



Javer v Pioneer General Assurance Society Ltd

REPUBLIC OF KENYA

Court, of Appeal at Nairobi

January 16, 1991

Gichuhi, Masime & Cockar JJ A

Civil Application No 80 of 1990

(An application for a stay in an intended appeal from a Ruling of the High Court of Kenya at Nairobi, Tank J, dated 22nd of October 1990 in Civil Case No 4168 of 1990 between the aforesaid parties)

Civil Practice and Procedure – *stay of execution pending appeal – power of the High Court to grant stay - appeal against the decision of the High Court - whether right of appeal exists as of right or should be preceded by an application for leave.*

The applicant who failed in his application for an interlocutory injunction in the High Court made an oral application for stay of execution pending appeal under order XLI rule 4 of the Civil Procedure Rules.

The High Court granted the application but on the condition that the applicant deposited Kshs 150,000 per month in court as a condition of the granting and continuance of the order.

The applicant filed a notice of appeal to the Court of Appeal against this conditional order for stay. No leave of the court was sought or obtained prior to filing the notice.

The applicant's counsel contended that no leave was necessary as the oral application for stay was merely a continuation of the application for injunction brought under order XXXIX rule 1 of Civil Procedure Rules from which an appeal lay as of right.

Held:

1. Under order 42 of the Civil Procedure Rules no appeal lies as of right from any decision of the court under an application under order 41 rule 4.
2. An order of stay pending appeal can be granted by the High Court under order 41 rule 4 of the Civil Procedure Rules only. It was therefore imperative for the applicant to have obtained the leave of the court before he filed the notice of appeal.
3. The applicant was wrong in his contention that his informal application for stay following the dismissal of his chamber summons for an injunction was merely an extension of the proceeding initiated by the chamber summons.

Notice of appeal struck out.

Cases

No cases referred to.

Statutes

1. Civil Procedure Act (cap 21) section 3A
2. Court of Appeal Rules (cap 9 Sub Leg) rules 5(2)(b); 39
3. Appellate Jurisdiction Act (cap 9)
4. Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rules 1, 2, 3; order XLI rules 4, 4(3); order XLII

Advocates

Mr Nagpal for the Applicant.

Mr Lakha for the Respondent.

January 16, 1991, the following Judgment of the Court was delivered.

This is a Notice of Motion application filed under the Court of Appeal Rules, including rule 5(2) (b); the Appellate Jurisdiction Act (cap 9), the inherent powers of the Court, sec 3 A, Civil Procedure Act, (cap 21) and all other enabling powers and provisions of law.

As per its title it is an application for a stay in an intended appeal from a ruling of Tank J dated 22nd day of October, 1990, in HCCC No 4168/ 1990. The orders prayed for in the application are for a stay of that part of the order of the High Court which required the applicant to deposit Shs 150,000/- per month in court as a condition of the granting and continuance of the said order further or in the alternative for the respondents to be restrained from evicting the applicant from the suit premises or from committing a default that may result in the applicant being unable to live in the suit premises.

On 27th July, 1990, the applicant filed a plaint seeking inter alia an injunction restraining the respondent (defendant – therein) from evicting him from the suit premises or from disposing of the suit premises. Simultaneously with it he also filed a chamber summons application under order 39 rules 1,2,3, of Civil Procedure Rules and s 3(a) of the Civil Procedure Act seeking an *ex-parte* order for injunction in terms of the aforesaid prayers. The *ex-parte* order was granted by the High Court and an inter- parties hearing was fixed for 30th August, 1990. The ruling in the inter-parties hearing was given by Tank, J on 16th October, 1990. The chamber summons application was dismissed and the *ex-parte* injunction that had been granted was discharged.

Mr Nagpal for the applicant immediately after the delivery of the ruling made two applications. He first applied for leave to appeal against the ruling adding that he thought that he did not need one. Thereafter he made his second application for an injunction order to issue so as to maintain a status quo pending appeal. Mr Lakha for the respondent opposed the same. On 22nd October, 1990, Tank, J gave his ruling on the aforesaid informal verbal application granting the interim injunction pending appeal upon terms whereby the applicant / plaintiff was to deposit within 7 days a sum of Shs 150,000/- in court and was to continue so to deposit a similar sum at the end of every succeeding calendar month pending the determination of the appeal; in default the interim injunction order was to lapse.

Earlier on 17th October, 1990, Mr Nagpal for the applicant had filed a notice of appeal against the ruling of Tank, J on 16th October, 1990. That notice of appeal is of no concern to us at this stage.

On 25th October, 1990, Mr Nagpal filed another notice of appeal directed against that part of the ruling of Tank, J dated 22nd October, 1990, which required the applicant to deposit the monthly sums of Shs 150,000/-. This later notice of appeal in fact forms the basis for the notice of motion application now before us. After Mr Nagpal concluded his submissions Mr Lakha for the respondent raised two interesting points of law which we feel we must dispose of first before we proceed to consider this application on merits.

One of the points of law that was submitted by Mr Lakha was that the notice of motion application was incompetent and not properly before the Court adding that as far as the ruling of 16th October, 1990, was concerned an appeal lay as a matter of right. But no appeal lay as a matter of right from the ruling of 22.10.90 which had granted a stay on terms pending the intended appeal. So leave of the Court had first to be obtained within 14 days of the said ruling. As that had not been done time to apply for such leave also had elapsed.

Mr Nagpal's submission was that there was only one application before the High Court and that was the one for injunction made under order 39 r 1,2 and 3. The application for stay that he had made to the High Court on 16.10.90 at the conclusion of the delivery of the ruling was not made under order 41 r 4. The Court was still dealing with the chamber summons application filed under order 39, and the application for interim stay that followed the delivery of the ruling on 16.10.90 was merely an extension of a proceeding under the same order. Leave to file appeal against the ruling of 22.10.90 was therefore not needed because an appeal lay as a matter of right from any decision in respect of the application under order 39 which the trial judge was dealing with.

Two facts emerge clearly from the record of proceedings that followed the delivery of ruling on 16.10.90. One was that the applicant intended to appeal against the decision of 16.10.90. The second is the anxiety of Mr Nagpal, for the applicant, to obtain an interim injunction for the status quo to be maintained pending appeal. The learned trial judge has recorded Mr Nagpal saying as follows:

“My application is for an injunction maintaining status quo pending appeal ...”

The above informal application made by Mr Nagpal on 16.10.90 was clearly made under order 41 r 4 (3) which empowers a court, without a formal application having been made, to order stay on terms pending the hearing of a formal application. In this case, however, Mr Nagpal did not have a need to follow up the granting of the stay on terms with a formal application because a stay order was granted on 22.11.90. But on 25.10.90 he filed a notice of appeal against the ruling delivered on 22.10.90 in consequence of the informal application made on 16.10.90. Be that as it may under order 42 of the Civil Procedure Rules no appeal lies as of right from any decision of the Court under an application under order 41 r 4 and from any sub-rules of the said rule. We do not agree with Mr Nagpal's contention that his informal application for stay made on 16.10.90 following the dismissal of his chamber summons application under order 39 seeking a stay pending the final determination of the High Court suit was a mere extension of proceedings initiated by his said chamber summons application. The chamber summons proceedings before the High Court under order 39 were exhausted and concluded on 16.10.90. In fact the learned judge made it clear in his ruling of 22.10.90 that he was granting an interim injunction on terms pending appeal. An order of stay pending appeal can be granted by the High Court under order 41 r 4 of Civil Procedure Rules only. It was, therefore, imperative for the applicant to have obtained leave of the Court before he filed the notice of appeal dated 25.10.90 against the decision of the High Court given on 22.10.90. Under rule 39 of the Court of Appeal Rules an application for such leave has to be made within 14 days of the decision. That was not done. Nor was any leave of the Court obtained before the said notice of appeal was filed. This notice of appeal was, therefore, filed improperly, is of no effect and needs to be struck out.

In view of the above findings we do not feel it necessary or desirable for this court to go into the merits of this appeal on facts nor into the merits of the other point of law raised by Mr Lakha for the respondent that the provisions of rule 5(2) of the Court of Appeal Rules do not allow for an application to vary the terms of an injunction order granted by the High Court to be made under it.

In the result we order that the notice of appeal dated 25.10.90 against the decision of Tank, J delivered on

22.10.90 together with this notice of motion application also dated 25.10.90, founded on the said notice of appeal be both struck out with costs awarded to the respondent.

Orders accordingly.