



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 37 OF 2016

(Being an Appeal from Naivasha CMCC No. 206 of 2016)

CROSSLAND TRAVELLERS LIMITED.....1ST APPELLANT

NYAMAKIMA LINE SERVICES LIMITED.....2ND APPELLANT

-VERSUS-

MOLO GROUP SHUTTLE LIMITED.....RESPONDENT

R U L I N G

1. The background to the application filed on 6th June 2016 is not contested. The Appellants were the Defendants sued by the current Respondents in CMCC 206 of 2016 Molo Group Shuttle Limited -Versus- Crossland Travellers Limited & Another. Both parties are public service vehicles operators in Naivasha. The dispute between the parties is in respect of the occupation and use of certain spaces at the Naivasha main bus park commonly referred to as the Nakuru Stage. It would seem that officers of the sub-county office had allocated designated spaces to public service vehicle operators in the said stage but some of the parties were dissatisfied.

2. Pursuant to an application made in the lower court suit by the Respondents, an ex parte injunction was issued against the Appellants in respect of a slot in the stage identified as number 13. Subsequently the Appellants filed a motion seeking to set aside the said ex parte order. The said application and the original application having been heard, the court through a considered ruling confirmed the interim injunction on 31st May 2016. The Appellants were aggrieved by the decision and filed a memorandum of appeal on 6th June, 2016, contemporaneously with the Notice of Motion that is the subject of this ruling. The Notice of Motion is expressed to be brought under Order 42 Rule 6 (6) of the Civil Procedure Rules.

3. The live prayer in the Notice of Motion is number 3 which seeks

“3. THAT pending hearing and determination of the appeal herein this Honourable Court be pleased to restrain the Plaintiff/Respondent herein way of temporary injunction the Respondents herein whether themselves, servants, agents, process persons excising authority from it from evicting, removing, harassing intimidating and/or any other manner whatsoever interfering with the Defendants/ Applicants operation at position No. 13 Naivasha Main Bus Park.”

4. The key ground upon which the Motion is premised is that the Applicants will suffer substantial loss if they are evicted from the disputed slot at the bus park. Legal arguments not suitable as affidavit material characterize the Respondent’s Replying affidavit. In addition, the Respondents have deponed that the

Applicants have already vacated the disputed slot and that the Applicants have failed to demonstrate likelihood of substantial loss if their application is rejected.

5. In a supplementary affidavit, the Applicants also countered legal arguments raised in the Replying affidavit. However, the Applicants also contest the assertion that they have moved out of the disputed slot, and contend that having invested “heavily” therein they stand to suffer substantial loss if evicted. The parties agreed to dispose of the application by way of written submission.

6. From a perusal of the said submissions three key questions are raised, namely the court’s jurisdiction to grant the orders sought, the propriety of the orders sought and merits of the application pursuant to Order 42 Rule 6 (6) of the Civil Procedure Rules.

7. On the first question, the Applicants take the position that this court has requisite jurisdiction to issue the orders sought, based on the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules. Next, they contend that they have established substantial loss and indicated willingness to offer security in addition to approaching the court without delay. They argue therefore that they have met all the conditions attached to the grant of an injunction pending appeal. They cite the case of **Otieno –Vs- Ougo & Anor (No. 2) [1987] KLR 400** and the case of **Joseph Kariko Mwangi –Vs- Shah Mohamed & Ano. NKU HCCA 74 of 2012** in support of their submissions.

8. For their part, the Respondents principally relied on the decision of the Court of Appeal in **Madhupaper International Limited –Vs-Kerr [1985] KLR 840** for the proposition that an appellate court can only issue an injunction pending appeal where an application for an interlocutory injunctive had been rejected, and not where an injunction order has been granted. That because the High Court cannot in the circumstances of this case issue a second injunction over and above the lower court injunction, the only tenable prayer available to the Applicants is for stay of execution, the latter which, not having been sought cannot be granted in this case.

9. Citing Order 42 Rule 6 (6) of the Civil Procedure Code and the **Madhupaper case** and **National Drycleaners Limited & Another –Vs- Ndune [1987] KLR 565** the Respondents contend that a party aggrieved by a decision of the lower court ought in the first instance to apply for stay of execution of injunction before that court. Thus in their view, this court has no jurisdiction to entertain the present application.

10. Regarding the substance of the Motion the Respondents argue that the Applicants have not demonstrated substantial loss; that if they are successful, the lower court orders will be set aside, hence the appeal will not rendered nugatory. That besides, the Applicants have not categorically controverted assertions that they have been evicted from the dispute slot number 13, and further that they have not offered any security.

11. I have considered the submissions of the parties as well as their respective affidavit material. In my considered view, some of the arguments presented by the parties as jurisdictional questions are *sensu stricto* not jurisdictional issues. Rather they are questions regarding the interpretation and application of Order 42 Rule 6 (6) of the Civil Procedure Rules to the circumstances of this case.

12. To start with, Order 42 Rule 6 (6) of the Civil Procedure Rules, must be read alongside Order 42 Rule 6 (1) of the Civil Procedure Rules. Order 42 Rule 6 (1) of the Civil Procedure Rules provides as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from any for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

13. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “**shall be at libertyto consider**” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof.

14. Besides, the decisions in **National Drycleaners Limited and Madhupaper** in no way support the position that the High Court can only entertain an application under the order in question where such application has in the first instance been made to the court appealed from. The language used in both cases is clearly permissive and not mandatory, in keeping with a proper reading of the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules. That notwithstanding, the court’s exercise of its jurisdiction under the said provision is also discretionary, taking into account, not only the requirements in Order 42 Rule 6 (2) of the Civil Procedure Rules but also other relevant considerations in the matter before the court.

15. The Court of Appeal has delivered itself on the application of Order 42 Rule 6 (1) of the Civil Procedure Rules in both original and appellate jurisdictions in several decisions, while considering its own Rule 5(2) b which is essentially at *pari materia* with order 42 Rule 6 (1) of the Civil Procedure Rules.

16. In **Equity Bank Ltd –Vs- West Link MBO Ltd [2013] eKLR Civil Applicaton No. 78 of 2011, Githinji J A** had this to say in his judgment:

“[13] It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (Githunguri –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838.

17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained a fresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the **Githunguri Case** concerning the court’s original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules.

18. The present application is brought under Order 42 Rule 6 (6) of the Civil Procedure Rules which states:-

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

19. It is clear from this provision that the power to grant an interim injunction is anchored in the court’s appellate jurisdiction. Hence the procedure for an appeal is prerequisite to the lodging of such an application. This jurisdiction is distinct from the jurisdiction in Order 42 Rule 6 (1). Thus under order 42 Rule 6 the court may pending appeal grant stay of execution, or an interim injunction.

20. This latter jurisdiction can be exercised after a court has dismissed an application for an interlocutory injunction, as stated in **Madhupaper (supra)** and **Erinford Properties Limited –Vs Cheshire County Council [1974] 2 ALLER 448**. As with the jurisdiction in Order 42 Rule 6 (1) of the Civil Procedure Rules, the power to grant an injunction pending appeal rests with the court appealed from as well as the court appealed to. The purpose of such an order is to prevent the decision of the appellate court being

rendered nugatory.

21. In my view therefore, the appellate court can be moved as in this case, by an unsuccessful Applicant who lost in the lower court in his opposition to an application for an injunction. The latter is the essence of Order 42 Rule 6 (6) of the Civil Procedure Rules. Order 42 Rule 6 (6) of the Civil Procedure Rules does not preclude such an Applicant from moving the court. But as stated in **Madhupaper**, the order is discretionary.

“The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.” (Emphasis added).

22. In the case of **Ruben & 9 Others –Vs- Nderito & Anor [1989] KLR 460** the Court of Appeal granted injunctive orders pending appeal to the Appellant after observing that:

“On the material before us, we are satisfied that the intended appeal raises a serious question for submissions to this court on appeal. Secondly, in this case there is a very real possibility of the appeal being rendered nugatory if the reliefs sought by the Plaintiffs are not granted.”

23. The considerations above are also the requirements for grant of stay pending appeal under Rule 5 (2) (b) of the Court of Appeal Rules, and is perhaps the basis for Applicant’s submissions on principles that apply to the grant of stay pending execution which resonate with those that govern the grant of injunctions pending appeal. Rule 5 (2) (b) states that:

“Subject to subrule (1) the institution of an appeal shall not operate to suspend any sentence or stay execution but court may-

a)

b) in any civil proceedings where notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, or injunction or stay any further proceedings on such terms as it may think just..”

24. Rule 5 (2) (b) was extensively considered in **Equity Bank Ltd -Vs- West Link MBO Limited (supra)** where it was stated *inter alia* that:

“This Court’s jurisdiction to grant interim orders of stay ... in exercise of its inherent powers ... is deeply entrenched in its operations and has been applied over a long period of time. That jurisdiction is of fundamental importance and without it the Court’s effectiveness would be greatly compromised.”

25. From several decisions of the High Court’s exercise of its jurisdiction under Order 42 Rule 6 (6) of the Civil Procedure Rules, the test applied is that laid down by the Court of Appeal in the exercise of its discretion in regard to applications for injunction pending appeal (See **Muriithi J in Julius Musili Kyunga -Vs- KCB Ltd & Anor [2012] eKLR**).

26. **Visram J** (as he then was), in my humble view distilled the applicable principles in **Patricia Njeri & 3 Others -Vs- National Museum of Kenya [2004] eKLR**. The learned Judge stated:

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?”

In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital).

b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).

c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).

d) The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).”

See also Mukoma –Vs-Abuoga [1988] KLR 645.

27. Starting with the well known principles of **Giella -Vs- Cassman Brown & Co. Limited [1973] EA 358** the Applicants herein have not established a *prima facie* case. A *prima facie* case was described in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Court stated:-

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.....

So what is a prima facie case? I would say in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

28. Evidently, the question of a prima facie case in this case relates to *prima facie* merits of the appeal filed. As contained in the memorandum, the appeal herein cannot be said to be frivolous. However, in this appeal, this is perhaps not a matter to be gone into in more detail than a perusal of the memorandum of appeal.

29. Secondly, I am not satisfied that the Applicants would suffer irreparably if the injunction sought is denied; they can revert back to their old public service vehicles slot if the appeal terminates in their favour. This finding also answers the question of substantial loss. I agree with the Respondents that the Applicants have not made clear what substantial loss will be suffered if the interim injunction is denied. The dispute relates to a public service vehicles slot. If the Applicants succeed on appeal, they can take back the slot. Thus the appeal cannot be rendered nugatory. As stated in **Erinford Properties Limited (supra)** the main purpose of an interim injunction pending appeal is to prevent the appellate court’s decision from being rendered nugatory.

30. In my considered view, the other weak link in the Applicant’s Motion is the choice of prayers therein. While I do not agree with the Respondent’s arguments that this court has no jurisdiction to issue an interim injunction pending appeal, as herein sought, I think the orders sought by the Applicants in the Motion are inappropriate and would have no effect, beyond creating confusion and disorder. There exists

an order of the lower court granting an injunction to the Respondents, over the same subject matter. The effect thereof is to exclude the Applicants from the disputed public service vehicles slot.

31. An injunction by this court to stop the Respondents from evicting the Applicants or interfering with the Applicants' use of the disputed slot would not automatically nullify or stay the impugned order of the lower court. The Applicants ought to have moved this court for an order to stay execution of the injunction order issued in the lower court, rather than seek their own injunction pending appeal. Issuing the order presently sought in the Notice of Motion would in my opinion inflict greater hardship than it would avoid, in addition to exposing the judicial process to ridicule, as two conflicting orders would exist in respect of the same subject matter.

32. Of course, the position would have been different had the Respondents herein lost the application for an injunction in the lower court and appealed to this court; a similar difficulty would not impede the granting of an interim injunction if merited. There is some merit in the Respondent's argument in this regard. In this case, although the Applicants herein lost their application to set aside the *exparte* injunction in the lower court, it is the Respondent's substantive Motion for an interim injunction that carried the day, hence the impugned injunctive orders issued in favour of the Respondents. Reviewing all the foregoing, I am not persuaded that the Applicants deserve the orders sought. Their Notice of Motion is dismissed with costs.

Delivered and signed at Naivasha this **8th** day of **November, 2016**.

In the presence of:

Everline Rono for Appellants

N/A for Respondent

Court Assistant: Barasa

C. MEOLI

JUDGE