



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 281 OF 1995 (132/95 UR)

BETWEEN

GURBUX SINGH SURI

PURJIT KAUR SURI.....APPLICANTS

AND

ROYAL CREDIT LTD.....RESPONDENT

**(Being an application for stay of execution of the order of the High Court of Kenya at Nairobi
(Justice Hayanga) dated 28th September, 1995**

in

H.C.C.C. NO. 2546 OF 1992)

RULING OF THE COURT

Gurbux Singh Suri and Purjit Kaur Suri, the applicants herein, apply to the Court under Rule 5(2) (b) of the Court of Appeal Rules, "the Rules" hereinafter, for an order that the order of Mr. Justice Hayanga made on and dated 28th September, 1995 be stayed pending the hearing and determination of their intended appeal against that order. On 12th May, 1995, Royal Credit Ltd., the respondent herein, instituted a suit against an entity called Msumeno Equipment and Construction Co. Ltd. and in the plaint that entity was described as "a Limited Liability Company incorporated under the Companies Act....." There was in fact no such company and it would appear to us at this stage that the respondent's suit in the High Court was brought against a non-existent person. We do not feel called upon in this application to make any pronouncement on that aspect of the matter. We were told that the summons was sent to Msumeno through the post but it neither entered appearance nor filed a defence. Judgment was accordingly entered against it, but when the respondent sought to enforce the judgment it could not do so. The respondent then applied to the High Court for the examination on oath of the two applicants who were thought to be the directors of Msumeno as to the means and resources of the latter. That application was withdrawn by consent, obviously because the applicants could not have directors of a non-existent company.

The respondent then applied to the High Court for the substitution of Msumeno by the two applicants. The application for substitution was made by way of an application to amend the plaint. The application

was heard by Hayanga, J and in a full and considered ruling, he allowed the amendment, and did not even find it necessary to set aside the default judgment and allow the applicants a chance to oppose the suit if they were so inclined. It is that order which the applicants seek to have stayed and on the face of it, it seems clear to us that the applicants have an arguable appeal, at least on the point that judgment was passed against them without being given an opportunity to defend themselves. If this was the only point we had to consider, that is, if we were to simply consider the merits of the application, we doubt if the respondent would have been able to successfully resist it.

But Mr. Weda for the respondent has raised before us the question that the applicants have never applied for a stay of the order in the superior court. Mr. Rebelo for the applicants agreed that they never applied for a stay in the superior court and he appeared to contend that they were not obliged to do so. The gravamen of Mr. Rebelo's contention is that the jurisdiction conferred on this Court by Rule 5(2)(b) is an original and independent one and once it is shown to the court that a notice of appeal has in fact been filed then the court is clothed with jurisdiction and it is irrelevant whether or not an application for stay was made in the superior court. That the jurisdiction conferred on the Court by Rule (5)(2)(b) is an original one is old hat and authorities to that effect are legion. In RHODA MUKUMA V JOHN ABUOGA, Civil Application No. NAI 95 of 1987 (Unreported) Platt, Gachuhi & Masime, JJA said:-

".....The Judge said that in his view there was not a sufficiently high degree of possible success in the appeal. Therefore the application was made in this court on the 12th June, 1987 under this Court's original jurisdiction provided by Rule 5(2)(b) of the Court of Appeal Rules."

And in STANLEY MUNGA GITHUNGURI V JIMBA CREDIT CORPORATION LIMITED, Civil Application No. NAI 161 of 1988 (Unreported) Apaloo, JA and Gicheru & Kwach, Ag.JJA said:-

".....We think this Court's jurisdiction under Rule 5(2)(b) to grant either a stay of execution, an injunction or a stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with Rule 74. And we are then clothed with jurisdiction to grant any of such orders 'on such terms as the Court may think just.' That rule confers an independent original discretion on us and we have to apply our minds de novo on the suitability or otherwise of the relief sought. It is not an appeal from the learned Judge's discretion to ours."

If we pause there it is clear enough what is meant by "independent original jurisdiction". It must not be forgotten that the main function of this Court is:-

"to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law" - See section 3(1) of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya.

In ordinary circumstances the Court has only appellate jurisdiction and in the absence of Rule 5(2)(b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then having done so, to grant the stay or injunction. That is what is contemplated in Order 41 Rule 4(1) of the Civil Procedure Rules. But because of the existence of Rule 5(2)(b) one does not have to apply to the Court to first set aside the refusal by the High Court and then having set aside the High Court order to grant one itself. That clearly is the sense in which the expression "independent original jurisdiction" is to be understood and that was made abundantly clear in the GITHUNGURI case, supra, by use of expressions such as "we have to apply our minds de novo" or "It is not an appeal from the learned Judge's discretion to ours." Order 41 Rule 4(1) of the Civil Procedure Rules to which we have already referred provides that an application for stay:-

"shall in every case be made in the first instance to the court from whose decree or order the appeal is taken:....."

In this Court, one can get over that mandatory requirement by simply saying that the rules of procedure prescribed under the Civil Procedure Act do not apply to the Court of Appeal, which has got its own rules of procedure.

However, there is Rule 41 of the Court's Rules and it is to this effect:-

"Whenever an application may be made either to the Court or to a superior court, it shall in the first instance be made to the superior court."

An application for stay of execution or for an injunction or for stay of further proceedings can be made both to the High Court and to the Court of Appeal. Another type of application which can be made both to the High Court and to the Court of Appeal is an application for leave to appeal (Rule 39). In these situations, Rule 41 supra, mandatorily requires that the application be first made to the superior court and in our view, this does not in any way derogate from the Court's independent and original jurisdiction which we have already touched on. In fact the case of GITHUNGURI, supra, contemplates a situation in which the High Court has had a go at the matter and that would explain the use of the expressions such as "we have to apply our minds de novo" or "It is not an appeal." There is nothing inconsistent or contradictory in this Court exercising its own independent original jurisdiction after the High Court has had a go at and refused whatever it was asked to grant.

The only decision of this Court which we have found difficult to fit into the pattern of the decided cases is that of JEAN PIERRE DE-LEU V ADRIAN G. MUTESHI, Civil Application No. 169 of 1995 (Unreported). In that case the court delivered itself as follows:-

"Once a notice of appeal is filed in time under Rule 74 of the Court of Appeal Rules, this court has jurisdiction to deal with such an application as is before us here. Such jurisdiction is coterminous with that of the superior court under Order 41 Rule 4 of the Civil Procedure Rules. It is the Rule 74 notice of appeal that gives jurisdiction to this Court.

It has long been established that this Court's jurisdiction to grant orders for injunction or stay are unfettered by any application (similar) in the superior court and we feel that it may even be at times, prudent for an intended appellant to come to this Court rather than putting the judge below in the invidious position of saying 'I could be wrong'"

It is clear from this decision that the attention of the Court was drawn to Rule 41 of its rules for there is not a single reference to it in the whole ruling. Had the Court's attention been drawn to the rule, we have no doubt that the court would have had to at least deal with it before coming to the conclusion that the only relevant factor which gives the Court jurisdiction is the notice of appeal. No doubt the notice of appeal forms the foundation of the Court's jurisdiction but before the jurisdiction is invoked one ought to show that one has complied with Rule 41 of the Court's Rules. It is not to be forgotten that if a successful application is made to the superior court, then there is again no need to invoke the jurisdiction of this Court. We think the decision in MUTESHI, supra, was made without the court's attention having been drawn to Rule 41. Our attention has now been specifically drawn to its existence and we cannot simply ignore the rule. The circumstances in that case are accordingly distinguishable in that respect from those now before us and we are obliged to draw that distinction.

These applicants ought to have first filed their application in the superior court. That is the mandatory requirement of rule 41. They did not do so. Their application is accordingly incompetent and we order that it be struck out with costs. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 23rd day of November, 1995.

J. E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR