Solio Ranch Limited v Takata Limited (Civil Appeal (Application) E138 of 2022) [2024] KECA 1074 (KLR) (2 April 2024) (Ruling)

Neutral citation: [2024] KECA 1074 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL (APPLICATION) E138 OF 2022

W KARANJA, J MOHAMMED & LK KIMARU, JJA

APRIL 2, 2024

BETWEEN

SOLIO RANCH LIMITED ..... APPLICANT

AND

TAKATA LIMITED ..... RESPONDENT

(An appeal from the Ruling of the Environment and Land Court of Kenya at Nanyuki (K. Bor, J.) dated and delivered on 28th September, 2022 in E. L. C. Case No. 18 of 2021)

RULING

1. By a notice of motion made pursuant to Rule 44 (1), 45 (1) and 49 of the Court of Appeal Rules (2022) and Sections 1A, 1B, 3A of the Civil Procedure Rules, the applicant sought for orders of stay of further proceedings in Nanyuki Environment and Land Court (ELC) Case No. 18 of 2021, Takata Ltd vs Solio Ranch pending the hearing and determination of the appeal. The grounds in support of the application are stated on the face of the motion and the annexed affidavit of Fred Ojiambo, MBC, SC.

2. In brief, the applicant was aggrieved by the decision made by the ELC onth September 2022, which ordered the firm of Kaplan & Stratton Advocates to be joined as a defendant in the suit. The applicant complained that the firm of Kaplan & Stratton Advocates had wrongly and unprocedurally been joined as a defendant in the suit, yet the issue that is not in dispute is that the said firm of Advocates acted in the matter in a professional capacity as the advocates for the applicant.

3. The applicant pointed out that the said firm of advocates could not be made a party to the proceedings because they acted as stakeholders in the agreement for sale. The applicant urged that the said firm of advocates are protected by Advocates – Client privilege applied in their case and therefore the said firm of advocates cannot be made parties to the suit. The applicant urged that if the order of stay of proceedings craved for is not granted, the intended appeal will be rendered nugatory.

4. The application is opposed. Eng. Michael Mwaura Kamau, CBS, HSC, a director of the respondent, swore a replying affidavit in opposition to the application. He deponed that the ruling that was the subject matter of the application was delivered thirteen (13) months before the present application was filed. He took the view that this period was inordinate and unexplained. He deponed that the application had been filed in abuse of the due process of the Court and is meant to delay the hearing and determination of the suit before the ELC. The respondent doubted if the applicant's appeal had high chances of success. The respondent denied the assertion by the applicant that the joinder of the firm of advocates would infringe on the Advocate– Client privilege. To the contrary, he deponed that the said firm of advocates had filed a defence to the suit. He swore that it could not be in the interest of justice for the hearing of the suit before the ELC to be stayed. He urged the Court to dismiss the application with costs.

5. Prior to the hearing of the application, both the applicant and the respondent filed written submissions. These submissions were highlighted by counsel when the application was heard in plenary. The principles to be considered by this Court in determining whether or not to grant the order of stay of proceedings pending the hearing of the intended appeal were appreciated by both the applicant and the respondent. In DHL Worldwide Express Kenya Ltd v Andrew Mutuma [2023] KECA 318 (KLR), the Court held thus:

> An applicant is entitled to a remedy under rules 5 (2) (b) of the rules of the court, if and only if, he or she can satisfy the court that the appeal or intended appeal is arguable and that, if stayed of proceedings is not ordered, the appeal will be rendered nugatory if it succeeds (See Githungura v Jimba Credit Corporation Ltd (No. 2) [1988 KLR 838). The applicant must satisfy both consideration and it is not enough to satisfy only one. (See Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).

6. With regard specifically to applications seeking stay of proceedings before the ELC, the Court in David Morton Silverstein v Atsango Chesoni [2002] eKLR held thus:

> "...what will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined, and, if it succeeds, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory. The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of Rule 5 (2)(b) of the Court's own Rules."

7. In the present application, the applicant was aggrieved by the decision of the ELC to enjoin the firm of Kaplan & Stratton Advocates, representing them in the suit, as co- defendant in the suit. The issue in dispute in the case involves, inter alia, a claim by the respondent to be paid interest, loss of bargain and damages in respect of the deposit which was held by the said firm of advocates as stakeholders pursuant to a sale agreement, when the subject matter of the agreement was frustrated by a sale of the land that was the subject of the agreement to a third party.

8. It is the applicant's case that it cannot be joined as a defendant in the suit as it enjoys Advocate – Client privilege when it acted as the advocates for the applicant. This assertion was challenged by the respondent who stated that it would not obtain appropriate relief before the ELC if the said firm of

advocates, who were holding the deposit of the purchase consideration, were not joined in the suit. In agreeing with the respondent, the ELC joined the said firm of advocates and stated thus:

> The issue that will ultimately fall for determination in the suit is whether a firm of advocates can be sued for damages for holding the deposit towards the purchase price after the land is sold to a third party. A determination will also be made at the trial as to whether there was concealment of facts or material non- disclosure or whether Kaplan and Stratton owed such duty to the plaintiff (respondent) in the transaction."

9. The main plank of the applicant's intended appeal is the question whether a firm of advocates can be joined in proceedings in respect of a sale transaction where the firm held the deposit as a stakeholder. We agree with the applicant that this issue is arguable. The applicant's intended appeal is thus not frivolous. The applicant has satisfied the first limb of the principles to be considered by this Court.

10. As regards the second limb, if the intended appeal would be rendered nugatory if stay of proceedings at the ELC is not granted, we are unable to agree with the applicant for the following reasons; the applicant has already entered appearance and filed a joint defence with the said firm of Kaplan and Stratton Advocates. It was curious that in the said defence, the firm of Kaplan and Stratton Advocates did not raise the defence that it had wrongly been joined in the suit. Indeed, the applicant's and the said firm of advocates' defence is one and cannot be severed or separated.

11. Will the hearing and determination of the case by the ELC render the intended appeal nugatory? We do not think so.

    Firstly, the said firm of advocates will have the opportunity to put its case before the ELC. If it will not find favour with the court, its appeal before this Court will still be viable. The said firm of advocates can still pursue the appeal and obtain the appropriate relief, if it succeeds, notwithstanding that the case before the ELC will have been heard and determined, either way.

12. This Court agrees with the ratio decidendi in the case of David Morton Silverstein (supra) that this Court rarely grants orders of stay of proceedings in applications under Rule 5 (2) (b) of the Court of Appeal Rules because the mere fact that proceedings are ongoing before the court below cannot, without material proof, render the intended appeal nugatory. We hold that the applicant failed to establish the second principle that its intended appeal would be rendered nugatory if the order of stay of proceedings is not granted.

13. It is clear from the foregoing that the application lacks merit. It is hereby dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR