REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, OMOLO & PALL, JJ.A.)
CIVIL APPLICATION NO. NAI. 284 OF 1998 (108/98)
BETWEEN

KENYA SHELL LIMITED .....APPLICANT

AND

CHARLES MIGUI MARANGA .....1ST RESPONDENT

AGNES WAIRIMU MARANGA

(Application from the order of the High Court of Kenya at Nairobi (Mr. Mbogholi Msagha, J.) dated 28th day of October, 1998
in
H.C.C.C. NO. 643 OF 1998)
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RULING OF THE COURT

In an application such as the one we have before us, namely, one under Rule 5 (2) (b) of the court's rules, an applicant must show to the court two things;

(i)that the intended appeal is an arguable one or one which is not frivolous, and

(ii)that unless a stay or an injunction or whatever is sought is not granted, the intended appeal, if successful, will be rendered nugatory.

We are satisfied on the material placed before us that the intended appeal by Kenya Shell Limited, the applicant, is clearly an arguable one. Before the High Court, the Marangas, the respondents, purported to rely on an agreement made in 1988 as the basis of the contract between them and the applicant and that it was pursuant to that agreement and that agreement alone upon which they operated the applicant's petrol station at Kenyatta Market. The applicant, on the other hand, contended that the relevant agreement was the one of 1995. The learned Judge of the High Court appeared to think, in granting the mandatory injunction, that the 1995 agreement was imposed upon the respondents. We think that is a debatable point. In any case, Mr. Kiragu Kimani for the applicant submitted before us that whether one relies on the agreement of 1988 or the one of 1995, both had termination clauses and that the applicant had validly terminated whichever agreement was relied on. That is another arguable point in the intended appeal. As we have said the applicant's intended appeal cannot in any way be described as frivolous.

Will that appeal be rendered nugatory if we do not grant a stay to the applicant? We do not think the applicant satisfied us on this point. As far as we understood Mr. Kimani, all he was saying on this point is

that the applicant has entered into a lease over the land upon which the petrol station stands and that by the terms of that lease the applicant is obliged to hand over the dealership of the petrol station to a nominee of the landlord.

We however, note that the terms of the lease do not take effect until the 1st May, 1999. We do not want to believe and cannot make a decision on the basis that by May, 1999, the intended appeal will not have been heard and determined and that the applicant would then be in violation of the terms of the lease and may, as a consequence, lose the petrol station itself. The other issue in dispute between the applicant and the respondents, as Mr. Kuria for the respondents correctly pointed out, is really the margin of profit being earned by the applicant from the operation of the station by the respondents. The applicant did not attempt to show even before the trial Judge that its profit margin is so low that it may suffer irreparable loss if an injunction was granted to the respondents. For our part we are unable to see in what manner the applicant's intended appeal will be rendered nugatory if we do not grant a stay. That being our view of the matter, this application must fail and we order that it be and is hereby dismissed with costs thereof to the respondents.

Dated and delivered at Nairobi this 13th day of November, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR