



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (GITHINJI, MWERA & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI. 89 OF 2011 (UR.60/2011)

BETWEEN

TRANSJUBA INTERNATIONAL LIMITED.....APPLICANT

AND

ZEP-RE (PTA REINSURANCE COMPANY).....1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

(An application for a stay of further proceedings pending the filing, hearing and determination of an intended appeal from the Ruling and order of the High Court of Kenya at Nairobi Muchelule, J) dated 3rd February, 2011

in

H.C.ELC. NO. 306 of 2008)

RULING OF THE COURT

Before us is a Notice of Motion dated 5th April 2011 that arises from the ruling and order of Muchelule, J made on 3rd February, 2011, in which the applicant prays for orders that:

1. *The application be certified as urgent and the same be heard on a priority basis;*
2. *The Honourable court be pleased to grant a stay of further proceedings of the High Court Civil Case ELC Number 306 of 2008 pending the hearing and determination of the intended appeal on such terms as it thinks just;*
3. *The costs of this application do abide by the result of the said intended appeal.*

Briefly, the facts as they relate to the application are that by way of a Chamber Summons dated 11th October 2010 the 1st respondent sought to strike out the applicant's defence in **High Court Civil suit No. 306 of 2008**. On 3rd February 2011, in granting the orders sought, the High Court struck out the applicant's defence for reasons that he was satisfied that the applicant did not have an arguable defence to the claim, as it had not exhibited any sale agreement to evidence that the title of the property in question had passed to it or that any title to the property had been issued to it by the Land's Registrar following the alleged sale.

Being aggrieved by the ruling of the High Court, the applicant filed this Notice of Motion which is before us under **Rule 5(2)(b)** of the **Court of Appeal Rules** which is premised on several grounds on its face and on a supporting affidavit sworn by **Ali Omar Jimale** wherein it was deponed that the applicant filed a Notice of Appeal in this Court on grounds that the learned judge misdirected himself in finding that there was no reasonable defence filed by the applicant, and that the court failed to take into consideration that the applicant had filed a bona fide defence which raised triable issues.

In a replying affidavit of **Jerry Sogoli**, the respondent's Company Secretary, it was deponed that the application lacks merit as at all times, the applicant was required to swear an affidavit to exhibit his alleged title which it had failed to do. It was also stated that, prior to the impugned ruling of 3rd February 2011, Okwengu, J (as she then was) had ruled on 30th June 2010, after the applicant had failed to file written submissions that, the property claimed by the applicant was the same property, the subject of a grant already issued in favour of the 1st respondent. The deponent concluded that as at the date of filing this application, the applicant had failed to produce any copy of its alleged agreement for sale, the transfer of the property to it or its alleged title.

When the application came up before us, **Mr. Lakicha**, learned counsel for the applicant stated that no record of appeal had been filed, as the file was still active in the High Court. According to counsel, the appeal was arguable as the High Court had determined the case without giving the applicant an opportunity to be heard, and to call evidence. Counsel pointed out that in the ruling, the learned judge had stated that there was an illegality, yet the applicant had filed a defence where it stated that it purchased the property, and had obtained approved subdivision plans. It was therefore unjust for the learned judge to have denied the applicant a chance to prove that it legitimately owned the property. The other issue was that there remained the question of whether there was only one property with two titles, or whether two different properties existed. As to whether the appeal would be rendered nugatory if it were to succeed and the stay of execution was denied, counsel's complaint was that if the suit were to proceed to formal proof without the applicant's defence, then the applicant would not have been accorded a fair hearing in respect of the dispute.

On his part **Mr. Wandago** submitted that according to the applicant, it was the owner of a different property with different particulars, and not the 1st respondent's property, and as such it followed that the applicant did not contest or challenge the 1st respondent's ownership of the property in question. Counsel went on to submit that despite having been given two opportunities to produce the sale agreement and the title documents, namely during the injunction application before Okwengu, J, and the application to strike out the defence before Muchelule, J, the applicant had not done so. Counsel argued further that, the applicant's claim was contradictory as, on the one hand the defence stated that the property was purchased, but on the other hand it also stated that it owned the property by virtue of a purported title granted by the President of the Republic of Kenya. Counsel concluded that in these circumstances there was no arguable appeal.

On whether the appeal would be rendered nugatory counsel submitted that, the applicant had not demonstrated that the proceedings in the High Court were irreversible, or that it could not be compensated with damages if the appeal was successful. More importantly, it was counsel's contention that the applicant still had an opportunity to participate in the formal proof proceedings, and could lodge an appeal if it was not successful upon final judgment.

We have considered the arguments, submissions and the obtaining circumstances in respect of this

application for stay of proceedings brought pursuant to **rule 5(2) (b)** of the Rules. The jurisdiction exercisable by this Court under **rule 5(2) (b)** is now well settled. It is discretionary, and for the applicant to succeed, it must satisfy the twin guiding principles, firstly that, the intended appeal is arguable, in that it is not frivolous, and secondly that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see ***Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).***

And in ***Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001*** the Court addressed what was considered to be an arguable appeal thus,

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”

As to whether the appeal is arguable and not frivolous, the applicant has argued that should we decline to stay the proceedings in the lower court, the case will proceed without the applicant’s defence, in the result that it will not have been accorded an opportunity to be heard. The 1st respondent’s reply to this is that, the applicant was provided with sufficient opportunity to file a replying affidavit to prove its ownership of the property in question by producing the sale agreement and title in both the injunction application which was heard by Okwengu, J. and in the application to strike out the defence upon which premises, Muchelule, J. struck out the applicant’s defence.

In adherence to the laid down requirements, what we are required to determine at this stage is whether or not there is an arguable appeal, and not whether or not the appeal will be successful, as this will be canvassed before another bench. This being the case, we take the view that, there is a question for determination which is whether or not the applicant was accorded an opportunity to present its case. In finding that there is a question for the determination by this Court, the only conclusion we can reach is that the appeal is arguable.

On whether the appeal would be rendered nugatory if the application was to be declined and the appeal were to succeed, it is apparent that the dispute is far from finalization. There is still the process of formal proof which is yet to be heard and determined by the court below. As to what defines proceeding by formal proof was outlined by Emukule J, in the case of ***Samson S. Maitai & Another vs African Safari Club Ltd & Another [2010] eKLR***, where it was stated thus:-

“...I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings-refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is "that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

In agreeing with the learned judge’s observation, it is evident that the applicant has yet another opportunity to participate in the trial, cross-examine plaintiff’s witnesses and make appropriate submissions. And if the court below should find in favour of the 1st respondent, there is still further opportunity to appeal that decision in this Court. All told, we are satisfied that all will not be lost to the applicant if, we declined to grant a stay of the proceedings in the lower court. Given these circumstances, we do not agree that the appeal would be rendered nugatory should we decline to grant the stay of proceedings in the lower court.

Accordingly, relying on our decision in ***David M. Silverstein vs Atsango* [2002] 1 KLR 867** we find that the applicant has failed to satisfy us that the success of the intended appeal would be rendered nugatory, and we order that the Notice of Motion dated 5th April 2011 be dismissed with costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of MARCH, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR