



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Application 55 of 2013

AFRICAN BANKING CORPORATION.....APPLICANT

AND

GLORY PROPERTIES LIMITED.....RESPONDENT

(An application for stay of proceedings pending the hearing and determination of Nairobi Civil Appeal No.163 of 2008 (African Banking Corporation Limited Vs. Glory Properties Limited) Appealing against the whole decision (Mutungi J)

in

HCCC No.559 of 1999 (O.S)

RULING OF NAMBUYE JA

The scanty background information to this ruling is that **Azimvirjee and Ashif Kassam** joint Receivers and Managers and **African Banking Corporation Limited** moved to the seat of justice in Milimani Commercial Court and presented HCCC No.559 of 1999 (OS) among others seeking to entrench the appointment of Receiver Managers over property known as LR. Number 1870/VI/228 (Original number 1691). The respondent presented an application by way of notice of motion seeking the striking out of the originating summons dated the 7th day of May 1999. In the alternatives, sought other various reliefs for the reasons given. A preliminary objection was raised to the said application. Parties were heard on their merits resulting in a ruling delivered by **O.K. Mutungi J** (as he then was) on the 5th day of July, 2007. Apparently **Mutungi J** (as he then was) had made orders that inquiries be held by way of adduction of evidence on how the property subject of the originating summons had been disposed off. No stay orders were sought soon after delivery of the said ruling.

The applicants were aggrieved by the orders of 5th July, 2007 and filed Civil Appeal No.163 of 2008 on the 8th day of August, 2008 but sought no stay orders premised on the said appeal.

Subsequently the respondent moved the court for a hearing date. Hearing commenced in February, 2013.

The applicant moved the court orally on the 19th day of February, 2013 for stay orders. The oral request was declined prompting the applicant to present the application of 8th day of March, 2013 under certificate of urgency seeking stay orders.

When the application for the certificate of urgency was placed before me in the first instance, I declined to grant the certificate of urgency. The applicants' counsel then applied informally under rule 47 (5) of the Court of Appeal Rules vide their letter dated the 12th day of March 2013 to have the question of urgency heard inter partes.

On the hearing date **Mr.M.Billing** learned counsel appeared for the applicant, whereas **Mr. Mutula Kilonzo Junior** learned counsel appeared for the respondent. In their oral highlights to court, learned counsel for the applicant relied on the content of the certificate of urgency and the affidavit in support of the urgency. In a summary, the applicant contends that they were aggrieved by the decision of **Mutungi J** (as he then was) and filed an appeal against that decision vide their appeal No.163 of 2008 which has been pending disposal; that the applicant had made an oral application to stay the proceedings pending the disposal of the pending appeal but it was declined paving the way for the commencement of the hearing in HCCC No.559 of 1999(OS). The applicant had also made efforts and made a request in writing to the Court of Appeal Registry, requesting the said registry to fast track Civil Appeal No.163 of 2008 but this request too bore no fruits. It is therefore learned counsels stand that since the hearing of HCCC No.559 of 1999 (OS) has been scheduled for hearing on 16-17th July, 2013, it is only prudent that either the appeal No.163 of 2008 be fast tracked and disposed off before that date or the application for stay of proceedings in HCCC No.559 of 1990 be disposed off before that date as a matter of urgency.

Learned counsel for the respondent **Mr. Mutula Kilonzo Junior** has opposed the certificate of urgency on the basis of a replying affidavit deposed by learned counsel, himself and filed on the 16th day of April, 2013. In a summary, learned counsel concedes that indeed HCCC No.559 of 1999 (OS) was filed by the applicant on the 7th day of May 1999; that the respondent applied to have the originating summons struck out resulting in the ruling of 5th day of July, 2007; that the applicant filed a notice of appeal and thereafter a record of appeal in the year 2008; that since then no action has ever been taken by the applicant either to fast track the appeal or seek stay orders. Learned counsel went on further to submit that the move by the applicant in presenting their application for stay of proceedings on the 8th day of March, 2013 a period of five years since the making of the orders sought to be stayed, is belated, a clear after thought and calculated to forestall the inquiry as to damages being conducted in HCCC No.559 of 1999 (OS). That it is the respondent who has been making efforts to the knowledge of the applicant to progress the disposal of the proceedings in HCCC No. 559 of 1999 (OS). They also have knowledge that on the 19th day of February, 2013 the applicant made a belated oral application to stay the proceedings in HCCC No.559 of 1999 upon the commencing of the hearing but this was declined by the court and hearing commenced and has been rescheduled for further hearing on the 16-17th day of July, 2013. In the premises any order to fast track the application will be prejudicial to the respondent.

My jurisdiction to certify the application urgent has been invoked under rule 47(5) of the Court of Appeal Rules. It provides:-

“The refusal by the Judge to certify an application as urgent under this rule shall not be subject to a reference to the court under rule 55, but the applicant may apply informally for the matter to be placed before a single Judge for hearing inter parte”

The undisputed background information discerned from the rival arguments above are that the grieving decision was made on the 5th day of July, 2007. A notice of appeal was promptly filed against the said decision followed by the filing of an appeal in the year 2008. No efforts were made by the applicant to seek an interim reprieve from the consequences of the orders of 5th July, 2007. It appears the applicant anticipated no problem and apparently went to sleep on its rights until awoken up by the action of the respondent when the respondent moved to fix HCCC No.559 of 1999(OS) for hearing. That is when the applicant made a move on the 19th February 2013 to make an oral application for stay of proceedings

which was declined prompting the presentation of the formal application on the 18th day of March, 2013.

The applicant has contended that they had hoped that the appeal would have been disposed off along time ago to settle all the issues in controversy and that is why they preferred the disposal of the appeal to pursuing of an interim application for stay. Further that there was no immediate threats then.

The principles that guide a Judge in the exercise of his/her judicial discretion have now been crystallized by case law. It is now trite that the exercise of this judicial discretion is wide and unfettered. The only fetter to it being that it has to be exercised upon sound reason and judiciously. See the case of **CMC Holdings Limited versus Nzioki(2004) 1KLR173**. There is also a requirement that the discretion be exercised based on sound reason rather than on whim, caprice or sympathy. See the case of **Bagajo versus Christian Children's Fund in (2004) 2KLR73**. It must also be exercised in the best interests of both parties to the litigation. See the case of **Githiaka versus Ndururi**.

I have also been invited to be guided by case law cited to me by the respondents counsel. There is in place the case of **Southern Credit Banking Corporation Limited versus Tulip Apartments Limited Lorimar Apartments Limited Civil Application No. NAI 64 OF 2002 (37/2002UR)** wherein Shah JA (as he then was declined to grant a certificate of urgency and also **Jacob Juma versus Agricultural Finance Corporation, Theta Tea Company Limited Jeniffer Kossitery Civil Application No. Nai 169 of 2005 (UR103/2005)** Wherein Deverell JA (as he then was) also declined to grant a certificate of urgency.

I have borne in mind the above guiding principles and applied them to the rival arguments herein. In this court's opinion, although the applicant seems to have sat on its rights, none the less having presented the application for stay under a certificate of urgency and considering that what he seeks to forestall namely stay of proceedings in HCCC No.559 of 1999(OS) is currently on course place, all that the applicant is asking for is a fair decision. A decision which will serve best the competing interests herein. I cannot ignore the fact that both the notice of appeal and the appeal were presented promptly. It is also to be noted that the applicant had no control over the Court of Appeal calendar as regards progressing of pending appeals for their prompt disposal. This depended largely on the availability of man power and the other matters having a prior right to disposal a head of appeal number 163 of 2008.

When faced with the peculiar circumstances herein, the applicant wrote to the court of appeal registry requesting them to fast track appeal, No. 163 of 2008 which was declined. The Applicant now seeks a solution from me, a solution which will serve the best interests of the parties.

In dealing with this matter I may also have recourse to the overriding objective rule enshrined in section 3A and 3B of the Appellate jurisdiction Act cap 9 Laws of Kenya. In a summary, this principle is meant to facilitate the just, expeditious, proportionate, and affordable resolution of appeals directed to the seat of justice of the Appellate Court. The aim being to attain the just determination of the proceedings, the efficient use of the available judicial and administrative resources, the final disposal of proceedings and all other proceedings at a cost affordable by the respective parties and the use of suitable technology

When applied to the scenario herein I am of the opinion that, fast tracking of the pending application by way of issuance of a certificate of urgency will not serve the best interests of the parties to this litigation considering that proceedings sought to be forestalled in HCCC No.559 of 1999 (OS) have already commenced. Such a move will instead increase costs and prolong litigation because any positive orders on the pending application will do no more than just to stay the hearing which has already commenced. Such a decision will not have any substantive impact on the real issues in controversy HCCC No.559 of 1999 (OS) which are intended to be resolved by the hearing which has commenced.

I also wish to take note of the provisions of Article 22(3) (d) and 159 (2) (d) of the current constitution which enjoins me to render justice without due regard to technicality.

Bearing in mind the current staffing in this Court of Appeal and there being a need for speedy disposal of appeals, I am of the opinion that the best interests of the parties herein will be served if appeal No.1633 of 2008 is fast tracked. My reason for opining so is because the disposal of the appeal will

crystallize the issues in controversy as between the parties as raised and are to be contested in the said appeal. The result of this appeal will impact in one way or the other on the proceedings in HCCC No.559 of 1999 (OS) resulting in neither the said proceedings to their finality or being halted at whatever stage they may have reached as at the time of the delivery of the Judgment in the appeal.

In the result, the issuance of the certificate of urgency sought by the applicants in respect of their application filed on the 8th day of March, 2013 is declined, but in lieu thereof and in the best interests of substantive justice to both parties, direction is given that appeal No.163 of 2008 be fast tracked and fixed for hearing on priority basis before the dates fixed for further hearing in HCCC No.559 of 1999 (OS).

Dated at Nairobi this 26th day of April, 2013.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR