REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, OMOLO & BOSIRE JJ.A)
CIVIL APPLICATION NO. NAI.303 OF 1997 (UR.125/97)
BETWEEN

RAOL INVESTMENTS LIMITED ..... APPLICANT
AND
LAKE CREDIT FINANCE LIMITED ..... RESPONDENT

(Being an application for stay of the ruling and order of the High Court Mr. Justice A. Hayanga delivered on 8th July 1997 in H.C.C.C. No. 3882 OF 1994)
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RULING OF THE COURT

On 8th July 1997, the superior court (Hayanga J.) in exercise of its jurisdiction under O.35 rules 1 and 2 of the Civil Procedure Rules granted Raol Investments Limited, which for purposes of convenience we shall hereafter refer to as the applicant, leave to defend the suit which was pending before that court against it but conditional on it paying to Lake Credit Finance Limited, the Plaintiff in the suit and the respondent in the application before us, a sum of Kshs.10,000,000/= within fourteen days. There was a default clause attached to the order that failing payment the applicant's property known as Kisumu Municipality Block 8/237 would be transferred to Lake Credit Finance Limited (the Respondent) free from any encumbrances. The applicant did not and does not think such an order could properly be made in a summary procedure under O.35 rules 1 and 2 above. On 10th July 1997 it filed a notice of appeal declaring its intention to appeal against the order, and on 26th November, 1997, moved this court under rule 5(2)(b) of the Rules of this court, for an order staying the execution of that order pending determination of an intended appeal against it.

It is trite law that to succeed in an application under rule 5(2)(b), above, besides showing that his appeal or intended appeal is arguable an applicant should in addition show that unless the stay applied for is granted the appeal or intended appeal if successful would be rendered nugatory.

The respondent's suit in the superior court was for specific performance of an alleged agreement between it and the applicant contained in a letter from the latter to the former, dated 23rd March, 1994 for the transfer to it by the applicant of land known as Kisumu Municipality/Block 8/237; damages for breach of contract; a declaration that the respondent as Plaintiff in the suit was entitled to a lien over the aforesaid property and an injunction restraining the respondent as defendant in the suit, its servants and directors from selling, charging, leasing or transferring the property, presumably to any other person, except itself.

The respondent's case as pleaded was that it from time to time advanced various sums of money to the applicant as its customer on the understanding that the latter would repay it on a mutually agreed arrangement, which it did not do, and as at 28th February, 1994, Kshs.12,534,255.60 was due and owing

from it. After discussions between it and the applicant the latter addressed to it the letter of 23rd March, 1994, aforesaid, which in pertinent part, states as follows:

> ***"... as per our discussion, we are currently negotiating for sale Kisumu/Block 8/237 with interested parties and assure you that in the event the sale goes through substantial amounts will be paid to reduce the debt structure after the debt analysis have been completed and both you and Mr Oluga have concluded the amount payable. However in the event the sale is not concluded by the 10th April 1994, then we will, as an option, transfer to you the said property for a sum of Kshs.10,000,000/= (Shillings Ten Million only). The proceeds received would be distributed towards the liquidation of the agreed amount in respect of Raol Property account and Bill account."***

The respondent further pleaded that it accepted the applicant's offer to transfer to it the aforesaid land for Kshs.10,000,000/= in full and final settlement of the applicant's loan account with it in the event that the applicant did not get a buyer for it by 10th April, 1994 and thereby created an enforceable contract; that indeed by that date the applicant had not got a buyer for the property with the result that the respondent was entitled to have the property transferred to it; and that the applicant having failed to effect the transfer of the property to it as agreed it was entitled to the equitable remedy of specific performance.

The applicant, filed a written statement of defence inter alia, denying that the letter of 23rd March, 1994, constituted a contract of any nature, and in addition contended that there was a previously instituted suit by the respondent against it, to wit Nairobi High Court Civil Case No.2965 of 1994 which was still pending in which the subject matter was the same as in that suit. It further averred that it had fully repaid the sums claimed and had in fact exceeded in payment the sums due which excess amounts were the subject matter of a counterclaim in the previous suit.

The respondent did not think the defence had any merit at all, and accordingly moved the superior court under O.35 rules 1, 2, 9 and 10 of the Civil Procedure Act (but we think Civil Procedure Rules and not Act was intended) and Section 3A of the Civil Procedure Act for summary judgment "as prayed in the plaint." It should be recalled that the primary prayer in the plaint was for an order of specific performance of an alleged agreement contained in the letter of 23rd March, 1994, aforesaid.

> ***O.35 rule 1 of the Civil Procedure Rules provides:***
>
> ***"In all suits where a plaintiff seeks judgment for -***
>
> ***(a)a debt or liquidated demand with or without interest; or***
>
> ***(b)the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser where the defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."***

The primary issue which was canvassed before the superior court and before us is whether a claim for specific performance comes within the ambit of the summary procedure provided under O.35, above. On a plain reading of rule 1 of that Order it is arguable whether it does, more so considering that the respondent's claim in the superior court was neither liquidated nor a claim for the recovery of land. Hayanga J. treated the letter from the applicant dated 23rd March 1994, as an admission by the applicant that it owed the respondent Kshs.10,000,000/=, and argued that because the respondent's claim was based on that letter the offer to transfer the parcel of land known as Kisumu Municipality/Block 8/237 to the respondent was merely a scheme of payment. In our view, however, the respondent pleaded and presented his case differently. Whether or not a case falls within the ambit of O.35 rules 1 and 2 has to be discerned purely from a plain reading of the statement of claim. Our plain reading of the respondent's statement of

claim leads to the conclusion that the applicant's intended appeal is not frivolous.

On whether the applicant's intended appeal, if successful may be rendered nugatory if a stay is refused we say this. The respondent already has a judgment in its favour decreeing that the parcel of land known as Kisumu Municipality/Block 8/237, presently registered in the applicant's name, be transferred to it. Mr Owino Opiyo for the applicant informed us from the bar that the respondent intends to take steps to move the superior court to authorize its Registrar to execute the necessary transfer documents respecting the suit premises in favour of the respondent on behalf of the applicant as the registered owner. Should that happen the applicant will lose its property and there is the obvious danger that the respondent may transfer it to a third party and thereby take it beyond the reach of the applicant. In the event that the applicant's intended appeal succeeds it certainly will be rendered nugatory. It is therefore important that the property be preserved.

In the result and for the reasons we have endeavoured to give we think that this is a proper case for granting a stay. Mr Basker Sheth for the respondent urged the view that if we are minded to grant a stay it should be on terms. We do not, however, think that in the circumstances of this matter we should impose any terms.We have evidence on record that the respondent had registered a caution against the subject property which caution is still in situ. That we think amply secures the respondent's interest over the suit property in the event that the applicant eventually fails to succeed in its intended appeal.

The order which therefore commends itself to us is that the application dated 24th November, 1997 be and is hereby allowed, the order of the superior court made on 8th July, 1997, in its Civil Case No.3882 of 1994, be and is hereby stayed pending the final determination of the applicant's intended appeal. The costs of the application to be costs in the intended appeal.

Dated and delivered at Nairobi this 23rd day of January 1998.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR