



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A.)

CIVIL APPLICATION NO.6 OF 2017

BETWEEN

TASMAC LIMITEDAPPELLANT

AND

ROBERTIO MACRI1ST RESPONDENT

RUGGERO SCIOMMERI2ND RESPONDENT

SHALIN CHITRANJAN GOR3RD RESPONDENT

NASSAU LIMITED4TH RESPONDENT

(Being an application for injunction pending the hearing and determination of the intended Appeal from the Ruling and Order of the High Court of Kenya at Malindi (Angote, J.) dated 3rd February, 2017

in

ELC MISC. No. 5 of 2013)

RULING OF THE COURT

By his motion on notice dated 21st February, 2017, the applicant Giancarlo Ernesto Bottini, through the firm of Kenyariri and Associates Advocates seeks, *inter alia*, orders that;

1. The Honourable Court be pleased to extend time for filing of this application seeking leave to appeal.
2. The Honourable Court be pleased to grant leave to the Applicant to appeal against the whole of the ruling of the Superior Court, Hon. **O. A. Angote J**, delivered on 3rd February, 2017.
3. The Ruling and Orders made on 3rd February, 2017 be set aside.
4. The Court do issue a conservatory order restraining the Respondents by themselves, agents, servants or employees from obstructing the Appellant's directors/shareholders or its agents access into premises of Nassau Limited on Land Reference No. 603 (Original No. M. 6/22) and Land Reference No. 12096C, whereof the Appellant is a shareholder, particularly Blue Marlin Resort in Malindi and Apartment Number 8 Block 'D' and any other properties howsoever and from accessing the Appellants documents, files and properties in the premises and offices of Nassau Limited. Further, the Respondents be restrained from interfering with the shareholding of the Appellant in Nassau Limited or interfering with the business of Nassau Limited without authority from the Appellant or from selling or transferring any property hereof pending the hearing and determination of the intended Appeal herein.

The application is premised on four grounds on its face which grounds state that the applicant has already filed a Notice of Appeal; that the intended appeal is arguable with high chances of success; that the appeal will be rendered nugatory if the respondents continue to interfere

with the shareholding of the appellant in Nassau Limited, and obstructing the rights of the appellant on the subject properties on L. R. No. 603 (Original No. M 6/22 and L. R. No. 12096C, particularly Blue Marlin Resort and Apartment No. 8 Block 'D'.

It is supported by the affidavit of the applicant sworn on 21st February, 2017.

When the application came up for hearing Mr. Kenyariri abandoned prayer No. 3 and pursued prayers 1, 2 & 4. We shall therefore deal with only the aspects of the application that touch on those three prayers.

The application is opposed through the grounds of opposition filed by Mr. Kilonzo, learned counsel for the respondent on 9th March, 2017 and the replying affidavit of Ruggero Sciommeri sworn on 20th April, 2017. According to the respondent's counsel, the application in question is incompetent as the leave sought ought to have been obtained from the High Court in the first instance. If leave to appeal is not granted this would inevitably mean that the application is incompetent and the prayer for injunction would not have a leg to stand on.

Mr. Kilonzo cited **Rule 39** of the Rules of this Court in support of that proposition. For ease of reference and clarity, it is important for us to reproduce here the provision in question;-

Rule 39 In civil matters-

(a) "Where an appeal lies on the certification by the Superior Court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the Superior Court, within fourteen days of such a decision;

(b) Where an appeal lies with the leave of the court, application for such leave shall be made in the manner laid down in Rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the Superior Court and refused, within fourteen days of such refusal."

The prayer for leave and extension of time is predicated on **Rule 39 and 41** of the Rules of this Court. In this case the relevant sub-rule is (b), which applies to appeals in which leave of the superior court is a pre-requisite. According to Mr. Kilonzo, **Rule 41** does not give the applicant any option to bypass the High Court when seeking leave to appeal. Again, we find it important to cite the said Rule.

Rule 41.

"The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the Superior Court."(emphasis added).

This Rule applies only to acts that are authorized under the Court of Appeal Rules. Granting of leave to appeal as provided for under **Rules 39 and 41** is a preserve of the superior court whose decision is being appealed against.

The extension contemplated above applies where the Court has jurisdiction to grant the orders sought in the first place. Where for instance a party has an automatic right of appeal but S/he has failed to file the appeal within the stipulated time; or where the record of appeal has not been filed on time; where documents need to be served out of time; or where the Court has given orders or directions that a particular act allowed by the Rules of the Court be done within a specific time frame and a party fails to meet such time frame.

Leave to appeal to this Court, where no automatic right of appeal exists under **Order 43** of the Civil Procedure Rules is nonetheless the preserve of the High Court and it is therefore that Court that can in the first instance extend time within which such an application may be filed. This stand is buttressed by **Order 43 Rule 3** of the Civil Procedure Rules which provides as follows:-

41 (3)

"An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made; or within 14 days from the date of such order."

What we must inevitably ask ourselves is whether if we have no jurisdiction to grant the leave sought, do we have jurisdiction to extend the time to apply for the said leave if no such application was made before the High Court? We answer that in the negative.

We agree with learned counsel for the applicant that the application before us is incompetent and is doomed to fail. If we cannot grant the leave to appeal or extend time as prayed in orders 1 and 2, then clearly we cannot entertain any other prayers sought in the said application because it is an incompetent application. For the foregoing reasons we find that this application is for dismissal and we dismiss it accordingly with costs to the Respondent.

Dated and delivered at Mombasa this 12th day of October, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR