD…….21ST APPLICANT

KAMUNA SACCO LTD……22ND APPLICANT

MWIKI PSV SACCO LTD……23RD APPLICANT

EASTLEGIH ROUTE SAVINGS &

CREDIT CO-OPERATIVE SOCIETY LIMITED……24TH APPLICANT

NGUMBA TRAVELERS SAVINGS &

CREDIT COOPERATIVE SOCIETY LIMITED…….25TH APPLICANT

DANDORA USAFIRI TRAVELLERS SACCO LIMITED…….26TH APPLICANT

VERSUS

COUNTY OF NAIROBI GOVERNMENT……1ST RESPONDENT

NAIROBI CITY COUNTY BOARD……2ND RESPONDENT

THE TRANSITION AUTHORITY……3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL……4TH RESPONDENT

(being an application for injunction of the implementation, or further implementation of paragraph 6.1 of the Schedule to the Nairobi County Government Act, 2013, pending the lodging hearing and determination of an intended appeal against the entire judgment and order of the Hon. Mr. Justice Isaac Lenaola delivered at Nairobi on 18th December 2013)

in

Nairobi High Court Cons. Petition No 486 of 2013

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RULING OF THE COURT

The background to this application stems from the enactment of the Nairobi City County Finance Act of 2013. Paragraph 6.1 of the schedule to that Act allows the Nairobi City County to levy, and to increase parking fees. After this enactment, the applicants moved to the High Court claiming that Article 190 of the Constitution binds County Governments to adhere to national legislation when enacting any County legislation. They argued that the 1st respondent ought to have followed the provisions in the Traffic Act, and that clause 6.1 in the Nairobi County Finance Act, if left to stand, will amount to letting unlawful legislation stand, which in their view ought not to be countenanced by the Court.

After the passing of the Nairobi City County Finance Act, 2013, the 1st respondent made the decision, pursuant to the schedule contained in the Act, to increase the parking fees within Nairobi from Kshs 140.00 per day to the present daily charge of Kshs 300.00. This increase was to affect both private motorists and public service vehicles operating within Nairobi.

Being aggrieved, the applicants, all of whom are engaged in the business of public service transport between Nairobi and the outlying counties, filed a petition before the High Court in which they claimed that the 1st respondent, in enacting the said Act, and in its implementation, acted in contravention of the Constitution and the Traffic Act. They also contended that the 1st respondent exceeded its mandate and violated the rights of the applicants, and that the continued implementation of that act would result in grave financial loss and prejudice to the applicants.

They further contended in that petition that the High Court was bound by its previous decision in ***Republic v City Council of Nairobi & 2 Others exparte Kaka Travellers Sacco Ltd & Others*** ***Nairobi HC JR No 323 of 2010***, where it held that under section 72B of the Traffic Act, the City Council of Nairobi could only levy parking charges by way of parking meters and enforcement of by laws.

The petition was heard and determined by *Lenaola J.* who, on 18th December 2013, dismissed it with no orders as to costs. Immediately thereafter, the applicants instructed their advocates on record to lodge an appeal, which was so lodged on the same date.

The applicants also filed an application for stay pending appeal, which was allowed on 28th January 2014, whereby the learned judge gave a stay for a period of seven days to allow the applicants lodge their intended appeal. The applicants now bring this application, seeking a further stay, and now state that at the time of filing, the record of appeal was ready for lodging, and should the orders sought be granted, there will be no period of prolonged waiting for the filing of the appeal.

The application is supported by the affidavit of Michael Kariuki sworn on behalf of all the applicants on the 4th February 2014. It is opposed by way of the replying affidavit of Lilian Ndegwa, sworn on the 27th February 2014, as well as her further affidavit sworn on the 17th of March 2014. Arguments in support of the application were presented before us by Mr. Kinyanjui for the applicants, while Mr. Ojienda opposed the application on behalf of the respondents.

The applicants are of the view that they have a good appeal, which is meritorious and with a good chance of success, and state that they will suffer irreparably should the injunction sought not be granted. The applicants further argue that they will encounter irreparable loss should the orders sought not be granted, as they continue to pay the hiked and exorbitant parking fees, and the respondent would never be able to refund any money that will be paid to the respondents.

It is trite law that to succeed in a motion of this nature, the applicants must show or demonstrate that first, the intended appeal is not frivolous, or that it is arguable, and second, that the intended appeal if it is successful, will be rendered nugatory if the orders sought are not granted.

These principles are well settled and have been restated in several decisions of this Court, such as in ***Patel v Transworld Safaris Ltd [2004] eKLR*** when the Court stated that:

"In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application."

See also ***Githinji v Amrit & Another [2004] eKLR*** where the Court held that:

"The principles applicable in an application under rule 5(2)(b) of the Court of Appeal Rules are now well settled. The applicant must demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would be rendered nugatory if the application for stay was refused."

Even in ***Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd (supra)*** this Court stated that:

"The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

Before we embark on determining whether the applicants have carried out their responsibility on the two principles, we must first consider the challenge brought by the respondents regarding the competency of this application. Professor Ojienda, who argued this application on behalf of the respondents, considers that this application is incompetent because the trial judge did not make any positive order that is capable of being stayed. The appellant submits that this Court is incapable of granting the order sought because the High Court did not order any of the parties to do anything or refrain from doing anything, it only dismissed the petition. The respondents relied on the decision of the Court in ***Western College of Arts & Applied Sciences v Oranga & Others [1976-80] 1 KLR 78*** where this Court dismissed an application for injunction pending appeal and rendered itself in the following manner:

"The High Court had no jurisdiction in its appellate capacity to order a temporary injunction pending an appeal; accordingly, any such jurisdiction in the Court of Appeal must be derived from its power under rule 5(1) of its own Rules to order a temporary injunction; but as there was nothing in the High Court judgment, other than an order for costs, to enforce or restrain by injunction, the Court had jurisdiction to make the order sought."

They further rely on the authority of ***Republic v Kenya Wildlife Service & 2 Others Civil Application No Nai 12 of 2007*** where in the Court dismissed with costs an application for injection pending appeal, and it held that:

"it would appear to us that we have no jurisdiction to grant any order for injunction or stay in the terms sought, or at all, for the reason that Aluoch, J. neither granted or refused the application for stay. The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.

This was also the direction that was taken in ***Stanbic Bank Kenya Ltd v Kenya Revenue Authority [2008] eKLR (Civil Application No Nai 294 of 2007 (UR 200 of 2007***)) where this Court held that:

Likewise, in this case, the superior court did not order the respondent to collect the disputed amounts, nor did it order the applicant to pay that money. All it did was to dismiss the judicial review application for certiorari and prohibition. There is therefore no positive order it made that can be stayed even if we were minded to read the third prayer of the application before us to include prayer for stay of execution or for an order of status quo ante which we cannot do.

This was followed by the recent decision of ***Shimmers Plaza Limited v National Bank of Kenya Ltd [2013] eKLR (Civil Application 38 of 2013)*** where this Court again stated that:

Further, we have examined the decision of the superior court made on 27th January 2012, the subject of the intended appeal. The superior court (Kimondo J.) made an order which dismissed the application for injunction. In the case of REPUBLIC – V- KENYA WILDLIFE SERVICES & 2 OTHERS Civil Application No. NAI 12 of 2007, this court stated "the superior court has not therefore ordered any of the parties to do anything or refrain from doing anything." There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for an injunction or stay.

Counsel also rely on the decision of the Court in ***Kenya Hotel Properties Limited v Willesden Investments Ltd [2011] eKLR (Civil Application No. Nai 131 of 2010 (UR 97/2010)*** where this Court stated that:

"Going back to the ruling of Muchelule, J which will be the subject of intended appeal it is to be observed that the entire suit by the plaintiff therein (KACC) and the application by the 6th Defendant (the applicant herein) were dismissed and/or struck out with costs. That is why we agree with the submissions of both Mr. Athuok and Mr. Njuguna that there was nothing capable of being stayed.

In Western College of Arts and Applied Sciences v Oranga and others [1976] Kenya L.R. 63 AT P. 66 Law VP said:-

"*But what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction".*

It would appear that we are faced with a similar situation since the applicant herein is dissatisfied with the order of Muchelule, J arising from the ruling delivered on 27th May, 2010. The applicant intends to appeal against that order which was an order dismissing its application and also striking out the entire suit. Clearly there is nothing capable of being stayed by this Court.

Even more recently, this Court in ***Marangu v Rucha & Anotehr v Attorney General & 10 Others [2014] eKLR (Civil Application No. 180 Of 2013 (Ur 127/2013)*** this Court stated that:

The above, in our view, does not constitute an order directing any party to do or restrain from doing anything. We can do no better than to reproduce a statement made recently by this Court

in F & S. Scientific Ltd. V. Kenya Revenue Authority & Another, Civil Application No. 260 of 2012. The court said:-

"Asking for "stay of implementation" of a decision by the respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law it is not possible to grant an order of stay of "execution" or "implementation" where the action has been dismissed. This is the view of this Court as expressed in many decisions. For instance, in the case of Republic V. Kenya Wildlife Services & 2 others, Civil Application No. Nai. 12 of 2007 the Court said in part:-

'The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the Superior Court which can be the subject matter of the application for injunction or stay……..'

That perhaps explains the curious manner in which the prayer in this application is framed."

Professor Ojienda contends that this Court lacks jurisdiction to entertain the orders sought because there are no positive orders made by the applicants that can be stayed. The court can therefore not grant a stay on any of the parties.

In granting orders sought in applications for stay, or grant of injunction as the case may be, this Court exercises original jurisdiction. This much the Court in ***Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006*** stated in the following manner:

"The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary."

That this Court has original jurisdiction was reiterated by Githinji JA in ***Equity Bank Limited vs. West Link Mbo Limited Civil Application No. NAI 78 of 2011*** wherein he stated that:

"It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. …

It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

Having read the judgment of the High Court, and bearing in mind the manner in which the applicants have couched their prayer, and giving due consideration to the authorities we have cited herein, we have no doubt that this Court has the jurisdiction to grant an injunction pending the hearing and determination of an appeal in order to preserve the subject matter of the intended appeal, or where it would facilitiate a proportionate resolution of the dispute before us as was the case in ***Mbaabu Mbui & Another – V-Langata Gardens Limited [2011] eKLR (Civil Application Nai 73 Of 2011 (Ur 49/2011)***. This Court, in granting such an application will of course consider if there will be substantial loss that may be occasioned should the injunction not be granted. See ***Lake Tanners Limited & 2 others v Oriental Commercial Bank Limited [2010] eKLR (Civil Application No. 64 Of 2010)*** where the Court stated that this consideration will apply to an application for injunction pending appeal because the purpose of the injunction will be to preserve the status quo pending appeal.

We now proceed to address our minds to the crux of the application, which is whether the applicants have met the conditions for the granting of the orders sought. In doing so, we bear in mind the guiding principles which, as we have stated before, the applicant bears a responsibility to satisfy us of: that the

intended appeal is arguable, and that the appeal would be rendered nugatory should the orders sought not be granted.

These were the guiding principles for the Court in ***Royal Media Services Ltd & 2 Others v Attorney General & 8 others [2013] eKLR Civil Application No Nai 341 of 2013 (UR251 of 2013)*** where they stated that:

"In giving due consideration to the matter, we understand that at this stage our role is to grant an injunction, when (i) there are grounds for an arguable appeal, and (ii) where not granting such orders would render an arguable appeal nugatory."

In considering whether the appeal is arguable we remind ourselves that an arguable appeal is not necessarily one that would succeed, but merely one that is deserving of full ventilation before this Court. On this we adopt the exposition of the Court as they stated it in ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR (Civil Application 31 of 2012)*** thus:

"vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...;

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...;"

Is this appeal arguable" According to Mr. Kinyanjui for the applicants, the increase of parking fees by way of the impugned legislation is unlawful, first because it was passed in contravention of the due process of law. In addition, the formula for setting up parking fees in the national legislation so the county government cannot set out another formula that is contradictory. Counsel contends that the monetary aspect is also prohibitive. On whether the appeal raises arguable issues, Professor Ojienda takes the view that the substantive basis of the orders sought is the process of passing the legislation, yet, the speaker of the county government did confirm that the bill went through the correct procedures before it was passed. He argues that the section requiring public participation must be read together with the powers of the county government in schedule 6 as well as with the transitional clauses in the Constitution. We have no hesitation in finding that this appeal raises these arguable points which in our view, will be ventilated during the hearing of the substantive appeal.

We now turn to whether the intended appeal, should it be successful, would be rendered nugatory if an order of injunction is not granted.

The applicants argue that there will be manifest injury to them because there will be an illegal levy to them by way of increased parking fees. The increased parking fees was levied in contravention of the Constitution and the Traffic Act, and the continued enforcement of this law, the Nairobi County Finance Act, 2013, can only be stopped by this Court's intervention by way of injunction, as was the case in ***Royal Media Services Ltd & 2 Others v Attorney General & 8 others (supra)*** where this Court granted an injunction pending appeal.

The respondents on their part argue that the nugatory aspect has not been satisfied because in the present situation, the balance of convenience tilts in favour of the respondents for this reason: the Nairobi City County Finance, 2013 was to come into force in November 2013, but due to the petition in the High Court, it did not. As at the time of the dismissal of the petition on 5th February 2014, the applicants had already cost the 1st respondent ninety seven days' worth of parking fees, which was budgeted revenue.

They further argue that to grant this application will only serve to occasion further loss to the 1st respondent, which revenue will be impossible to recover, and which was to be used by the 1st respondent in the carrying out of its constitutional functions. In addition, since the dismissal of the petition in the High Court, the applicants, as well as other members of the public have been paying the increased rates, thus to grant this application would not only occasion irreparable loss to the 1st respondent, but would also jeopardize its position with regard to the revenue already collected as it has already been appropriated toward the carrying out of the county's functions as it has been budgeted for use as recurrent and development expenditure. In addition, it would only serve to reverse the gains made by the 1st respondent.

The respondents further argued that even if this Court was minded to find that the nugatory aspect had been satisfied, we ought to take cognizance of the fact that the order sought is the same one that is sought in the substantive appeal, and to grant it would be premature as it would amount to pre-empting the substantive appeal.

In making a determination on the nugatory aspect, we are aware that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See ***Reliance Bank Ltd v Norlake Investments Limited (2002) 1 EA 227***.

As has been pointed out by the respondents, the Act complained of is already in operation, with the effect that the increased parking fees are already being levied by the 1st respondent. We do not find, therefore, that the balance of convenience lies in favour of the applicants. We also fail to see in what aspect the intended appeal, should it be successful, would be rendered nugatory should an order of injunction not be granted. For these reasons, we are not satisfied that the applicants have satisfied the second prerequisite limb for the grant of an order of injunction.

The application consequently fails, and we hereby order it dismissed, with the order that the costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 6th day of June, 2014

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

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