



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 98 OF 2011

KENYA AIRPORTS AUTHORITY..... APPELLANT

VERSUS

DORIS NDUNGE KIIA.....RESPONDENT

RULING

The appellant has filed this appeal against the lower court's ruling delivered on 27th May 2011. The appellant had been sued by the respondent in the lower court as the 2nd defendant. In the respondent's plaint before the lower court, the respondent stated that the 1st defendant Michael Otieno Odhiambo (not a party in this appeal) owed her Ksh. 930,000. This was money lent to the said Odhiambo by the respondent. The respondent further pleaded that Odhiambo had failed to repay the loan as agreed. That Odhiambo had obtained a contract of refurbishment of the appellant's fire station at Malindi Airport and the amount that Odhiambo was to be paid for that contract was Ksh. 1,898,801. The basis upon which the respondent lay claim against the appellant in the lower court was to found in the following paragraph:

“The plaintiff (respondent) avers that the 1st defendant (Odhiambo) is not entitled to receive the aforesaid sum from the 2nd defendant (the appellant) and that the 2nd defendant is stopped from making payment to the 1st defendant until the 1st defendant undertakes to pay to the plaintiff the sum of Ksh. 930,000 plus interest.”

The lower court by its ruling which is the subject of this appeal ordered there be attachment before judgment which in effect was an order requiring the appellant to deposit the amount claimed by the

respondent into court. It is that order that has aggrieved the appellant. The appellant has filed an application by notice of motion dated 10th November 2011. The appellant seeks stay of execution of the order of 27th May 2011 and of 14th October 2011 in **CMCC MSA No. 274 of 2011** pending the hearing and determination of this appeal. It ought to be mentioned that the lower court on a further application being made by the appellant ordered the appellant on 14th October 2011 to deposit the amount claimed by the respondent into the joint accounts of the advocates representing the appellant and the respondent.

In the affidavit in support of the application, the appellant stated that it was not a party to the agreement between the respondent and Odhiambo and therefore the lower court should not have made the order of 27th May, 2011. That the appellant was also not a guarantor of Odhiambo. The appellant therefore denied liability in a case where the respondent has sued Odhiambo for breach of contract. It is for that reason that the appellant argued that it has high chances of success in the pending appeal. On a prima facie basis, I do find that the appellant's pending appeal is not without merit. This is when one considers what is stated in the book of G. H. Treitel entitled 'The Law of contract 11th edition' where the learned author stated;

“The common law doctrine of privity means that a contract cannot as a general rule, confer rights or impose obligations arising under it on any person except the parties to it.”

The appellant in the supporting affidavit in respect of the effect of the order of the lower court stated thus:

“That the applicant (appellant) runs on a budget and it spends money as allocated from the Consolidated Fund and therefore any undue stress on the available funds may impact on its service delivery as the funds available are utilized for ensuring safety of users of airport facilities especially during this volatile period.

That the applicants service delivery will greatly be prejudiced should the execution of the order of attachment before judgment not stayed pending the hearing and determination of the appeal hereon.”

The respondent opposed the application on the basis that the appellant had failed to satisfy the conditions of granting stay pending appeal found in order 42 of the Civil Procedure Rules. The respondent opposed the application on the basis that the appellant had brought it after inordinate delay that is 26 days after the order of the lower court. In oral submissions the appellant's learned counsel stated that the delay, in filing the application had been caused by the missing file in the lower court and that the appellant had to get assistance from the Chief Magistrate to have the file traced. The respondent's learned counsel did not respond to that submission from the bar, and the court therefore takes it that that was the correct position. The respondent further argued that the appellant had not shown that it would suffer substantial loss. That in my view is not correct because the appellant did state that it operates on a budget and would be hard pressed to find the money that it is required to deposit in the account. The appellant also stated that it is involved in the provision of sensitive services which would be affected by the order of the lower court.

The parties relied on various authorities. The appellant relied on the case **Provincial Construction Company Ltd & Another vs. Attorney General Civil Appeal No. 165 of 1991 [1991] KLR 497**. It was held in that case as follows:

“It is a cardinal principle of the applicable common law that a third party cannot benefit from a contract unless such a contract is for his benefit or was made on his behalf by his agent.”

That holding reinforced the submissions made by the appellant’s learned counsel that there was no privity of contract between the appellant and the respondent. The respondent relied on the cases **Southern Credit Banking Corporation vs Grandways Ventures Ltd & Anor C. A. No. NAI 321 of 2001** and **Equitorial Commercial Bank Ltd & 2 others vs Retreat Villas Ltd (2006) eKLR**. These are cases that reiterated that a party seeking stay pending appeal must satisfy the conditions set out in order 42 Rule 6(2). Those conditions are:

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Having considered the submissions made by the parties and the affidavit evidence, I find that there is merit in the appellant’s application and that the orders sought should be granted. I therefore make the following orders:

1. A stay of execution is hereby granted in respect of the rulings issued in MSA CMCC 274 of 2011 issued on 27th May and 14th October, 2011 pending the hearing and determination of this appeal.

2. The appellant is granted cost of the notice of motion dated 10th November, 2011.

DATED and DELIVERED at MOMBASA this 15th day of March, 2012.

Mary Kasango

JUDGE