



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ. A.)

CIVIL APPLICATION NO. 65 OF 2017

BETWEEN

KATANGI DEVELOPERS LIMITED.....APPLICANT

AND

PRAFULA ENTERPRISES LIMITED.....1ST RESPONDENT

J. O. JOSIAH T/A NYALUOYO AUCTIONEERS.....2ND RESPONDENT

(Being an application to stay further proceedings in ELC (Kisumu) No. 75 of 2016) following the Ruling dated 14th June, 2017 by (Hon. S. M. Kibunja, J.)

in

ELC NO. 75 OF 2016

RULING OF THE COURT

[1] The applicant Katangi Developers Limited has moved this Court under Rule 5(2)(b) of the Court of Appeal Rules, for orders of stay of proceedings in Kisumu ELC No. 75 of 2016 pending the hearing and determination of an intended appeal by the applicant against a ruling dated 14th June, 2017 delivered by the ELC Court, (Kibunja J).

[2] The ruling related to an application made by the applicant to the ELC Court seeking to have a suit filed against it by Prafula Enterprises Limited (*herein the 1st respondent*), struck out. The applicant had contended that Kisumu ELC Case No.75 of 2016 was *res judicata* as it raises issues that were directly and substantially in issue in previous proceedings between the applicant and the 1st respondent, that is, Kisumu ELC No.33 of 1999 and Kisumu Civil Appeal No.117 of 2006, which issues were fully heard and determined both by the High Court and the Court of Appeal. It was also contended that the 1st respondent suit was time barred and an abuse of the court process.

[3] In his ruling delivered on 14th June, 2017, the trial judge in the Environment and Land Court,

dismissed the applicant's motion for striking out the 1st respondent's suit holding, *inter alia*, that the applicant's motion had no merit as the prayers sought in ELC case No.75 of 2016 were not entirely the same as the previous suits determined between the applicant and the 1st respondent.

[4] The applicant is aggrieved by that ruling and intends to file an appeal. The applicant therefore seeks an order to have the proceedings in Kisumu ELC No.75 of 2016 stayed pending the hearing and determination of the intended appeal. In support of the motion for stay of proceedings, Mitesh Fulchand Shah has sworn a lengthy supporting affidavit giving the background to the motion and the grounds upon which the motion is anchored. He has also sworn a further affidavit to which he has annexed bundles of documents in support of his contention that the matters directly and substantially in issue have been dealt with before. There are also grounds stated on the face of the motion.

[5] The motion was opposed through a replying affidavit sworn by Ramesh Madhavji Karia, a Director of the 1st respondent. He contends that the applicant's motion for stay of proceedings is brought in bad faith with the sole intention of making it difficult to conclude the trial in the ELC Court on merit; that an order for stay of proceedings was not necessary as the trial judge in the ELC Court being the only judge in the Western region covering 4 counties, is unlikely to hear and determine the 1st respondent's suit in the ELC Court before the intended appeal is finalized; and that the applicant has not demonstrated in what manner his intended appeal is likely to be rendered nugatory in the event that the trial in the ELC Court is determined on merit before the appeal. This is because the judgment would be easily enforced without any prejudice to the parties. Further, that on a balance of convenience, rather than await the outcome of the appeal, it is in the interest of all members of the society, that the trial in the ELC Court ought to proceed on merit and be disposed of expeditiously.

[6] During the hearing of this motion, the applicant was represented by A. B. Shah assisted by Mr. F. E. Wasuna, while the 1st respondent was represented by Mr. Jude Ragot. There was no representation for the 2nd respondent. The applicant filed written submissions that were duly highlighted before us by counsel. The 1st respondent relied on the submissions that had been filed in the ELC Court during the hearing of the applicant's motion for striking out. These submissions were highlighted by the 1st respondent's counsel.

[7] In brief, it was submitted for the applicant that, for an application for an order of stay under Rule 5(2) (b) of the Court Rules to succeed, an applicant must satisfy the Court that the appeal is arguable and not frivolous, and secondly, that, if the stay order is not granted, the appeal would be rendered nugatory if it eventually succeeds. Relying on Supreme Court decision in ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others [2014] eKLR***, it was submitted that public interest was a further consideration that may be taken into account.

[8] It was argued that the intended appeal was arguable and not frivolous as it raised various issues such as, whether the 1st respondent's suit was time barred, *res judicata* or an abuse of the court process. In the submissions, substantive issues have been made concerning these issues but we do not find it appropriate at this stage to address the merit of those submissions.

[9] For the 1st respondent, it was submitted that there were no arguable issues disclosed by the applicant as the issues that had been raised had been dealt with in the previous suits. It was pointed out that the High Court and the Court of Appeal in the previous cases did not determine the dispute concerning the exact position of plot No.438 and plot No.428 because there were conflicting survey maps; that the 1st respondents suit in the ELC was anchored on two letters by the Director of Survey indicating the correct position of the plots, and that these letters is what gave the 1st respondent a new cause of action. In this regard, the applicant relied on ***Siri Ram Kaura vs MJE Morgan [1961] 1 E.A. 462***; and ***David Morton Silverstein vs Atsango Chesoni [2002] eKLR*** (Silverstein decision).

[10] As regards the nugatory aspect, Mr. Ragot, relying on the Silverstein decision maintained that even if the stay is not granted and the suit succeeds, it will only inform the position and not affect the appeal,

and therefore, the appeal would not be rendered nugatory. Relying further on **Permanent Secretary, Ministry of Roads & Another vs Fleur Investments Limited [2014]** eKLR on the serious consequences of interruption in the right of a litigant to conduct his litigation, and the need to exercise caution in granting an order for stay. The Court was therefore urged to dismiss the motion.

[11] We have carefully considered the motion, the submissions made and the authorities cited. What is in issue before us is simply an application for stay of proceedings under Rule 5(2)(b) of the Court Rules. As noted in Halsbury's Laws of England 4th edition volume 37 at paragraph 330:

“the stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and, therefore, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue”.

[12] The principles upon which such an application is considered are quite clear having been reiterated in several decisions, some of which were relied upon by counsel. There are two twin conditions that must both be satisfied before such an order of stay can be granted. As stated in the **Silverstein** case, an applicant must satisfy the court that his intended appeal is an arguable one, or put differently, that the intended appeal is not frivolous. Secondly, that unless the court grants an order of stay the intended appeal, if successful, would be rendered nugatory.

[13] On the first limb, the parties have devoted a lot of time in their submissions and affidavits in support and in reply, to the issues that arose in the hearing of the applicant's motion for striking out the 1st respondent's suit in the ELC Case No.75 of 2016. It is clear to us that these issues, such as, whether the respondent's suit is statute barred under the Limitation of Actions Act, or whether the suit is *res judicata*, or an abuse of the court process are arguable issues that will need to be canvassed during the hearing of the intended appeal. It is for this reason that we did not find it appropriate to delve into the propriety or merit of those issues, it suffices for the purpose of the motion before us that there are arguable issues.

[14] As regards the second limb concerning the nugatory aspect, we reiterate what was stated by this Court in **Reliance Bank Limited vs Norlake Investments Limited [2002]** 1 E.A. 227 that:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

[15] Therefore, the issue before us is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay of proceedings is not granted. It is evident that if an order of stay of proceedings is not granted, the case in the ELC Court will proceed to hearing and determination. To an extent that may lead to determination of some of the issues intended to be raised in the intended appeal. It will not however, render the intended appeal otiose or irrelevant unless the suit is determined in the applicant's favour. As was stated by this Court in the **Silverstein** Case, where a similar order of stay of proceedings was sought:

“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 is already heard, determined and, it succeeded, 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”.

[16] In short, the failure to grant an order of stay will not render the applicant's intended appeal nugatory. As the applicant had to satisfy both limbs in the twin conditions, we come to the conclusion that this application cannot succeed. It is accordingly dismissed with costs.

Dated and delivered at Eldoret this 22nd day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR