



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU, M’INOTI. JJA)

CIVIL APPLICATION NO, NAI 209 OF 2014 (UR. 165/2014)

BETWEEN

KWAME KARIUKI.....1ST APPLICANT

RUTH ABRAHAM KARIUKI.....2ND APPLICANT

AND

MOHAMED HASSNALI ALI MOHAMED JANMOHAMED.....1ST RESPONDENT

HAMIDA MOHAMED HASSANALI JAN JANMOHAMED.....2ND RESPONDENT

KARANJA KABAGE.....INTEESTED PARTY/3RD RESPONDENT

***(Application for stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi
(Nyameya, J.) dated 20th March, 2014***

In

ELC. NO. 599 of 2011

RULING OF THE COURT

Before us is an application expressed to be brought under **rule 2, 5(2) (b) and 47(1) & (2)** of the Court of Appeal Rules. It is dated 11th August, 2014 and lodged in this Court’s Registry on 12th August, 2014. It substantively seeks an order of stay of execution of the ruling and order delivered on 20th March, 2014 in Nairobi ELC No. 599/2011 pending the hearing and determination of an intended appeal. The application is founded on the grounds in the body of the application and the supporting affidavit deposed by **Kwame Kariuki**, the 1st applicant. It is opposed by a replying affidavit deposed by **Karanja Kabage**, the interested party, on 2nd September, 2014 and a notice of preliminary objection dated and filed on 4th September, 2014.

The brief background to this application is that the applicants **Kwame Kariuki** and **Ruth Abraham**

Kariuki filed High Court ELC No.599 OF 2011 on 1st day of November, 2011 against the 1st and 2nd respondents, **Mohamed Hassan-Ali Ali Mohammed Jan Mohamed and Hamida Mohammed Hassan Ali Jan Mohammed**, seeking various reliefs.

The suit was accompanied by an application seeking interlocutory reliefs which were subsequently granted on 14th November, 2011 and later amended to bind the interested party after he had been joined to the proceedings. In response to the suit and the application, the respondents filed a notice of preliminary objection dated 28th November, 2011 contending that the Court had no jurisdiction to hear the matter.

On 6th July, 2012 the interested party **Karanja Kabage** filed an application seeking leave to be joined as a party to the proceedings, which orders were granted on 17th July, 2012. The interested party then filed an application dated 9th August 2012 seeking stay of the proceedings.

On 18th September, 2012, an application to refer the matter to arbitration was allowed with a rider that the status quo on the suit property be maintained. On 18th June, 2013 the interested party filed an application dated 12th June, 2013 expressed to be brought under **section 7** of the Arbitration Act No.4 of 1995, seeking an order that the applicants do pay the sum of **US\$133,000.00** into court or into an interest earning bank account as an interim measure of protection pending arbitration. The application was opposed by a replying affidavit deposed by **Kwame Kariuki** on 2nd August, 2013.

On 20th March 2014, **Nyamweya, J.** granted the interested party's application in the following terms:

"1. That the plaintiff shall within 30(thirty) days of the date of this ruling deposit the sum of Kenya shillings 6,000,000.00 (six million) in an interest earning account to be opened in the joint names of the plaintiffs and interested party's' Advocates as security for costs pending arbitration and/or the final determination of the suit herein.

2. Parties shall be at liberty to apply.

3. The costs of the interested party's chamber summons shall be in the cause."

The applicants were aggrieved by those orders and filed a notice of appeal dated 27th March, 2014. On 8th of April, 2014 the applicants applied before the High Court for stay of execution. The application was heard and dismissed on 31st July, 2014, paving the way for the presentation of the application now before us. On the preliminary objection, **Mr. Ndambiri** argued that the applicant stands non suited because the order for security for costs stipulated clearly that the security for costs was to last pending either the determination of the arbitration proceedings which proceedings were now spent; that the orders made under **Order 26** of the Civil Procedure Rules are appealable as of right and as such no leave of court was required before the applicant could seek a relief from this Court; that the applicants are therefore properly before this Court and are entitled to a decision on their application.

Turning to the merits of the application, **Mr. Ndambiri** argued that the applicant has satisfied the threshold for granting a relief under the rule 5(2)(b) because both the draft memorandum of appeal and the grounds in the body of the application raise an arguable appeal; that the learned judge erred by holding that the interested party had been deprived of possession and income from the portion marked No.11 on LR. 1160/42; and by failing to hold that: there was no court order stopping the interested party from taking possession and or occupying house No. 11; that the dispute was only in respect of construction of an extra unit on portion No.11; and that the order for maintenance of status quo recorded on 18th September, 2012 did not stop interference with the property but only further construction. Lastly that it is submitted that it was arguable whether the interested party, in the absence of a specific claim or adduced evidence, was entitled to security for costs based on the premium rental value of the suit property.

On whether the appeal, if successful would be rendered nugatory, **Mr. Ndambiri** argued that the amount

assessed was not only prohibitive but also based on no evidence and that the arbitration proceedings sought to be secured had ended with an award of costs of **Kshs.200, 500.00**. If any security for costs is to be ordered, counsel submitted, the same should not exceed that figure. It was also contended that the order on security for costs had been overtaken by events or in the alternative the applicant should be allowed to provide a bank guarantee instead of cash deposit to avoid crippling the applicants real estate business.

On case law, the applicant relied upon **Chevron Kenya Limited (Caltex) versus Kenyota Holdings Ltd [2009] eKLR** for the proposition that where the amount ordered by the High Court for security would cause an investor hardship by reason of the sudden withdrawal of such sums from its working capital, the order that would commend itself to a court of law would be the granting of a conditional stay. The ruling in **Nation Media Group and another versus Chirau Ali Mwakwere[2010]eKLR** was cited for the proposition that where there is an offer in good faith for a bank guarantee, such guarantee would be appropriate.

On the authority of **KNWESI Company Limited & 2 others versus Wendy Martin [2011] eKLR, Five Forty Aviation Ltd versus Trade Winds Aviation services Ltd [2010] eKLR, and E. MuriuKamau& another versus National Bank of Kenya Limited [2009 eKLR**, it was argued that the overriding objective principle confers on this Court considerable latitude in the interpretation of the law and the rules made thereunder so as to achieve any or all of the attributes of the overriding objective, particularly the interests of justice.

Lastly the case of **Caltex Oil (Kenya) Limited Versus Evanson Njiiri Wanjihia[2009] eKLR** was cited for the proposition *inter alia* that the question as to whether an appeal would be rendered nugatory must be considered within the circumstances of each particular case and that conflicting claims of both parties must be considered where circumstances permit.

In response **Mr. Mbobu**, learned counsel for the respondent urged us to dismiss the application on the grounds that the appellants were the beneficiaries of the orders on status quo of 18th September, 2012, by which the interested party was prevented from taking up possession of the suit property for an undeterminable period and had therefore to meet the consequences of that order so as to cushion the interested party against any ultimate loss from that status quo order. Counsel further argued that there was no threat of execution and that the money was being held in a secure neutral account so as to be available to the successful party at the conclusion of the litigation. On that account he urged us to dismiss the application.

The interested party relied on **Kenya Shell Limited versus Kibiru& another [1986] KLR 410** for the proposition that in an application for stay of execution under rule 5(2) (b) of the Court of Appeal Rules, the applicant is not required to give security for due performance of the decree; that all what is required is a duly filed notice of Appeal; that the Court must address its collective mind to the question whether refusal of an order of stay would render the appeal nugatory; that the Court ought to balance the interests of a successful litigant who should not be unduly deprived of the fruits of his judgment against those of an applicant whose right of appeal should not be rendered nugatory. The interested party also relied on the decisions in **Valibhdas Raghavji Jetiwa versus Ghashikant Zaverchand Vasin Shah t/a Supreme Sytles, CA Nai 26 of 1989 (UR),Rose MbitheNdetei versus Mathew KyaloMbobu, CA Nai 86/2008 UR 49/08,Githunguri versus Jumba Credit Corporation (No.2) 1988 KLR 838 and J.K. Industries versus Kenya Commercial Bank Ltd & Another [1987] KLR 506** on the application of the relevant considerations under rule 5(2)(b).

We have carefully considered the application, the submissions of learned counsel, the authorities cited and the law.

On the interested party's preliminary objection, it has been held without number that it is the filing of a notice of appeal, which enables this court to assume jurisdiction in an application under rule 5(2)(b). There is no dispute that the applicants have a notice of appeal lodged against the decision sought to be impugned. It matters not that it may ultimately be struck off (See **Rose Mbithe Ndetei versus Mathew**

Kyalo Mbobu (supra) and Safaricom Limited versus Ocean View Beach Hotel Limited & 2 others, Civil Application No. 327 of 2009 (UR).

It was correctly submitted that security for costs is provided for under **Order 26** of the Civil Procedure Rules. What is in controversy is the right of appeal from a decision under that Order. **Order 43 rule (1)** provides the answer to that controversy because under it, decisions made under **Order 26** are appealable to this Court as of right. We are therefore satisfied that no leave was required before the applicant could appeal to this Court.

Turning to the merits, it is trite that the jurisdiction of this Court under Rule 5(2)(b) is original, independent and discretionary. The discretion is exercised judiciously and with reason; not on whim caprice or sympathy (see **Githunguri versus Jimba Credit Corporation Limited No.(2) (supra)**). Rule 5(2)(b) is a procedural innovation designed to enable the Court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. (See **Equity Bank Ltd versus West Link NBO Civil Application No. 78 of 2011**). The conditions to be met before a party can obtain a relief under **rule 5(2) (b)** are first that the appeal or the intended appeal is arguable. By arguable it does not mean an appeal or intended appeal which must succeed but one which raises a bonafide issue worthy of consideration by the Court. (See the case of **Kenya Tea Grounds Association & another versus Kenya Planters Agricultural Workers Union, Civil Application No. Nai 72 of 2001 (UR)** and **Joseph Gitahi Gachav & another versus Planeer Holdings (A) Ltd and 2 others Civil Application No. 124 of 2008**). An appeal need not raise a multiplicity or, any number of such points; a single arguable point is sufficient. (See **Damji Pragji Mandaria versus Saralee Household & Body Care (K) Ltd Civil application No. Nai 345 of 2005**, **Silverstein versus Chesoni [2002] 1KLR867**, **Kenya Railways Corporation versus Edermann Properties Ltd Civil appeal No. Nai 176 of 2012** and **Ahmed Musa Ismael versus Kimba Ole Nta Morua & 4 others, CANai 256/2013**). To succeed, the applicant must establish both limbs. (See **Republic versus Kenya Anti Corruption Commission & 2 others [2009] KLR 31**, **Reliance Bank Ltd versus Norlake Investments Ltd [2012] IEA 227** and **Githunguri versus Jumba Credit Corporation (supra)**).

Lastly the jurisdiction under rule 5(2)(b) has been by the overriding objective principle introduced by **section 3A and 3B** of the Appellate Jurisdiction Act. These provisions emphasize the need to apply the principle of proportionality in balancing the competing claims of the parties so as to advance the interests of justice. (See **E. Muriu Kamau versus National Bank of Kenya Ltd [2009] EKLR**).

On whether the applicant has established an arguable appeal, our answer is in the affirmative. Among the issues raised by the applicant which we thin merit consideration by this Court is whether the injunction issued in favour of the applicants which were later extended to apply to the interested party bared the interested party from taking possession of portion II of the suit property or only restrained further development and erection of structures beyond what was already constructed; whether the learned Judge erred by ordering security for costs in the sum of **Kshs. 6,000,000.00** on the basis of a valuation report and in the absence of a substantive pleading; and the learned trial judge could *suo moto* extend preservative orders to cover the hearing and determination of the entire whilst the interested party had sought such orders for the duration of the intended arbitration. These issues are in our opinion not frivolous.

As regards whether the appeal, if successful, will be rendered nugatory, should the applicants succeed on appeal, it is plainly obvious to us that the applicants will have been deprived of the use of their Kshs 6,000,000/- for a considerable period, thus exposing their business to ruin. On the other hand, the interested party who continues to be kept out of possession of the premises deserves to be protected from ruin should the applicant's intended appeal fail.

Considering all the circumstances of this application, the order that best commends itself to us is to grant stay of execution on condition that the applicants provide a bank guarantee in the sum of Kshs 6,000,000. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

Dated and Delivered at Nairobi this 6th day of March, 2015.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

P.M. MWILU

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.