

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 44 OF 2018

BETWEEN

JOHN MUTHEE NGUNJIRI

PETER OTIENO OKETCH

CHARLES MAINA WANDAKA

SILAS RICHARD MUKOLWE

**(Duly Registered Trustees of Kenya African
National Union, Nakuru Branch)**

**PETITIONERS/
RESPONDENT**

AND

THE KENYA POWER & LIGHTING

COMPANY LIMITED RESPONDENT/APPLICANT

(Being an application to strike out the Petition of appeal from the Judgment of the Court of Appeal at Nairobi (P.N. Waki, P. O. Kiage & F Sichale, JJA) dated 26th October, 2018 in Civil Appeal No. 149 of 2018)

RULING

I. LITIGATION BACKGROUND

[1] On 3rd December 2018, this Court was moved by the Petitioners/ Respondents via the filing of a Petition of Appeal dated 30th November 2018. The substantive prayers sought in the petition are that: *the petition be allowed with costs; and the Court of Appeal decision of dismissal with costs of the application dated 22nd May 2018 on the 26th October 2018 be set aside and the same be replaced with orders of stay of the decree of Nairobi HCCC No. 14 of 2004.*

[2] The appeal filed in this Court springs from the High Court decision in *HCCC No. 14 of 2004* delivered on 7th August 2009. In that matter, Kenya Power & Lighting Company (KPLC) filed a suit against Kenya African National Union (KANU) and two of its officials, Julius Ole Sunkuli and Mohammed Yusuf Haji, in their respective capacities as Ag. Secretary General and National Treasurer. KPLC claimed a sum of Kshs. 212, 816, 986.80/- being the amount due for electricity supplied by KPLC to KANU as the landlord at Kenyatta International Conference Center (KICC), Nairobi between 1995 and March 2003.

[3] The High Court, *Lesiit, J*, in a judgement delivered on 7th August 2009 found that the Plaintiff, KPLC, had proved that it supplied electricity to KANU during the said period and that the latter owed it Kshs. 212, 816, 986.80/-. Consequently, the learned judge entered judgment in favour of the KPLC, against the KANU in the sum of 212, 816,986.80/- together with interest at court rates and costs from the date of filing the suit until payment in full.

[4] KANU was aggrieved and filed a notice of motion dated 26th July 2012 seeking to set aside that judgement of the High Court under Order 12 Rule 7 of the Civil

Procedure Rules, 2010. The crux of its application was that due to the fact that KANU's advocate on record, Kilonzo & Co. Advocates, had applied to cease acting for it after taking the hearing date hence the hearing date was later confirmed without its knowledge. The Court, *Mutava J* (as then was) dismissed the application with costs in a ruling delivered on 8th November, 2012.

[5] Another application was filed by KANU on 23rd November, 2012 seeking to stay the execution of the decision of *Mutava J* of 8th November, 2012. The application was grounded on the fact that an intended appeal by IT would be rendered nugatory if the stay was not granted and execution levied against it. KPLC had by then moved and attached land Parcel No. **Nakuru Municipality Block 93/1** belonging to KANU. In a ruling delivered on 23rd May, 2013, the High Court, *Havelock, J* granted the application on the ground that KANU had to furnish security within 30 days in either of the following forms, failure to which the application stood dismissed, thus:

- i. *A bank or insurance bond for Kshs. 483, 217, 081 or;*
- ii. *The deposit of the decretal amount i.e. 483, 217, 081/- in an interest earning account to be opened in the joint names of the Advocates for KANU and the Advocates for KPLC with a reputable bank to be agreed upon by the respective firms.*

[6] Subsequently, in a plaint dated 28th July 2014, four litigants, the Petitioners in the substantive Petition before this Court, filed a case in the High Court at Nakuru seeking to permanently restrain the defendant from selling or disposing off land title No. **Nakuru Municipality /Block 9/31**, and a declaration that the said property is the exclusive property of KANU, Nakuru Branch, to the exclusion of KANU Headquarters.

[7] On the even date, by a notice of motion dated 28th July 2014, filed in the earlier suit: *HCCC No. 14 of 2004, under Order 22 rule 51 and Order 51 rule 1 by the*

Objectors, the petitioners now before the Supreme Court, sought that there be stay of execution, attachment and sale by public auction of the property, and that the intended sale on 14th August, 2014 of the same be declared null and void. In a ruling delivered on **12th February 2015**, the Deputy Registrar of the High Court, D.W. Nyambu dismissed the objectors' application. She held that the property was indeed owned and registered in the name of KANU, Nakuru Branch. However, applying section 16(1) of the Political Parties Act, 2011, she held that KANU, Nakuru branch, was not a political party on its own. That land owned by all its branches belong to KANU as a single entity. A 30 days' stay of execution was however granted as the objectors sought to be supplied with copies of the Ruling and typed proceedings.

[8] On 26th February 2015, the objectors filed an application dated 24th February 2015 seeking referral of a matter to the Judge or the High Court for review under the powers and duties of the Deputy Registrar Rules. The gist of their application's argument was that KANU, Nakuru branch, by its registered Trustees is the absolute and indefeasible owner of the property and that the same cannot be attached. They further contended that having found that KANU, Nakuru branch, is the registered owner, the Deputy Registrar should have found and determined that registration was the spring board to determine objection proceedings in favour of the Objector(s).

[9] This application was however later withdrawn on 3rd November 2015 and another application dated 19th November 2015 filed on 30th November 2015 seeking extension of time to file an appeal against the decision of the Deputy Registrar. The application was opposed on the ground(s) that it was 10 months late, yet such an appeal was to be filed within 7 days of the decision of the Deputy Registrar. They also sought to preserve **LR. No. Nakuru Municipality Block 9/31**. In a ruling delivered on **8th April, 2016**, *Kariuki, J* allowed the application and allowed the appeal to be filed with 7 days. The applicant was condemned to

pay costs of Ksh. 30, 000 to the Respondent. Failure of the above meant that the application stood dismissed.

[10] The appeal was thus filed on **13th April, 2016** by the lodging of a memorandum of appeal dated 11th April, 2016, hence, *HC Civil Appeal No. 177 of 2016* filed in the High Court, Civil Appeal Division. This appeal was heard and in a Ruling delivered on 17th November 2016, was dismissed. Unfortunately, the record before us has no copy of this ruling by Justice Francis Tuiyott dated 17th November, 2016.

[11] Upon the dismissal of that appeal, the objectors were granted leave to appeal to the Court of Appeal. They filed an application dated 8th December 2016 within **HCCC No. 14 of 2004** seeking stay of execution pending the hearing and determination of their intended appeal. Unfortunately again, the record does not indicate what became of this application, save that it was certified urgent on 13th December 2016 and ordered to be heard on 16th December 2016.

[12] Meanwhile the present Petitioners/Respondents filed a Notice of Appeal dated 21st November 2016 on 25th November 2016 expressing their intention to appeal the decision of *Tuiyott J*, in the Court of Appeal.

[13] It is on the basis of that notice of appeal that an application under rule 5(2)(b) of the Court of Appeal Rules, 2010 was lodged on 22nd May, 2018 seeking stay of execution of the judgment of *Hon. Justice Francis Tuiyott* pending the hearing and determination of the intended appeal. Among the grounds in support of the application were that they have overwhelming chances of success in ***Civil Appeal No. 149 of 2018*** as the appeal raises very serious and fundamental questions of law regarding the conflict of law between the Land Registration Act No. 3 of 2012 and the Political Parties Act, 2011 as well as the Supremacy of the Constitution.

[14] The Court of Appeal (*Waki, Kiage & Sichale, JJA*) considered the application and in a ruling delivered on **26th October 2018**, dismissed it with costs. The

appellate Court was emphatic that for the application to succeed, the applicants had to satisfy the court on two principles: firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the intended appeal would be rendered nugatory. On the first issue, the Court of Appeal held that the same issue had been answered by Parliament in the Political Parties Act, which provision the High Court had articulated at length. While the Court of Appeal also doubted the success of that issue at the substantive hearing, it held that its success was not a ground to determine the stay application. It nonetheless held that the appeal was indeed not frivolous.

[15] However as regards the nugatory limb, the appellate Court held that there was nothing in the applicants' affidavit to show that the property is unique and irreplaceable. The Court further stated that the property's market value had been given for auction purposes and so it must have a value, which is not contested. There was also no averment that the present Respondents/Applicant was incapable of compensating the Respondents/Applicants in the event of their appeal succeeding. Hence the appellate Court was not satisfied that a case on the nugatory limb had been made and it dismissed the application with costs.

[16] It is that Court of Appeal decision that forms the foundation of the appeal before this Court subject of the petition dated 3rd November 2018.

II. THE APPLICATION

[17] Upon being served with the Petition of Appeal, the Respondent, KPLC, filed a Notice of Motion application dated 4th February 2019. The gist of the application is that the petition of appeal ought to be struck out on the grounds that the appeal is against the ruling of the Court of Appeal on an application for stay pending an appeal to the Court of Appeal. Further, that the appeal neither involves the

interpretation or application of the Constitution nor has the matter been certified as one involving matters of general public importance.

[18] Alongside the grounds stated in the body of the application, the application is supported by an affidavit sworn by one Emily Kirui, a Legal Officer of the Respondents/Applicant on 4th February 2019 in which she reiterates the substance of the grounds in support of the application. In her affidavit, she also discloses to the Court that the Petitioners/Respondents herein filed an application on 5th June, 2018 in **Nakuru ELC 222 of 2014** for stay of the sale of the property that was scheduled for 8th June, 2018 and a temporary stay was granted with a ruling reserved for delivery on notice. Further, that there is pending in the Court of Appeal an application to strike out the Respondents' appeal, that was the basis of the stay application that was dismissed in the Ruling of 26th October, 2018.

[19] The Respondents/Applicant duly filed its Written Submissions and List of Authorities on 19th February 2019 in which it elaborates its case and seeks that the application be allowed and the petition of appeal be struck out with costs.

III. RESPONSE

[20] There is no response to the application from the Petitioners/Respondents. However, we have perused the record and we are satisfied that the Petitioners/Respondents had due notice of this application. The record is also clear that, while during the mention of the application before the Deputy Registrar on 12th February 2019 the Petitioners/Respondents were not present, there are two affidavits of service on record: one filed on 20th February 2019 and another on 25th February 2019, which indicate that they had been properly served. We are thus satisfied that the Petitioners/Respondents were served and chose not to reply to the application.

[21] Be that as it may, we find that the issue raised by the Applicant in its application is a legal question that this Court can determine even without the Respondents' input. It is a question of jurisdiction: whether this Court has jurisdiction to hear and determine the appeal filed before it.

IV. ANALYSIS

[22] Having perused the record before us, it is clear that despite the convoluted litigation background of this matter which we have endeavored to capture above, the petition of appeal before this Court, which the Applicant seeks to strike out, springs from the High Court ruling delivered on 17th November, 2016 by *Tuiyott, J*, on an appeal against the decision of the Deputy Registrar. Aggrieved by the dismissal of that appeal, the Respondents filed a Notice of Appeal to the Court of Appeal and on its basis filed an application under Rule 5(2)(b) of the Court of Appeal Rules, 2010 seeking stay of that High Court decision. It is that stay application that was dismissed by the appellate Court in a Ruling delivered on 26th October, 2018, which the Respondents now seek to appeal before this Court. It is common ground that the substantive appeal before the Court of Appeal, being *Civil Appeal No. 149 of 2018*, is still pending before the Court of Appeal. Also pending before the appellate Court is an application by the Applicant herein, to strike out that appeal. In a nutshell, the substantive justice of this matter still lies before the Court of Appeal for determination.

[23] This Court is now replete with jurisprudence on the import of Court of Appeal decisions under Rule 5(2)(b) of the Court of Appeal Rules, 2010. First, in ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another***, SC Application No. 3 of 2014; [2015] eKLR this Court expressed deference to discretionary powers of

the Court of Appeal and stated that decisions made in exercise of those powers were not appealable to this Court, thus [paragraph 21]:

“Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.”

[24] Subsequently, in the case of *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others*, SC Application No. 16 of 2015; [2015] eKLR, this Court interrogated the nature of Court of Appeal’s powers under Rule 5(2)(b) and found them to fall squarely within the discretionary powers of that Court stating thus:

“[27] Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as “original” (the term “inherent” more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction.”

[25] The Court then concluded thus: [paragraph 36]:

“In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court’s Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court.”

[26] Following that decision, this Court has been consistent in not assuming jurisdiction in matters where a Court of Appeal decision was made in exercise of its discretionary jurisdiction under Rule 5(2)(b) of its Rules. The case before this Court is a similar one and we see no reason to depart from this sound jurisprudence.

[27] The upshot is that having established that the substantive appeal in this matter is still pending in the Court of Appeal and that the decision of the Court of Appeal delivered on 26th October 2018 was subject of an application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules 2010, no appeal lies to this Court. Hence the petition of Appeal before this Court is fatally defective for want of jurisdiction. The Application seeking its striking out is therefore merited.

[28] Consequently, we make the following orders:

(i) The Notice of Motion application dated 4th February 2019 is hereby allowed.

(ii) The Petition of Appeal dated 30th November 2018 and filed on 3rd December 2018 is hereby struck out for want of jurisdiction.

(iii) The Petitioners/Respondents shall bear the Applicant’s costs of the application.

Orders accordingly.

DATED and DELIVERED at Nairobi this6th..... Day of ...August 10.. 2019

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE-
PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM
JUSTICE OF THE SUPREME
COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT
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NJOKI NDUNGU
JUSTICE OF THE SUPREME

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA