



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(Coram: Omolo, Shah & Owuor, JJ.A.)  
CIVIL APPLICATION NO. NAI. 223 OF 1999 (89/99UR)  
BETWEEN**

**INDUSTRIAL AND COMMERCIAL  
DEVELOPMENT CORPORATION.....APPLICANT**

**AND**

**DABER ENTERPRISES LIMITED.....RESPONDENT**

**(An application for a stay of execution pending the lodging and hearing of an intended appeal from  
the Ruling of the High Court of Kenya at Nairobi Milimani (Lady Commissioner of Assize J.  
Gacheche) dated 5th August, 1989**

**in**

**H.C.C.C. NO. 113 OF 1999)**

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**RULING OF THE COURT:**

Daber Enterprises Limited, the respondent, was the successful bidder at a public auction sale conducted by the applicant's auctioneers on 17th September, 1997 at their premises along Meru Road, Mombasa.

The public auction was in respect of a piece or parcel of land known as Title No Mombasa/Block/291 (the suit property) situate along Tom Mboya Avenue, Mombasa and was conducted in exercise of the applicant's statutory power of sale. The applicant is Industrial and Commercial Development Corporation.

It is common ground that the respondent, through its director one Bernard Mwangi Mbai was the highest bidder and that upon the fall of the hammer the respondent paid a sum of Shs. 800,000/- (being 25% of the bid price) to the auctioneer.

The balance was payable within 30 days of the auction sale.

It is also common ground that the auctioneer upon receipt of Shs. 800,000/- aforesaid prepared and signed a certificate of sale dated 23rd September, 1997 by which he confirmed having sold the suit premises to the respondent.

By their letter of 23rd September, 1997 the respondent's then advocates M/s Mbai & Kibuthu wrote to the Managing Director of the applicant seeking documents to enable them to prepare the transfer of the suit property to the respondent. In this letter M/s Mbai and Kibuthu undertook to release the balance of the purchase price (less any rates and rents outstanding) to the applicant within seven days of registration of the transfer to the respondent adding that the respondent might require sixty days to enable it to

organise finance necessary but that it expected it to organise such finance earlier.

The applicant responded to the said letter of 23rd September, 1997 pointing out that it was unable to release the documents as it was expecting to receive the balance of the purchase price within 30 days.

There was, it appears, a meeting between the Deputy Secretary to the applicant Corporation and Mr. Mbai. Mr. Mbai is on record saying that it was agreed that his client would pay the balance of the purchase price within 30 days of the receipt of the documents subject to further mutually agreeable extension of such period for sufficient reasons.

All this seems not to have found favour with the applicant and it returned the sum of Shs. 800,000/- to M/s Mbai and Kibuthu under cover of its letter of 14th October, 1997. The applicant sold the property thereafter to a third party.

The respondent commenced proceedings in the superior court for damages for breach of contract, specific performance of the contract by execution of all necessary documents, general damages, exemplary damages, interests and costs, and upon receipt of defence filed by the applicant, applied for summary judgment and striking out of the defence. The superior court (Commissioner Gacheche) struck out the plaint and entered summary judgment against the applicant in the sum of Shs. 11,800,000/-.

At this stage we are only bound to inquire as to whether or not there is an arguable appeal and if so, would the success of the appeal be rendered nugatory if the order sought is not granted? The applicant seeks an order for stay of execution of the interlocutory judgment in the sum of shs. 11,800,000/- as well as setting down the suit for hearing by way of formal proof for assessment of general and exemplary damages pending the hearing and determination of the intended appeal.

As we see it, it is at least arguable that, because the respondent sought extension of time to pay the balance of the sum bid by it, it sought variation of the terms of the contract. What was agreed between Mr. Mbai and the Deputy Corporation Secretary will of course be a matter for trial.

It is arguable if the offer of sale was revoked by the respondent.

Mr. Kamaara for the respondent urged that a firm and settled contract for sale had come into existence upon fall of the hammer and payment of 25% of the bid price and that, as the respondent was still within the 30 day period for payment, the revocation of the sale was a breach of contract. As pointed out it will be a matter for argument later. At this stage (and Mr Kamaara so conceded) the matter remains arguable.

Then there is the issue of special damages in the sum of Shs. 11,800,000/-. The learned Commissioner entered judgment in that sum on the basis of a letter addressed to M/s Mbai and Kibuthu by Githere Investments Limited. This company offered to purchase the suit property at a sum of shs. 15,000,000/-.

Special damages have to be strictly proved. The applicant had not admitted any damages which are always in issue unless admitted. Order VI rule 9(4) reads:

"(4) Any allegation that a party has suffered damages and any allegation as to the amount of damages shall be deemed to be traversed unless specifically admitted."

Whether Githere Investments limited was serious about its offer or not would be a matter for cross-examination.

We think we have said enough about the intended appeal not being frivolous. We come now to the second aspect to be considered on a rule 5(2)(b) application. Would the success of the appeal be rendered nugatory if stay were not to be granted? The amount at stake is over Shs. 12,000,000/-. It is not shown if the respondent is a company of means. The onus is on the applicant to show that the money paid would not be recoverable. The applicant has stated that it is on record that the respondent needed time to raise a sum of Shs. 2.4 million and we are unable to say that the respondent is a company of means. The

respondent did not itself show to this Court that the applicant's statement as regards "no known assets" is untrue. Mr. Kamaara did not seek time to file replying affidavit although he was entitled to such time having been served only a day prior to the date of hearing.

Mr. Kamaara argued that stay of execution of a money decree is not normally granted. He relied on the case of Kenya Shell Limited vs. Karuga & Another [1982-88] 1 KAR 1018 in support of his argument. The Kenya Shell Limited case has at the very least been modified for it was held in the cases of Kenindia Assurance Company Limited v. Muturi, Civil Application No. NAI 107 of 1993 (unreported) and Nairobi Duluxe Services Limited v. Ndege Civil Application No. NAI 64 of 1992 (unreported) that if the circumstances of the case so demand a stay order can be granted even in respect of money decrees. In any event if the respondent were to succeed in the end the applicant corporation is substantial enough to pay any decretal amount.

The upshot of all this is that we hereby grant a stay of execution of the decree in the High Court in this matter until the determination of the intended appeal. Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 7th day of September, 1999.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.