



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GATEMBU & M'INOTI, J.J.A) CIVIL APPLICATION NO. NAI. 69 OF 2017 BETWEEN

GUARDIAN BANK LIMITED.....APPLICANT

AND

BOOK POINT LIMITED.....1ST RESPONDENT

GUILDERS INTERNATIONAL BANK LIMITED... 2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. NAI. 72 OF 2017

BOOK POINT LIMITED.....APPLICANT

AND

GUILDERS INTERNATION BANK LIMITED.....1ST RESPONDENT

GUARDIAN BANK LIMITED.....2ND RESPONDENT

(Being an Application for stay of Execution of the Order of the High Court at

Nairobi (Sergon, J) delivered on 3rd March, 2017

in

NAIROBI H. C. C. C. NO. 1807 OF 2002)

RULING OF THE COURT

Introduction

1. We have two applications before us. The first application, being Civil Application No. NAI. 69 of 2017, is dated 30th March 2017. It was filed on 4th April 2017 by Guardian Bank Limited and is made under Rule 5(2)(b) of the Rules of this Court. Book Point Limited and Guilders International Bank Limited are named as the respondents in that application. It seeks orders of stay of proceedings in the High Court in HCCC No. 1807 of 2002 pending the hearing and determination of an appeal from a ruling of the High Court (Sergon, J) delivered on 3rd March 2017.

2. The second application, being Civil Application No. NAI. 72 of 2017, is by Book Point Limited, the beneficiary of a decree issued by the High Court in HCCC No. 1807 of 2002. That application is dated 10th April 2017 and was filed in Court on 11th April 2017. Guilders International Bank Limited and Guardian Bank Limited are named as the respondents. The application is made under Rule 84 of the Rules of this Court and seeks an order that the notice of appeal filed by the Guardian Bank Limited, and on which Civil Application No. NAI. 69 of 2017 is based, should be struck out as no appeal lies as of right from the decision of the High Court given on 3rd March 2017, the subject of the intended appeal.

3. When the two applications came up for hearing before us on 21st June 2018, we, upon consultation with counsel, made an order consolidating them. We accordingly heard them together and reserved this ruling.

Background

4. On 1st April 1996, Book Point Limited (Bookpoint) as landlord, entered into a lease with Guilders International Bank Limited (Guilders) as the tenant over the premises known as Bidd Chambers on L.R. No. 209/12086 situated along Moi Avenue in the City of Nairobi. The term of the lease was for 10 years expiring on 28th February 2006. Subsequently, there was a merger or amalgamation between Guilders and Guardian Bank Limited (Guardian) on the basis of which Guardian took over the assets of Guilders.

5. Following default in payment of rent and service charge under the lease, Bookpoint filed suit in the High Court against Guilders and Guardian seeking judgment against them jointly and severally for Kshs. 9,552,714.00 in respect of outstanding rent and service charge. The defences filed by Guilders and Guardian in that action were struck out in a ruling delivered by Ransley, J on 9th July 2003 following an application by Bookpoint. In the same ruling, Ransley, J entered judgment in favour of Bookpoint for the amount claimed as against Guilders only. A decree was then issued against Guilders.

6. Subsequently, Bookpoint applied to review that judgment in order to extend it to Guardian. The application for review was allowed by Onyancha, J in a ruling delivered on 8th February 2010 with the result that Guilders and Guardian became liable, jointly and severally, to satisfy the decree. An amended decree, incorporating Guardian was then issued on 9th September 2010.

7. Under item 1 of the original as well as the amended decree, the amount payable by Guilders and Guardian, jointly and severally was decreed as Kshs. 14,573,311.50. Under item 2 of the decrees, judgment was granted in favour of Bookpoint against Guilders and Guardian jointly and severally for “rent, service charge, interest and other outgoings as and when they fall due from 1st September 2001 until the expiration of the lease.” Attached to the amended decree was a schedule under which the “balance due” was computed at Kshs. 178,514,179.00 after crediting an amount of Kshs. 15,156,543.20 that was acknowledged as having been paid. Included in the figure of Kshs. 178,514,179.00 was a computation of “rent, service charge, interest and other outgoings as when they fall due from 1st September 2001 until the expiration of the lease.” Bookpoint then made an application to execute the amended decree whereupon a notice to show cause, under the then Order XXI rule 18 of the Civil Procedure Rules, was issued by the court to Guardian. That notice required Guardian to show cause why execution should not issue against it to recover the amount of Kshs. 178,514,179.00.

8. Faced with that notice to show cause, Guardian made an application before the lower court dated 17th January 2012 seeking orders that the notice to show cause be stayed and set aside and that “all proceedings, directions and orders based on the notice to show cause why execution should not issue [under] Order XXI, dated 11th January, 2012 for the sum of Kshs. 178,514,178.00 be set aside.” That application was made “under the inherent power of the Honourable court”. It was based on the grounds that the notice to show cause was at variance with the decree; that the advocates for Bookpoint had no jurisdiction or power or authority “to embellish a High Court Decree and supply further sums”; that the notice to show cause was issued in excess of jurisdiction; that Bookpoint’s claim for rent, service charge, interest and other outgoings as and when they fall due from 1st September 2001 until the expiration of the lease was never quantified and presented to the court and the same had not been specifically proved as required by law. That application was dismissed by Serگون J in the ruling dated 3rd March 2017 the subject of the intended appeal.

9. In dismissing that application, the Judge took the view that in lieu of the application, Guardian ought to have challenged Bookpoint to explain how it had arrived at the amount Kshs. 178,514,179.00 that it claimed was due; and that according to the Judge’s own calculations, “the total sum payable is Kshs. 57,390,517.40 without calculating other outgoings.”

10. Guilders and Guardian subsequently filed a notice of appeal on 8th March 2017 which was later amended and an amended notice of appeal filed on 14th March 2017. We were informed from the bar that the substantive appeal, being Civil Appeal No 90 of 2017 has since been filed before this Court.

11. It is against that background that Guardian moved the Court in Civil Application No. NAI. 69 of 2017 seeking a stay of proceedings in the lower court on grounds that it has an arguable appeal which will be rendered nugatory unless we grant the orders of stay. On its part, Bookpoint in its application Civil Application No. NAI. 72 of 2017 has sought an order to have the appeal struck out on grounds that Guardian did not seek or obtain leave to appeal.

12. As the application by Bookpoint raises the question of the competence of Guardian’s appeal on which the application for stay is founded, we shall consider it first.

Bookpoint’s application and submissions by counsel

13. Bookpoint’s application is supported by an affidavit sworn by its director, Sudhir Shah, in which he states that the impugned ruling of 3rd March 2017 by Serگون J arose from Guardian’s application dated 17th January 2012 that was filed under the inherent powers of the court; that no appeal lies as of right from that ruling; and that Guardian did not seek or obtain leave of the court before filing its notices of appeal. (A notice of appeal dated 3rd March 2017 was filed on 8th March 2017. An amended notice of appeal also dated 3rd March 2017 was filed on 14th March 2017). It is Bookpoint’s case that as leave to appeal the decision of 3rd March 2017 was not sought or obtained, the notices of appeal are invalid and should be struck out with costs.

14. Learned counsel Mr. A. B. Shah who appeared before us on behalf of Bookpoint urged that in those circumstances, the application dated 10th April 2017 should be allowed. He relied on Order 43 rule 1(1) and 1(1) of the Civil Procedure Rules and submitted that court orders

made in execution proceedings can only be appealed with leave of court. He urged, on the strength of the decisions of this Court in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 others [2013] eKLR*, that litigants have an obligation to comply with the rules of procedure and the courts have a corresponding duty to ensure rules of procedure are complied with. Counsel also cited the decision of this Court in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 other [2013] eKLR* in support of the argument that “*unless an appeal lies to the Court of Appeal, it is bereft of jurisdiction.*”

15. In a replying affidavit sworn on 21st July 2017 and filed on 24th July 2017 in opposition to the application, Kenvine Odhiambo Ouma, an advocate, after setting out the background to the matter, had this to say on the question of leave:

“THAT being aggrieved with the Ruling and Order of the Court, I received instructions from the 1st Respondent to seek leave to Appeal and immediately sought leave to appeal which the Court (Hon. Justice J. Serгон) granted stating that “of course you have the right to appeal.” Unfortunately, the Court record of proceeding does not reflect this application which I made and was granted in the terms stated above.

THAT having been granted leave to appeal against the decision of the High Court of 3rd March 2017, I Sought a limited stay of execution for 30 days which the High Court granted for a period of Thirty (30) days pending appeal to this Honourable Court. I subsequently filed the Notices of Appeal dated 3rd March 2017.”

16. And at paragraph 21 of the same affidavit, Mr. Ouma deposed that:

“...entirely without prejudice to the foregoing, I verily believe that under Article 164(3) of the Constitution of Kenya 2010, this Honourable Court would have jurisdiction to hear and determine the Appeal as of right even if the High Court did not grant the 1st Respondent leave to appeal as it did on 3rd March 2017.”

He went on to depose in that affidavit that it is pertinent for this Court to determine the appeal substantively as it raises fundamental questions.

17. Learned counsel for the respondents Mr. James Ochieng Oduol who appeared before us during the hearing of the applications submitted that Bookpoint’s application does not lie; that it was filed outside the time permitted under Rule 84 of the rules of the Court; that under the proviso to Rule 84, Bookpoint had 30 days from the date it was served with the notice of appeal to apply to strike it out; that under Rule 3 of the Rules of the Court, the application should have been filed, at the very latest, by 9th April 2017 but was not filed until 11th April 2017.

18. Furthermore, counsel argued, Article 164(3) confers an automatic and unqualified right of appeal to this Court that is not shackled with the requirement to seek leave to appeal. In support of the proposition that the right to appeal decisions of the High Court exists as a matter of right without the requirement to seek leave to appeal, counsel cited the decisions of this Court in *Mohammed Hassan Maalim & 2 others vs Gravet Limited [2014] eKLR*; *Judicial Service Commission & Secretary, Judicial Service Commission vs. Kalpana H. Rawal [2015] eKLR* and *DHL Excel Supply Chain Kenya Limited vs Tilton Investments Limited [2017] eKLR*.

19. We have considered the application, the affidavits and the submissions by counsel. The question that arises is whether Bookpoint’s application is barred under the proviso to Rule 84 of the Rules of the Court. The proviso to Rule 84 of the Rules of the Court stipulates that:

“Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

20. Following the impugned decision on 3rd March 2017, Guilders and Guardian lodged a notice of appeal with the High Court on 8th March 2017. On the face of it, it was served on the advocates for Bookpoint on 10th March 2017 and again on 30th March 2017. An amended notice of appeal in which the name of Guilders was crossed out (leaving Guardian as the only appellant) was lodged in the High Court on 14th March 2017 and served on Bookpoint’s advocates on 23rd March 2017.

21. Undoubtedly, the notice of appeal lodged on 8th March 2017 as well as the amended notice of appeal lodged on 14th March 2017 were filed within the 14 days period permitted under Rule 75(2) of the Rules of the Court. The notice of appeal having been served on 10th March 2017, the application by Bookpoint to strike it out should have been made within 30 days from that date. That is what the proviso to Rule 84 of the Rules of the Court demand.

22. For purposes of computing the 30 days, the 10th day of March 2017, being the date on which the notice of appeal was served, is to be excluded by reason of Rule 3(a) of the Rules. Consequently, 30 days from 10th March 2017 lapsed on 9th April 2017 which fell on a Sunday. By reason once again of Rule 3(b) of the Rules, the 30 days would therefore be deemed to have expired on Monday 10th April 2017 which is the last day on which Bookpoint should have filed its application to strike out the notice of appeal. The application by Bookpoint to strike out the notice of appeal was filed on Tuesday 11th April 2017. Although it was late by only one day, it was nonetheless outside the 30 days window provided for under the proviso to Rule 84 of the Rules.

23. There are many decisions to the effect that an application to strike out a notice of appeal filed outside the time frame provided under the proviso to Rule 84 of the Rules of the Court is incompetent and is for striking out. Some examples are found in *Pickwell Properties Ltd vs Kenya Commercial Bank Ltd [2016] eKLR*; *Michael Mwalo vs Board of Trustees of National Social Security Fund [2014] eKLR*; and *C.Y.O.O vs R.O.O, Civil Appeal No. 148 of 2009 [2011] eKLR*.

24. Although we are sympathetic that the delay involved is only for one day, it nonetheless amounts to non-compliance with the proviso to Rule 84 of the Rules rendering Bookpoint's application incompetent. Furthermore, and without prejudging the same, the appeal appears to raise weighty issues for substantive consideration. In the result, we hold that Bookpoint's application to strike out the notice of appeal is barred by the proviso to Rule 84 of the Rules. It is therefore incompetent and is accordingly struck out with no orders as to costs.

Guardian's application and submissions by counsel

25. As already stated, Guardian's motion seeks orders of stay of proceedings in the High Court in HCCC No. 1807 of 2002 pending the hearing and determination of an appeal from a ruling of the High Court (Sergon, J) delivered on 3rd March 2017. Mr. Oduol submitted that the intended appeal is arguable. Referring to Guardian's memorandum of appeal attached to the application, counsel submitted that it will be demonstrated on appeal, among other things that, the learned Judge erred in sanctioning "embellishment" of a decree to adjust or inflate the decretal amount; that amounts that were never specifically pleaded, proved or determined were surreptitiously sneaked into the decree; that the Judge abdicated his responsibilities by leaving it to parties to determine the ingredients of a decree; that the Judge erred in failing to find that the deputy Registrar of the High Court had no jurisdiction to issue a notice to show cause that was not in accordance with the judgment of the court; and that the Judge dealt with an issue not before him by undertaking calculations of what he considered as the outstanding amount.

26. As to whether the intended appeal will be rendered nugatory unless the orders sought are granted, counsel submitted that it is self-evident that if execution is carried out in respect of amounts that were never allowed or adjudicated, the appeal will be rendered nugatory; that the applicant should not suffer execution in respect of claims that were never decreed.

27. Opposing the application, learned counsel Mr. A. B. Shah referred to the replying affidavit sworn by Sudhir Shah and urged that what Guardian is seeking to do is to unfairly deprive Bookpoint of rent for 6 years by taking advantage of technicalities; that the amount stated in the notice to show cause was claimed and awarded and is due to Bookpoint. On the question whether the appeal will be rendered nugatory, it was submitted that it will not; that it has not been demonstrated that Bookpoint, which owns a substantial property along Moi Avenue in the City of Nairobi, will not be able to refund the amounts in the event of the appeal succeeding. Counsel urged that if an order for stay is granted, it should be on terms securing the amount claimed.

28. We have considered the application, the affidavits and the submissions. Counsel addressed us on the principles governing applications of this nature as stated in Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. NAI. 157 of 2006 thus:

"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."

29. Mindful, as we are, that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court's consideration, [See Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR], we do not think that the issues identified by counsel for the applicant as summarized above are frivolous. There is for instance the question whether the amended decree on the basis of which execution against the applicant is sought is indeed a decree of the court.

30. As to whether the intended appeal will be rendered nugatory, the object of Rule 5(2)(b) as stated by Githinji JA, in Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011 is the "preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals". Considering the amount involved, as was done by this Court in the case of Reliance Bank Limited vs. Norlake Investments Ltd [2002] 1 EA 231 and the circumstances under which it is contended the decree was generated, and considering also that the substantive appeal is already filed, we are inclined to grant, which we hereby do, orders in terms of prayer 3 of the notice of motion dated 30th March 2017 with the result that there will be a stay of further proceedings in Nairobi HCCC No. 1807 of 2002, Book Point Limited vs Guilders International Bank Ltd & Guardian Bank Limited, pending the hearing and determination of Civil Appeal No. 90 of 2017.

31. Costs to the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 21st day of September, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR