IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KWACH, AKIWUMI & SHAH JJ A

CIVIL APPLICATION NO NAI 251 OF 1994

BETWEEN

ARTHUR K. MAGUGU .....APPLICANT

INN OF INNS LTD. .....APPLICANT

AND

GITUTHO ASSOCIATES.....RESPONDENT

COST CARE CONSULTANTS.....RESPONDENT

KAM CONSULT .....RESPONDENT

UTMOST CONSULTANTS .....RESPONDENT

(Application for stay of execution in an intended appeal from a ruling of the High Court of Kenya at Mombasa (Mr Justice Wambilyangah) dated 29th July, 1994,

in

HCCC No 15 of 1994)

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RULING OF THE COURT

This cause was originally fixed before Omolo, Tunoi and Shah, JJA but the coram had to be changed at the last minute when Omolo and Tunoi, JJA disqualified themselves after they had been approached separately by persons purporting to speak on behalf of Mr Arthur Magugu (the first applicant) in an attempt to influence them.

This application is brought under rule 5(2)(b) of the Court of Appeal Rules by Arthur K Magugu (Mr Magugu) and Inn and Inns Ltd (Inns Ltd) for a stay of the judgment and decree of Wambilyangah, J dated 29th July, 1994, by which he entered summary judgment in the sum of Shs 17,773,889/- against Mr Magugu and Inns Ltd in favour of Gitutho Associates, Costcare Consultants, Kam Consult Engineers and Utmost Consultants (the respondent), pending the hearing and final determination of an intended appeal or further order. The application is supported by the affidavit of Mr Magugu sworn on 7th December, 1994. The respondent sued Mr Magugu and Inns Ltd in the superior court to recover a sum of Shs

17,773,889/=, together with interest and costs, in respect of engineering and architectural services alleged to have been rendered by the respondents to Mr Magugu and Inns Ltd in the development of two properties owned by them in Nairobi and Mombasa. A composite fee note was rendered for these services on 10th February, 1992, which both Mr Magugu and Inns Ltd admit having received, but took no steps to either dispute or settle for more than a year.

The defence filed on behalf of Mr Magugu and Inns Ltd was a bare denial. They denied owing the amount claimed by the respondents and also denied instructing the respondents to render the services in respect of which payment was being demanded. That defence naturally triggered off an application for summary judgment by the respondents under order 35 rule 1 of the Civil Procedure Rules.

In their grounds of objection and replying affidavit, Mr Magugu and Inns Ltd contended that it was a condition for the payment of the respondents' fees that Inns Ltd obtained finances to undertake the project; that Inns Ltd did not engage any of the respondents; and that the fees had not been calculated in accordance with the scales laid down under the Architects and Quantity Surveyors Act (cap 525). In his affidavit dated 10th June, 1994, Mr Magugu deponed *inter alia*:

> "(3) That I now recall having given instructions to Messrs Gitutho Associates to prepare drawings and all architectural designs, civil works, etc to enable me have a shopping document to obtain finance for the whole project – club and hotel. This is clearly borne out in my letter dated 19th September, 1991.
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> (4) That to meet some of the professional expenses it was agreed between me and the head architect Mr Kamau Njendu that I would pay a small portion of their expenses and the balance would be paid at the construction stage when I will have obtained finance using the final drawings obtained from all professionals engaged in the project."

Mr Magugu also deponed that he had not procured the finances and that he had also consulted a qualified quantity surveyor who advised him that his liability and that of Inns Ltd could not exceed Kshs 14m.

The judge considered the averments contained in Mr Magugu's affidavit and rejected them on the grounds that they were raised as an afterthought after a long silence and that there was a letter dated 19th September, 1991 from Mr Magugu addressed to one Silas Njuki and copied to Gitutho Associates in which he gave instructions for engagement. It is to be noted that that letter was written by Mr Magugu in his personal capacity and there is nothing in it to suggest that he intended to commit Inns Ltd.

The main thrust of Mr Machira's submission before us was that the fees claimed by the respondents were excessive and not within the scales prescribed under the Act (cap 525). He also submitted that neither Mr Magugu nor Inns Ltd had any contact with the second, third and fourth respondents. Finally, he submitted that in signing judgment for the respondents for the full amount the judge misdirected himself because he rejected the opinion given by the applicants' quantity surveyor without giving any valid reason for doing so.

We agree entirely with Mr Waweru Gatonye, for the respondents that Mr Magugu's track record has been completely appalling but as a court of justice we cannot permit his conduct however reprehensible to deter us from considering any redeeming features of his case. There was clearly more to this case than meets the eye and the truth of the matter cannot be determined without the benefit of a trial.

For the purpose of this application, we are satisfied that the applicants have shown that they have an arguable appeal. This is more so in view of the fact that no affidavits have been filed by the respondents to controvert the very serious allegation made by Mr Magugu that the plans were prepared for the purpose of hoodwinking financiers into advancing more money than was actually required for the project with the knowledge and connivance of the respondents.

Mr Magugu and Inns Ltd have shown, by affidavit, that they have a reasonable defence to the claim. Having regard to the circumstances of this case, we think that this is a case in which we should grant a

stay on terms. Accordingly, the application is allowed and the execution of the judgment and decree of Wambilyangah, J is hereby stayed pending the hearing and final determination of the intended appeal or further order on terms that the applicant execute a guarantee by a reputable commercial bank in the sum of Shs 10,000,000/- within 14 days from today, and in default, this application to stand dismissed with costs.

The respondents are also ordered to forthwith release and return to the applicants all the vehicles and household goods they have so far attached in execution of the decree at their own expense (the respondents).

Finally, we would like to emphasise that the only reason we deigned in the first place to hear the application which is supported by the affidavit of a self confessed conspirator to defraud innocent third partiers, is that the respondents, who, it may now be deduced from the affidavit evidence before us, to have heartily participated in the same conspiracy to defraud, would otherwise, on their part, have without any challenge whatsoever, successfully exploited and abused the process of the court in achieving their reprehensible designs.

We make no order as to costs.

Dated and delivered at Mombasa this 20th day of January, 1995

R.O KWACH

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JUDGE OF APPEAL

A.M AKIWUMI

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JUDGE OF APPEAL

A.B SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR