



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, ASIKE -MAKHANDIA & MURGOR J.J.A)

CIVIL APPLICATION NO. E005 OF 2020

BETWEEN

RHINO VALLEY LODGE LIMITED.....APPLICANT

AND

KENYA WILDLIFE SERVICES LIMITED.....RESPONDENT

(An application for stay of execution from the ruling and order of

(Munyao Sila, J) delivered on the 30th September 2020 at the

Environment and Land Court at Mombasa in Mombasa ELC Case No 148 of 2019)

RULING OF THE COURT

The Notice of Motion dated 4th March 2020 is brought pursuant to **Article 25 (c) & 50 (1) of the Constitution of Kenya and Section 3, 3A and B and rule 5 (2) (b) of the Appellate Jurisdiction Act amongst other provisions** of the **Civil Procedure Act 2010**. It seeks for orders that pending filing, hearing and determination of an appeal against the orders given on the 30th September 2020, the respondent by itself, its Director General, Board of Trustees, Area Director for the Tsavo Conservation Area covering Tsavo West National Park and all other Wardens, officers, employees and agents be restrained from evicting the applicant and or interfering in any manner with the applicant's access to Rhino Valley Lodge formerly known as Ngulia Bandasa situated on a portion of land measuring 12.303. Ha and being part of the land Reference Number 24360 registered as CR No. 36021 measuring 701,063 Ha (*the leased premises*) and from interfering with the entry to and exit from the leased premises by the applicant's Directors, employees and guests or in any manner altering the means of access to the suit premises within the meaning of the lease dated 30th September 2015.

The motion was premised on the grounds set out in the application, the supporting affidavit of Wilfred K. Njiiri, the applicant's director.

By a lease agreement dated 30th September 2015, the respondent rented the leased premises to the applicant for a period of 20 years. The applicant fell on to hard times that caused it to accrue rent arrears to the tune of Kshs. 9,464,778. When the rent payments were not forthcoming the respondent wrote to the applicant seeking to terminate the lease, evict the applicant, and forcefully take possession of the leased premises. The applicant responded by declaring a dispute and referring it to arbitration. The applicant does not deny being in arrears, a situation it attributes to tribal clashes, post-election violence and terrorist attacks. It nevertheless petitioned the lower court to grant injunctive orders against eviction, so as to enable the parties resolve the dispute through arbitration.

On 29th July 2020, the learned judge (*Yano, J.*) delivered a ruling that was sent to parties with the word 'DRAFT' embossed on each page. In the ruling, the court allowed the interim protection sought on condition that the applicant deposited the rent arrears of Kshs. 9,764,774 into an interest earning account in the joint names of the parties' advocates. The court further ordered that mediation, and failing mediation, arbitration commence within 60 days of the ruling, failure to comply of which would mean that the interim orders would lapse.

By an application dated 15th August 2019 the applicant, informed the trial judge that they could not appeal against a 'draft Ruling' and requested that it be rectified. By way of another application dated 28th September 2020, the applicant sought confirmation that the ruling was a draft. The application was placed before Sila Munyao, J. who on 30th September 2020, declined to grant the orders prayed for in the application, having merely observed that an original signed hard copy of the ruling was available in the court file. It is on the basis of the learned judge's observations that the applicant intends to lodge its appeal and has since filed a notice of appeal dated 3rd October 2020.

There was no response to the application or submissions filed by the respondent.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

Upon considering the application, and the affidavit in support, it is important to note that the applicant intends to appeal against a ruling and orders made by Sila Munyao, J of 30th September 2020, yet it did not attach any ruling, order or proceedings relevant to that order. Neither did the applicant attach a draft memorandum of appeal. The applicant's grievance seems to be that the learned judge was wrong to hold without evidence that the ruling emailed to the parties' advocates was a copy of the original ruling alleged to be on the court file, and that it cannot now appeal against the draft ruling as it is not enforceable since no order can be extracted from it. For our part, our hands are tied. Without there having been a decision by Sila Munyao, J upon which we can rely to discern one way or the other whether the intended appeal is arguable, we are not satisfied that the applicant has adequately demonstrated that the intended appeal is arguable.

Since the applicant has failed to satisfy the prerequisites necessary for a **rule 5 (2) (b)** application, the motion dated 4th March 2020 is unmerited, and is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M.K. KOOME

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR