



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A)

CIVIL APPLICATION NUMBER 92 OF 2017

BETWEEN

KENYA WILDLIFE SERVICE APPLICANT

AND

LAKE JIPE SAFARI LODGE LIMITED.....RESPONDENT

(An Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the Judgment of the High Court at Nairobi delivered (Olga Sewe, J) on behalf of (Charles Kariuki, J) dated 17th October, 2016 in

H. C. C. NO. 92 OF 2006)

RULING OF THE COURT

1. By its Notice of Motion dated 25th April 2017 presented to this Court on the same date, the applicant seeks an order of a stay of execution of the judgment of the High Court dated 12th October 2016 and delivered on 17th October 2016 in Nairobi HCCC No. 92 of 2006 pending the hearing and determination of the intended appeal.
2. The respondent's case before the High Court was that on 5th June 1987, it entered into an agreement with the predecessor of the applicant agreeing to lease a site comprising 10 ha within Tsavo West National Park for purposes of constructing and running a tourist hotel. The lease was for a term of 20 years with effect from 1st January 1987 with an option to renew for another 10 years on the terms and conditions set out in the agreement.
3. The respondent averred that on 14th November 2000 the applicant, in breach of the said agreement, unlawfully, violently, and forcefully evicted the respondent's employees from the site and took possession of the same. The respondent asserted that despite paying arrears of rent demanded by the applicant and despite negotiations held in good faith, the applicant refused to deliver possession of the site back to be respondent.
4. The respondent pleaded that as the applicant did not allow it to carry away its property, the same was vandalised or stolen. The respondent claimed an amount of Kshs. 440,172,000.00 as itemised in its amended plaint being the total value of the loss and damage that it claimed to have incurred.

5. In its defence and counterclaim, the applicant averred that it was entitled under the agreement with the respondent to re-enter the premises and determine the lease in the event of breach by the respondent of its covenants. The applicant pleaded that the respondent breached the terms of the lease by among other things, failing to maintain standards; abandoning the site; defaulting in the payment of arrears of rent. The applicant further pleaded that on 13th October 2000 it gave notice to the respondent of its intention to terminate the lease and retake possession of the premises on account of the said breaches; and that on 14th November 2000 it re-entered and took possession the premises. It denied that the respondent had suffered the loss claimed or that it was entitled to the amount of Kshs. 440,172,000.00. It asserted that all improvements and buildings constructed on the land belonged to it.

6. The applicant counterclaimed for an amount of Kshs. 1,378,695.00 as provisional rent arrears. It also sought an order directed at the respondent to provide documentation showing occupancy of the lodge and the relevant rates payable by guests in order to calculate rents due and a declaration that it is entitled to an order for the vacant possession.

7. In its judgment dated 12th October 2016 and delivered on 17th October 2016, the High Court (C. Kariuki, J) held that the applicant lawfully terminated the lease and lawfully re-took possession of the premises on 14th November 2000

8. With regard to liability for the loss the respondent claimed to have incurred the Judge held that ***“due to the defendant's negligence, the movables were stolen and the premises vandalised as shown on the photographs. The court therefore finds the defendant liable for the loss arising therefrom.”***

9. With regards to the quantum of loss, the Judge observed that it was not possible to verify the value or costs attached to each of the particularised items making up the respondent's total claim of Kshs. 440,172,000.00. However, determined to do equity in the circumstances of the case as the court was enjoined to do under Article 10(2)(b) of the Constitution of Kenya, and taking into account that *“the properties' value was diminishing as time went by”* the court awarded the respondent Kshs. 23,100,000.00 *“for the lost/stolen items.”* The applicant's counterclaim was dismissed for want of supporting evidence.

10. Aggrieved, the applicant lodged a notice of appeal on 26th October 2016 intending to appeal against part of the said judgment.

11. Meanwhile, and pending the hearing and determination of the intended appeal, the applicant has moved this Court by Notice of Motion dated 25th April 2017, principally under Rule 5(2)(b) of the Rules of this Court, to stay execution of the said judgment urging that it has an arguable appeal which will be rendered nugatory unless we grant the orders.

12. Referring to the application, the affidavit and further affidavit sworn by Leonard Maingi, the supplementary further affidavit sworn by Jillian Ndirangu all in support of the application, and the applicant's skeleton submissions, Mrs. Irene Kashindi, learned counsel for the applicant, submitted that the applicant has met the conditions for the grant of the orders sought.

13. Adverting to the draft memorandum of appeal, counsel argued that some of the grievances the applicant has against the judgement of the High Court include the complaint that the amount awarded as special damages was not strictly proved; that the award of Kshs. 23,100,000.00 was based on an estimation without any supporting evidence; that while the Judge acknowledged that it was not possible to verify the respondent's claims, he went ahead to apply, wrongly in her view, principles of equity premised on Article 10 of the Constitution to justify the award. Citing a decision of this Court in **David Sironga Ole Tukai vs. Francis Arap Muge & 2 others [2014] eKLR**, counsel argued that a court should not depart from established statutory or common law or substitute the same with principles of equity.

14. Furthermore, counsel argued, the Judge found the applicant liable for negligence. She argued that the

respondent's claim as pleaded was not founded on negligence, no particulars of negligence were provided, and no evidence relating to the applicant's alleged negligence was tendered.

15. As to whether the intended appeal will be rendered nugatory unless we grant the orders of stay of execution, counsel argued that the respondent is no longer trading or in operation; that the respondent has not controverted an averment by the applicant to that effect; that in the event that the appeal is successful, the applicant will not be able to recover the judgement amount from the respondent.

16. Referring to the case of **David Silverstein vs. Atsango Chesoni [2002]1 EA 296** for the proposition that each case must be decided on its own facts when deciding whether or not an appeal will be rendered nugatory, counsel invited us to consider that the applicant is a statutory corporation whose funds that are not provided for in the budget and which might not be recoverable, should not be tied up.

17. Counsel concluded by urging that should the court in its discretion determine that the applicant should provide security as a condition for granting the orders of stay of execution, the applicant will be prepared to furnish a bank guarantee for the principal sum awarded or for portion thereof.

18. Opposing the application, Ms. Elizabeth Fundi, learned counsel for the respondent, relied on the respondent's replying affidavit sworn by Ashwin Gandhi, a director of the respondent. Counsel submitted that the applicant has not fulfilled the two requirements for the grant of the application. In her view, the applicant has not demonstrated that it has an arguable appeal or that the appeal will be rendered nugatory if the application is declined.

19. Counsel argued that the respondent's claim was pleaded and particularised in the amended plaint; that the respondent was not allowed by the applicant to collect its properties from the premises and was therefore handicapped; that the court justifiably resorted to equity after establishing that the applicant had denied the respondent access to the premises. In those circumstances, counsel argued, the court properly invoked Article 10 of the Constitution to render justice.

20. As to the complaint that the court founded the applicant's liability on negligence which was not pleaded, counsel argued that that was not the case; that the use of the word negligence by the Judge was a reference to the recklessness on the part of the applicant and not as a cause of action.

21. Arguing that the appeal will not be rendered nugatory if the application is refused, counsel pointed out that the award by the court is a monetary decree for which stay of execution should not ordinarily be granted as the amount can be refunded.

22. According to counsel, although the respondent's lodge is no longer operational, the respondent is still in existence and is a going concern. The respondent should therefore not be disadvantaged, counsel argued.

23. We have considered the application, the affidavits and the rival arguments. In order to succeed in an application of this nature, the applicant is required to satisfy this Court on two fronts. Firstly, that it has an arguable appeal. Secondly, that if the orders sought are not granted, the appeal will be rendered nugatory. There are many authorities for that proposition. For instance, in the case of **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd**, Civil Application No. NAI. 157 of 2006 this Court stated:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

24. Has the applicant in this case satisfied those requirements? As to whether the applicant has an arguable appeal, there is the contention by the applicant that the lower court granted relief in the nature of special damages based on the doctrine of equity with absolutely no proof. There is also the complaint that

the court wrongly found the applicant liable based on negligence when in fact the respondent did not plead or prove negligence on the part of the applicant. The answers to these complaints will have to await the hearing and determination of the intended appeal. For now, we do not think these complaints are frivolous. We think the applicant has demonstrated an arguable appeal. We are alive to the consideration that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. See **Dennis Mogambi Mongare vs. AG & 3 others [2012] 1 EA 177; Kenya Commercial Bank Ltd v Hon. Nicholas Ombija, Civil Application No. Nai. 153 of 2009; Kenya Hotel Properties Ltd vs. Willisden Investments Limited and 6 others [2013] eKLR.**

25.As to whether the appeal will be rendered nugatory unless the stay is granted, the applicant asserted that the respondent does not have the means to refund the judgment amount in the event that the appeal succeeds. Beyond stating in the replying affidavit that the respondent is an established entity, it did not controvert, the assertion that it does not have the means to repay by showing what resources it has. See **International Laboratory for Research on Animal Diseases vs. Kinyua [1990] eKLR; National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & another; Civil Application No. 238 of 2005.**

26.In the foregoing circumstances, there is merit in the applicant's application. The application dated 25th April 2017 is granted in terms of prayer 3 thereof. There will be a stay of execution of the judgment of the High Court dated 12th October 2016 and delivered on 17th October 2016 in Nairobi HCCC No. 92 of 2006 pending the hearing and determination of the intended appeal. The costs of the application shall abide the outcome of the intended appeal.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of January, 2018.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR