



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI. 224 OF 2014 (UR 175/2014)

BETWEEN

VILLA CARE MANAGEMENT LIMITED.....APPLICANT

AND

GEORGE NDUATI MUNENE.....RESPONDENT

(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 Nairobi (Onyancha, J.) dated 26th May, 2014

in

H.C. C. C. No. 29 of 2013)

RULING OF THE COURT

1. On 24th November, 2005 the respondent herein and Mentor Group Ltd. entered into an agreement to develop 27 housing units on LR. No. 4857/121 (suit property) through Easthaven Company Limited. Upon completion of the said development, the respondent and Mentor Group Ltd. each retained 6 housing units and sold the remaining 15 to individuals. Subsequently, the respondent and Mentor Group Ltd. incorporated Brooklyn Springs Management Ltd. to provide management services to the 27 housing units. However, sometime in the year 2012 Mentor Group Ltd. unilaterally engaged the services of the applicant to manage all the 27 housing units.

2. The respondent was not happy because firstly, he claimed that neither he nor the other owners of the 15 housing units were consulted in the said appointment and secondly, the applicant was charging exorbitant fees as service charge which resulted in three of his houses being vacated. Consequently, the respondent filed suit in the High Court and simultaneously sought interlocutory orders against the applicant stopping it from managing the respondent's units.

3. In opposing the application, the applicant contended that there was no privity of contract between the respondent and itself, hence the said suit could not stand. Furthermore, the applicant was merely an agent and the suit ought to have been instituted against Mentor Group Ltd. being the principal. The applicant also argued that the respondent had jumped the gun in instituting the suit before referring the matter to arbitration in accordance with the memorandum and articles of association of Brooklyn Springs Management Ltd.

4. The High Court vide a ruling dated 26th May, 2014 issued an injunction restraining the applicant from managing and/or purporting to provide and charge unsolicited services in respect of the six housing units owned by the respondent pending the determination of the suit. It is this decision that is the subject of the intended appeal and the application before us.

5. The application has been brought pursuant to **Rules 5 (2) (b) & 42** of the Court of Appeal Rules (the Rules) seeking *inter alia*:-

(i) An injunction restraining the respondent from further executing the order issued on 26th May, 2014 in H. C. C. No. 29 of 2013 pending the hearing and determination of the intended appeal against the impugned ruling.

The application is anchored on the grounds that the intended appeal is arguable and would otherwise be rendered nugatory unless the order sought is granted; and the applicant continues to suffer substantial loss as a result of the impugned ruling.

6. Daniel Ojijo, a director in the applicant company, elaborating on the arguability of the intended appeal, deposed that the grounds which the learned Judge relied on in granting the injunction were a travesty of justice because he failed to appreciate the relationship between the respondent and Mentor Group Ltd; the respondent interpreted the impugned ruling to mean that he had been exempted from payment of service charge on common areas yet he still benefits from the applicant's service; that at the time of filing the application the amount owing from the respondent was Kshs.1,000,000/= and continues to accumulate; and that the learned Judge erroneously made determination on substantive matters at the interlocutory stage without hearing the parties.

7. In response, the respondent deposed that the application was misconceived and lacked merit; he neither solicited nor retained the services of the applicant at any point; the dispute was not within Brooklyn Springs Management Ltd. but was between the respondent and applicant who was a third party hence the clause on arbitration was not available; and the intended appeal was not arguable.

8. By consent the parties agreed to dispose of the application by way of both written submissions and oral highlights. However, we note that only the applicant's written submission were on record. Mr. Felix Ndolo appeared for the applicant while M/s Paula Mwaniki appeared for the respondent.

9. Placing reliance on the Supreme Court's decision in ***Dickson Mwenda Kithinji -vs- Gatirau Peter Munya & 2 Others (2014) eKLR***, it was submitted on behalf of the applicant, that apart from the established twin principles in applications under **Rule 5 (2) (b)** of the Rules, the Court should also consider a third principle, that is, whether it is in public interest to issue the order sought. The applicant faulted the learned Judge in granting the injunction in favour of the respondent. According to the applicant, the fact that there was a dispute as to the amount the respondent owed the applicant for services rendered was not a ground for issuing an injunction. To buttress this line of argument the applicant cited the case of ***Morris & Co. -vs- Kenya Commercial Bank Ltd. (2003) 2 EA 605***. It was submitted that it was not a proper case for granting an injunction since damages would have sufficed as an adequate remedy to the respondent in the event the suit was determined in his favour. The applicant also submitted that the balance of convenience tilted in its favour because the respondent was still continuing to benefit from its services. Mr. Ndolo urged us to allow the application. M/s Mwaniki on the other hand, reiterated the matters deposed in the respondent's replying affidavit and urged us to dismiss the application.

10. We have considered the application, affidavits on record, submissions and the law. We note that in as

much as the applicant has crafted the prayer he seeks as an injunction, the essence of his application is for stay of execution of the impugned ruling. Be that as it may, in Multimedia University & Another -vs- Professor Gitile N. Naituli (2014) eKLR this Court while considering an application under **Rule 5 (2) (b)** expressed,

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5 (2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui -vs- Tony Ketter & Others [2013] eKLR as follows:

- i. In dealing with Rule 5 (2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this Court.***
- v. The discretion of this Court under Rule 5 (2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.***
- viii. An applicant must satisfy the Court on both the twin principles.***
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.***
- x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.***
- xi. In considering an application brought under Rule 5(2)(b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
- xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
- xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”***

11. Being mindful not to make final findings on the intended appeal, we cannot help but note that the applicant did admit in its pleadings that it was engaged by Metro Group Ltd and not the respondent; there was no contract between the applicant and the respondent for rendering the services in respect of which the applicant claims payment. That being the case we express our doubts on the arguability of the intended appeal. However, on the nugatory aspect we find that the applicant has not demonstrated to our satisfaction how the intended appeal would be rendered nugatory in the event we do not issue the order sought. We note in as much as the applicant claims that the respondent owes it a sum in excess of Kshs.1,000,000/= for services rendered we are at this juncture unable to appreciate how the said figure was arrived at. Further, the applicant has not demonstrated that in the event the intended appeal succeeds that damages would not adequately compensate any loss suffered.

12. The totality of the foregoing is that we find that the application lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 24th day of June, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR