REPUBLIC OF KENYA

HIGH COURT AT NYERI

CIVIL APPLI 168 OF 2009 (UR 113/2009)

WANYIRI KIHORO.....……..…….....APPLICANT

AND

KONAHAUTHI LIMITED ……..…….……..RESPONDENT

(Application for stay of execution of judgment and decree and all consequential orders (Kasango, J) dated 15th December, 2008

in

H.C.C.C. NO.9 OF 2000)

****

RULING OF THE COURT

The applicant, ***Mr. Wanyiri Kihoro***, who is also an advocate, filed an application, dated 28th May, 2009, under ***rule 5(2)(b)*** of the Court of Appeal Rules seeking the following orders:-

"***That there be a grant of Stay of Execution of the Decree and Judgment and any consequential orders in Nyeri, HCCC no. 9 of 2000 pending the hearing and determination of the Appeal AND the costs of this application abide the results of (sic) of the said Appeal."***

The application was made on the following grounds:-

"***(a) THAT the summary judgment was entered against the applicant in the superior court in the absence of the applicant and his legal adviser.***

(b) THAT the applicant moved the superior court to set aside the said judgment and decree which application was refused.

(c) THAT the applicant had lodged an appeal which is arguable with a high likelihood of success.

(d) THAT the respondent has moved to execute the decree appealed against.

(e) THAT if execution proceeds, the applicant will suffer undue hardship and loss and unless a stay is ordered the appeal will be rendered nugatory.

The applicant swore an affidavit on 28th May 2009 in support of this application, and filed the same on 2nd June, 2009.

When this application came up for hearing before us on 8th July, 2009, Mr. Kihoro appeared in person while Mr. Wambani, advocate appeared for the respondent.

By a plaint dated 11th January 2000 the respondent commenced suit against the applicant. The relevant averments in the plaint state:-

"***(4.) By an agreement dated the 9th day of July 1997 made between the plaintiff and the defendant, the plaintiff demised to the defendant the premises for the term of six (6) years from the 1st day of August 1997 at the monthly rent of Kshs 14,700 payable quarterly in advance ……***

(5.) In the lease, the defendant covenanted inter-alia to pay rent on the first day of each quarter in advance, being the 1st day of August, November, February and May in each year, and the lease also contained a proviso for re- entry in case of any breach or non observance of inter-alia, the said covenant.

(6) Commencing the 1st day of November 1997, to August 31st 1999, the defendant was persistently in arrears of rent* causing the plaintiff to request its advocate on r*ecord Njeri Kariuki, to issue a Notice of Forfeiture in accordance with section 111(9) of the Transfer of Property Act (the Act)."

The relief claimed in the plaint included kshs 322,800.00 being arrears of rent due up to August 31st 1999. Mesne profits at the rate of Kshs 14,700 per month were also claimed until possession of the premises and an order for costs.

Upon service of the plaint, the applicant instructed the firm of Ng'ang'a Thiong'o & Co. Advocates to file a defence on his behalf which defence was filed on 2nd March, 2000. The defence states:-

"***2. The defendant states that he is owed Kshs 100,000 by the plaintiff which sum plus the accrued interest has not been credited to his account to offset the rent.***

3. The defendant states that he has tendered the balance of the rent which the plaintiff has refused to accept with sole aim of re-possessing the premises.

4. The defendant denies having been served with a notice of forfeiture or having refused to pay the rent and puts the plaintiff to strict proof.

5. The defendant states that he is ready to pay any amount due after credit of Kshs 100,000 and the accrued interest.

6. The defendant states that the plaintiff is not entitled to an order of vacant possession or mesne profits."

The respondent then filed an application for summary judgment on 6th February 2001, and in the affidavit in support of that application, denied owing Kshs 100,000 or that the rent due was tendered. He further deponed that the applicant was truly and justly indebted to the respondent in the sum of Kshs 554,204 "*as claimed in the plaint."*

The applicant did not file an affidavit in opposition to the summary judgment application and on 6th November 2002 judgment was entered in favour of the respondent.

The applicant states in his affidavit filed on 2nd June 2009 in support of this application that upon service of the application for summary judgment he instructed his advocates, Messrs Ng'ang'a Thiong'o

& co. to file grounds of opposition and after becoming aware of the entry of the judgment he further instructed his advocates to appeal against the judgment, within the year 2002. The applicant has deponed that between 2002 and 2008 the matter was dormant and that he believed that his advocates had settled the matter. However, to his surprise, on 29th July 2008 he was served with a notice to show cause why execution of the decree should not issue against him for failure to pay Kshs 1,560,819.30. Upon perusal of the court file, the applicant realized that his advocate had failed to file the grounds of opposition and had also failed to attend court when the summary judgment application came up for hearing. As a result, the applicant filed a notice to act in person.

Aggrieved by the state of affairs as outlined above, the applicant filed an application to have the summary judgment set aside, but the application was dismissed by the superior court at Nyeri (Kasango, J) on 15th December, 2008. He then filed a notice of appeal on 23rd December, 2008 against the "*judgment*" delivered on 15th December, 2008. At the outset, and for the purpose of clarity, we would like to point out, that the notice of appeal, referred to by the applicant relates to the entry of the summary judgment itself. However, the decision intended to be challenged in the intended appeal is, the ruling of 15th December, 2008 which is a refusal to set aside the summary judgment. Be that as it may the issue is not for consideration in this ruling. Suffice it to state that for purposes of ***rule 5 (2) (b)*** we are satisfied that a notice of appeal has been filed and we therefore have jurisdiction to deal with this motion.

We will therefore consider on the application an application for stay grounded on prayer (b) of the application which relates to the superior court's refusal to set aside the summary judgment application. The intended appeal is also limited to the refusal to set aside the summary judgment. For this reason, we have deliberately decided to say as little as we can and also to refrain from making any premature pronouncements concerning the merits or demerits of the intended appeal. Having warned ourselves, as above, we are of course aware that the thrust of the applicant's case as per the affidavit in support of his application is that the superior court failed to consider his defence on record and also failed to consider his counterclaim. A summary of his case is that all he wanted the court to do is to have the parties take accounts but this did not happen. As a result, judgment was entered against him, not in accordance with the prayers in the plaint but in terms of an arbitrary figure contained in the affidavit in support of the application for summary judgment. The applicant adds that if accounts were taken his account would have been found to have been in credit. In addition, he laments that the omission, failure or mistake of his counsel in not defending the application for summary judgment ought not to have been visited on him. Finally, the applicant contends that the superior court did not exercise its discretion properly. For all these reasons the applicant submitted that the intended appeal is arguable.

As the orders sought fall under ***rule 5(2)(b)*** of the rules of this Court, we consider it proper to restate the two tests. Thus, the applicant in order to succeed must satisfy the Court that the appeal or intended appeal is an arguable one, that is, it is not a frivolous appeal. Secondly, that if an order of stay or injunction, as the case may be, is not granted the appeal were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.

On the first test on whether the intended appeal is frivolous, the applicant has submitted that the fact that a filed defence on record was ignored at the time the summary judgment was entered constituted an arguable point. Moreover, the applicant submitted that the court's failure to order the taking of accounts, while it was clear from the affidavits the parties had disagreed on the amount due, constitutes a strong ground in the intended appeal and finally whether or not the superior court properly exercised its discretion, is an arguable ground.

As regards the second test, the applicant submitted that since a notice to show cause why he should not be committed to civil jail had been served on him and was awaiting a hearing, this constituted a threat to his personal liberty because he might be arrested and committed to civil jail in default of payment and this would render the intended appeal nugatory because liberty once lost could not be recovered.

In his submissions the learned counsel for the respondent Mr. Wambani contended that the applicant had not shown that he had an arguable appeal and that his application to set aside the summary judgment

dated 30th July 2008 was determined on merit, after the court had fully addressed the guiding principles of law in the exercise of the court's discretion. He further submitted that the applicant as an advocate should have taken appropriate steps immediately after the entry of the judgment and he was therefore guilty of laches. The learned counsel further urged the Court to note that, in the entire ruling, the superior court did not blame the applicant for the mistakes of his counsel and that the documents perused by the court did not reveal any triable defence.

On the principle whether the intended appeal if successful would be rendered nugatory if stay was not granted, the respondent's counsel submitted that the applicant, who is a man of means, could liquidate the decretal amount, and he would not suffer any prejudice as the respondent had sufficient means to repay the amount should the intended appeal succeed.

Taking into account rival submissions as outlined above, on the first test, we agree with the applicant that on the grounds cited above, the intended appeal cannot be said to be frivolous.

On the issue of delay in filing the application now before us, the applicant has stated that his wife was bedridden for a long time during the relevant period and as the respondent has not challenged this in its reply, we take no negative view of the delay.

On the second test we are of the view that although the respondent might be in a position to refund the decretal amount what is at issue at the end of the day, is that should the applicant fail to pay the decretal amount or fail to show sufficient cause, he will be committed to civil jail thereby losing his liberty. It is clear to us it would not be right to place a value on liberty because it is priceless.

This Court, has in a line of authorities, held that where an applicant might lose his liberty the second test is satisfied. In the case of ***FATIMA ALI MOHAMED v HARBANS SINGH SOOR NAI C.A. 3130/2006*** this Court rendered itself thus:-

"***The second hurdle must however be surmounted Will the intended appeal be rendered nugatory. If we do not grant the order sought at this stage. We think undoubtedly it would. The warrant issued for arrest of the applicant could in all probability have been executed by now if we did not grant interim orders suspending it …… both will lose their liberty and it is irretrievable once lost whether or not the appeal succeeds …"***

Similarly in the case of ***ROSE DETHO v RATILAL AUTOMOBILE C.A. NAI 304/2006,*** a case concerning alleged contempt of a court order, our learned brother Githinji, JA, in a single judge ruling stated:-

"***In my view, the applicant would similarly be entitled to be heard on an interlocutory application seeking stay of execution of the impugned orders pending appeal as otherwise the applicant would be committed to prison and thus render the appeal ineffectual."***

In the face of the above authorities we are of the view that the applicant has passed the second test as well.

In the result, we grant an order of stay of execution of the judgment entered on 6th November, 2002 and all consequential orders until the determination of the intended appeal against the superior court ruling dated 15th December, 2008.

Dated and delivered at Nairobi this 18th day of September, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

J.G. NYAMU

…….**……..**

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR