



No.2991
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCC. APPEAL NO.7 OF 2011

MUNICIPAL COUNCIL OF MAVOKO..... APPELLANT

VERSUS

GALOT INDUSTRIES LTD.RESPONDENT

RULING

On the 8th February, 2011, Municipal Council of Mavoko, hereinafter “**the appellant**” pursuant to order 42 rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, took out a Notice of Motion seeking in the main that:

“pending the hearing and determination of the appeal herein, there be a stay of execution of the ruling and order of the Machakos Chief Magistrate’s Court Civil Suit No.398 of 2009 [Cor. Coram Mr. Munguti, Senior Resident Magistrate] delivered on the 27th day of January, 2011”.

The appellant also prayed that the costs of the application be provided for.

The grounds in support of the application were that the applicant had timeously filed an appeal against the ruling sought to be impugned, there was no temporary order of stay and should Galot Industries Limited hereinafter “**the respondent**” be granted the rates clearance certificates that the subordinate court had ordered the appellant to issue to it, the respondent may transfer and or dispose the properties to 3rd parties and evade payment of any rates that may be found to be due on appeal with the consequence that the appeal would be rendered nugatory. That the appellant will suffer substantial loss if an order of stay is not granted pending the hearing and determination of the appeal as it will lose a lot of revenue and may never recover the rates once the suit premises change hands. That if the impugned order is not stayed, the respondent will evade payment of rates, a legal obligation, through an act of error committed by the magistrate. Otherwise, the appellant had an arguable appeal with a high probability of success and was ready and willing to furnish such security as the court orders.

A supporting affidavit by one, **Wilson Mwita Maroa**, the Town Clerk of the appellant was also filed. That affidavit gives the history of the dispute leading to the instant application. The origin of the dispute appears to be a civil suit originated by the respondent on 2nd April, 2009 in the Chief Magistrates Court, Machakos. In the suit, the respondent claimed that it had been paying land rates and rents in respect of land parcel Nos.12867/3, 12867/6, 12867/14 and 12867/15 hereinafter “**the suit premises**”; as required by the relevant laws yet the appellant had flatly refused to issue it with the necessary rates clearance certificates. The respondent therefore prayed that the appellant be compelled to issue the rate clearance certificates in respect of the aforesaid suit premises.

On 12th May, 2009, the appellant filed its statement of defence stating that the respondent had not

paid any rates in respect of the suit premises and was in fact in arrears to the tune of KShs.12,845,450/-. In any event the court lacked jurisdiction to hear and determine the suit in view of the pecuniary value of the subject matter.

On 22nd October, 2010, the respondent vide Chamber Summons application sought to strike out the appellant's defence ostensibly on the grounds that the defence was a mere sham, disclosed no reasonable defence, raised no triable issues, was scandalous, frivolous, vexatious, and may prejudice, embarrass or delay the fair trial of the action.

In support of the application, one, **Mohan Galot**, who described himself as the Chairman and Governing Director asserted in an affidavit in support thereof that after raising the issue of jurisdiction, the appellant filed an application in this court urging the court to transfer the suit to this court for hearing and disposal. The application was heard inter partes and in a ruling delivered on 26th November, 2009, the application was found to be wholly incompetent and was accordingly dismissed with costs to the respondent. The respondent was registered proprietor of the suit premises which had been declared to be agricultural land and were to attract land rent based on agricultural user. This meant that any land rates would similarly be charged on agricultural user basis. In the premises, the defence filed was incompetent, unmeritorious and ought to be struck out.

The appellant responded to the application by filing grounds of opposition and replying affidavit, in which it took the position that the application was a muddle, misconceived, incompetent and bad in law. In view of the provisions of Article 159 of the Constitution, sections 1A and 1B of the Civil Procedure Act, the application lacked merit and in the obtaining circumstances clearly untenable. That the application was *res judicata*, the defence raised triable issues that could only be determined vide *viva voce* evidence. Otherwise the application was an abuse of the court process or was a clear act of obfuscation/obstruction which the court ought not to countenance.

On 27th January, 2011, the trial magistrate delivered a ruling on the application above and struck out the appellant's defence. Aggrieved by the ruling, the appellant lodged this appeal on 4th February, 2011. Six days later, the appellant mounted the instant.

In sum, the position of the appellant is that the respondent is not entitled to rates clearance certificates as ordered by the learned magistrate since it has at all material times not paid any rates in respect thereof. If the appellant was to issue the certificates as ordered, it will lose revenue to the tune or in excess of KShs.23,638,759/- that the respondent owes it. This is quite a significant amount of money which could otherwise be utilized in paying staff salaries as well as improving infrastructure. It is also possible that if the rates clearance certificates were to be issued, the respondent may dispose off the suit premises rendering it impossible for the appellant to recover any amount that may be found to be due to it when the appeal is ultimately heard. Thus the appellant may suffer substantial loss as it does not know of any other assets that the respondent owns. On the other hand, the appellant was a successful local authority, with substantial assets and is ready and willing to furnish security for the due performance of the decree and or any order as may ultimately be binding on it as this court may direct.

Reacting to the application, the respondent filed a replying affidavit sworn again by **Mohan Galot** in which he deponed where pertinent that the suit premises were classified as agricultural and were to attract land rents based on agricultural user, there was no due compliance with both rating and valuation of Rating Acts, there was no assessment and valuation done on the suit premises, if any valuation roll for the suit premises was prepared, then the method of valuation and ascertainment of rateable value employed by the appellant was in violation of Valuation of Rating Act. Accordingly, the orders of the subordinate court were properly given, and that no loss will be suffered by the appellant in the event that stay is denied.

When the application came up for inter partes hearing before **Kihara Kariuki J.** on 5th April, 2011, he directed that the same be canvassed by way of written submissions. Parties subsequently filed and exchanged written submissions. However, before the good judge could craft and deliver a ruling, he

left the station. On 10th November, 2011 the matter fell on me to give directions on the way forward. Luckily, parties involved were in agreement that I should take over from where **Kihara Kariuki J.** left. In other words, I should act on the material on record, craft and deliver the ruling.

I have carefully read and considered the written submissions and authorities cited. It is trite law that for an appellant, to succeed in application for stay of execution pending the hearing and determination of an appeal, he must establish:-

- Sufficient cause
- Substantial loss
- That the application was timeously
- Security.

Above all, the grant of such stay is discretionary. But again, it is not just to deny a successful litigant the benefits or fruits of his judgment. In considering an application for stay therefore, the court must balance the foregoing competing interests. See **Oraro and Rachier Advocates -Vs- Co-operative Bank of Kenya Ltd. (1999) I E.A. 236.**

Starting with the issue of sufficient cause, there is no doubt that the appellant has filed an appeal. In doing so, it has exercised its undoubted right of appeal. That is sufficient cause. Again, I have perused the grounds of appeal and they do raise weighty issues and arguable points of law. They fault the learned Magistrate on his appreciation of the application and tenor of land rates and rent Acts. These grounds again bring out the issue of sufficient cause.

With regard to substantial loss, the **Oraro case** (*supra*) defined such loss as;

“firstly, that substantial loss may result to the applicant unless the application is granted; which prima facie means that if the appeal succeeds the respondent would not be in a position to make full restitution”.

In this case the applicant claims KShs.23,638,759/- from the respondent allegedly on account of rates or rent arrears yet the learned magistrate has ordered;

“That the defendant do issue the plaintiff with the rates clearance certificate in respect of plot No. LR.No.12867/3, LR.No.12867/6, LR.No.12867/14 and LR.No.12867/15”.

The appellant’s position is that, if it was to issue the rates clearance certificates as ordered, it stands to lose colossal amounts of money that the respondent allegedly owes it. That amount could be utilized in paying staff salaries as well as improving infrastructure for its inhabitants. Similarly, if it was to issue the rates clearance certificates, the respondent may dispose off the suit premises to third parties and it will be almost impossible to recover any amounts that may be found to be due and payable to it when the appeal is ultimately heard and determined in its favour. The fears of the applicant are not wholly unjustified. I did not hear the respondent rebut those fears. I did not hear it say that it is well heeled financially and not as poor as a church mouse. I did not hear it say that in the event that it was found liable to pay to the respondent the alleged arrears or indeed any other amount, it would readily meet such an obligation. Nor has it been shown that it has any other assets that it owns that may come in handy should it be ordered to pay. I would in the premises side with the appellant’s submissions that due to matters and imponderables alluded to above, there is real apprehension that the appellant may suffer substantial loss if it issues rates clearance certificates to the respondent as full restitution may not be possible should the appeal be decided in its favour whilst it has already granted the certificates. No such loss is however imminent with regard to the respondent. The suit premises will remain registered in its name. It has not been suggested that it seeks the rates clearance certificates so as to sell the suit premises and if not issued, the prospective buyers will bolt and thereby cause it immense loss.

Was the application for stay made timeously? The answer ought to be obvious. The order by the learned magistrate striking out the appellant's defence and ordering it to issue rates clearance certificates to the respondent was given on 27th January, 2011. This application was filed on 8th February, 2011, hardly eleven days after the order. That kind of delay cannot pass for inordinate. There was no indolence exhibited by the appellant in filing and prosecuting the application.

The appellant too has indicated that it is ready and willing to furnish any security that this court may call upon it to offer. However, in the circumstances of this case, I do not think that such condition is necessary. Since the respondent has not indicated what its desire or purpose was in seeking to obtain the rates clearance certificate, no loss can be anticipated that should otherwise be secured by an offer of security by the appellant. The suit premises will continue being in the name of the respondent and the appellant will not be in a position to take adverse steps over the same to the detriment of the respondent without its knowledge and consent. That in itself is sufficient security. In any event the appellant has deponed that it is one of the most successful local authorities in the country, that it has substantial assets and therefore in a position to restitute the respondent in the event that its appeal is found wanting. These depositions have not been countered and or rebutted by the respondent.

Finally, on discretion, I do not think that the appellant has conducted itself so far in such a manner as to disentitle it from the exercise of my wide and unfettered discretion in its favour.

In the result, I allow the application in terms of prayers 3 on its face. The costs of this application shall however, abide the outcome of the appeal.

Dated and delivered at Machakos, this 30th day of November, 2011.

ASIKE-MAKHANDIA
JUDGE