



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, OMOLO & TUNOI, J.J.A.)

CIVIL APPLICATION NO. NAI. 200 OF 1997 (86/97 UR)

BETWEEN

DHANJAL INVESTMENTS LIMITEDAPPLICANT

AND

SHABAHA INVESTMENTS LIMITED.....RESPONDENT

(Being an application for stay of execution in an
intended appeal from the Ruling and Order of the
High Court of Kenya at Mombasa (Ang'awa, J.) dated
17th June, 1997

in

H.C.C.C. NO. 38 OF 1997)

RULING OF THE COURT

This application is brought under rule 5(2)(b) of our Rules for a stay of execution of the order made by Ang'awa, J. on June 17, 1997, pending the hearing and determination of the intended appeal. By this order, the learned judge ordered the applicant, the defendant in Mombasa H.C.C.C. No. 38 of 1997, to deposit Shs.38,700,000/= in an interest bearing account with the East African Building Society in the joint names of the advocates of the parties to the suit and the Deputy Registrar of the High Court of Kenya at Mombasa within 7 days and in default summary judgment shall be entered against the applicant. In the event of the applicant making payment as ordered, it would then have leave to defend the suit and to prosecute its counter-claim.

The applicant purchased from the respondent ALL THAT seafront piece or parcel of land known as subdivision Number 1549, Section I, Mainland North, the suit property, for the price of Shs.43,000,000/=. The Transfer in its favour was registered on January 12, 1996. Developments on the suit property include the famous Piccolo Beach Hotel, now renamed the Travellers Inn, along the busy Mombasa - Malindi Road. Immediately upon registration of the Transfer the applicant took possession and commenced business but on February 22, 1996, it was served with an order for a temporary injunction which had been made by the superior court at Mombasa in H.C.C.C. No. 85 of 1996 in favour of Dhiram Kotak and Aziz Tayabali, as plaintiffs, against the respondent and the applicant herein and five others, as defendants.

It is apparent from the incomplete and scanty record of the application and the somewhat difficult to understand ruling made by the learned judge, that there are three or possibly more, pending and undetermined suits at least one of which was instituted before the transfer was registered in favour of the applicant. In this regard it is worthy of note that in the agreement of sale made between the applicant and the respondent the suit property was being sold free from litigation. Special condition No.7 reads as follows:- "The vendors confirm that there is no litigation pending against the property and/or business".

The applicant's fear as expressed in this application is that in the event of the High Court holding in favour of the plaintiffs in the suits Mombasa H.C.C.C. No. 289 of 1994 and H.C.C.C. No. 85 of 1996 the applicant will be compelled to hand over and give away the suit property to the plaintiffs in those suits under the doctrine of lis pendens without receiving any consideration therefor and the applicant in that even, will be ruined financially.

The notice of appeal was duly lodged on June 20, 1997. On its face it specifies that the applicant is dissatisfied with the decision made on June 17, 1997, but in the notice of motion, the subject matter of this application, it is stated that the applicant moves the court for an order that the execution of the ruling dated July 17, 1997, be stayed. This is clearly an error as no ruling was ever made on the even date. It is obviously a clerical error or slip which does not deprive us of jurisdiction since the notice of appeal is valid.

As is well established, the two conditions which the applicant should satisfy in order to obtain the order it seeks, are that its intended appeal is not a frivolous one; in other words, that it has an arguable ground to canvass during the intended appeal; and secondly, that the intended appeal, if it succeeds, would be rendered nugatory if stay of the order of the superior court is not granted.

In his bid to persuade us that the intended appeal is not frivolous, Mr. Gautama for the applicant, drew our attention to various issues involving substantial matters of law and fact. He referred us to the agreement of sale, the pleadings, interlocutory proceedings between the parties and rulings made by the two Mombasa Resident judges. Mr. Gikandi for the respondent in his reply to Mr. Gautama's submissions readily admitted that the intended appeal was indeed arguable. In this respect we agree with him. The applicant has therefore satisfied the first test required for the granting of stay of execution pending appeal.

The next issue for determination is whether the appeal would be rendered nugatory if no stay is granted. We would say that this would be the case. No doubt the applicant's hopes of achieving a good investment have been frustrated. It instead bought a law suit. Income has been lost and no doubt the loss is continuing every day until the pending suits are determined. Future investment has been curtailed. Shs.38,700,000/= is a large sum of money and we are far from being persuaded, in view of various pending suits instituted against the respondent both in the High Court and in the Resident Magistrate's Courts, that the respondent has means to refund such some of money if it was paid over to it.

In the result, and for the reasons above given, the applicant's application for stay succeeds. The order of the learned judge made on June 17, 1997 is stayed pending the determination of the intended appeal. However, the applicant shall provide security by way of depositing the documents of title to the suit property with the Deputy Registrar of this Court and the applicant shall not alienate, charge or otherwise deal with the title documents until further orders of this Court. For avoidance of doubt the status quo shall prevail. The costs of the motion shall be in the proposed appeal.

Dated and delivered at Nairobi this 8th day of August, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR