



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GBM KARIUKI, J. MOHAMMED & ODEK, JJ.A.

CIVIL APPLICATION NO. NAI 101 OF 2015 [UR 82/2015]

BETWEEN

AGUTHI ENTERPRISES LIMITED.....APPLICANT

AND

HUSSEIN IBRAHIM NUNI.....RESPONDENT

(An application for stay of execution from the ruling & orders

of the High Court of Kenya at Nairobi by the (Mutungi, J)

delivered on 25th March, 2015

in

HCCC NO. 432 OF 2014)

RULING OF THE COURT

1. Before us is a Notice of Motion application under certificate of urgency

dated 20th April, 2015 brought pursuant to **Sections 3, 3A and 3B of the**

Appellate Jurisdiction Act Cap. 9 and Rules 5(2)(b) of the Court of Appeal Rules (Rules) seeking **inter alia** a temporary injunction and stay of execution of the ruling and orders dated 25th March, 2015 in ELC No. 432 of 2014 pending the hearing and determination of the intended appeal.

2. The genesis of this application is that the respondent and the applicant are parties to a lease agreement dated 9th December, 2013 (1st lease Agreement) over property known as **LR .NO.36/II/38** (the suit property) for a period of 27

years and 3 months. It was the respondent's case that on the expectation that the applicant would honor its obligation, he paid the contractual rental amount of KShs.1.8 million for the first two years of the lease as agreed by the parties. The applicant was to hand over possession of the suit property to the respondent on 1st April, 2014, but it had unlawfully declined to hand over possession of the suit property to him despite having received rent as agreed.

The applicant has at all material times been aware that the purpose of the lease was to allow him utilize the suit property by constructing a 7 storey building and collect all rent and income from the property until the date of termination of the lease by effluxion of time when the building would then be handed back to the applicant; that the applicant commenced discreet negotiations with third parties for the purpose of either selling or leasing the suit property to them at a higher rental income. The respondent was advised by the officials from the registry of documents that the applicant had presented another lease agreement (2nd lease agreement) over the suit property to a different lessee for registration which was rejected since the 1st lease agreement had already been presented for registration. It is for that reason that the respondent filed an application dated 7th April, 2014 seeking several orders restraining the applicant either by itself, its appointed director, servants, agents, advocates or any other person acting on its behalf from terminating the lease, lease the suit property to a third party, advertising or offering for sale or purporting to sell, charging or offering to charge the suit property, collecting

rent on the suit property. He also sought for a mandatory injunction enjoining the applicant to grant him possession of the suit property.

3. The applicant in opposition to the said application filed grounds of objection dated 24th June, 2014 and a replying affidavit sworn on the same date by its directors. It contended that the 1st lease agreement was ineffective, unconscionable and fraudulent for having unreasonable terms as a lease for a term of 27 years with a flat rent of approximately KShs.200,000/= throughout the period without any increment for the entire period was unreasonable and therefore null and void. The applicant denied being a party to the 1st lease agreement.

4. The High Court, *Mutungu, J*, in a ruling dated 25th March, 2015, granted

an injunction restraining the applicant either by itself, its appointed directors, servants, agents, advocates or any person acting on its behalf from terminating the 1st lease agreement, from advertising or offering for sale or purporting to sell, lease or offer for lease or charge, alienating or in any other way alienating the suit property. The learned Judge further granted a mandatory injunction enjoining the applicant to grant the respondent possession of the suit property with costs of the application. The learned Judge further ordered that the parties maintain status quo for a period of 30 days from the date of the said ruling. It is that decision that the applicant intends to appeal against and filed a Notice of Appeal dated 26th March, 2015 on 30th March, 2015. In the meantime the applicant has filed the present application seeking injunction

and stay of execution of the ruling dated 25th March, 2015.

5. The respondent in opposition to the present application, has filed a replying affidavit on 9th June, 2015 sworn on 5th June, 2015.

Submissions by counsel

6. At the hearing of the application, Mr Mbabu, learned counsel for the applicant, submitted that the current application is arguable and not frivolous. Counsel stated that the applicant has already filed an appeal and the same has been served. He argued that the orders granted to the respondent were undeserved; that the applicant is still in possession of the suit property and the respondent has filed for eviction orders which were scheduled for hearing on 1st

July, 2015. Counsel argued that the learned Judge granted the respondent a mandatory injunction at the interlocutory stage. He urged us that for the foregoing reason the applicant should be granted orders staying the mandatory injunction granted. Counsel maintained that the 1st lease agreement is invalid for the reason that the same is not registered as required by law and the same cannot take effect until it is registered. Further, counsel pointed out that the persons who allegedly signed the 1st lease agreement have not been identified by the respondent and their names do not appear on the document; and that this issue was raised in the High Court. It was counsel's submission that the

1st lease agreement has four commencement dates and therefore not clear when the same was to commence and the respondent failed to put in any

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supporting document to clarify that issue. Counsel maintained that the applicant has an arguable appeal as the 1st lease agreement is invalid and there are contested issues of fact. Lastly, he submitted that if the orders sought are not granted the applicant will suffer as there are already existing buildings with a rental income of KShs.400,000/= a month.

7. In opposition to the application, Mr Muriithi, learned counsel for the

respondent, submitted that the issue of commencement date of the lease is of paramount importance as is the date of possession. He stated that the recital

No. 4 of the 1st lease agreement is very clear that the commencement date was to be 1st April, 2014 and the said date was very clear when the orders of mandatory injunction were granted. Further, that in a letter dated 21st March,

2014, the applicant acknowledged the lease and the date of commencement.

Counsel submitted that for these reasons, the applicant has no arguable appeal. Counsel maintained that the lease was presented at the Ministry of

Lands on 19th February, 2014, for registration and the same could not be registered as the title was mortgaged. Further, that the replying affidavit by the applicant does not challenge facts adduced by the respondent; that it is the duty of the court to give effect to the terms of a contract and it is also the duty of the parties to a contract to honour the contractual obligations. Counsel maintained that it is a known principle that a party cannot rely on a contract which it has breached. That the dispute is very clear that the applicant has refused to give possession under the contract. As to whether the appeal will be

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rendered nugatory, counsel argued that the respondent has paid 2 years rent to the applicant but the suit property is still retained by the applicant and also at the end of the lease period, the applicant will take possession of the commercial building the respondent will have constructed without having paid any money towards its construction as per the agreement.

Determination

8. We have considered the application, the grounds in support thereof, the replying affidavit filed on behalf of the respondent, the able submissions by counsel and the law. The principles applicable for the determination of applications under **rule 5(2) (b) of the Court of Appeal Rules** are well settled as was observed by this Court in **ISHMAEL KAGUNYI THANDE V HOUSING**

FINANCE KENYA LTD., CIVIL APPLN NO. NAI 157 OF 2006 (unreported):

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that 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 that appeal will be rendered nugatory.”

(See Githunguri v Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838 and J.K. Industries Ltd v Kenya Commercial Bank Ltd, (1982-88)

9. As pointed out in the case of **EQUITY BANK LIMITED V WEST LINK**

MBO LIMITED, CIVIL APPLN NO. NAI 78 OF 2011 that the true nature of an

application under **Rule 5(2)(b)** is an interlocutory application in an appeal

pending before this Court; and that **Rule 5 (2)(b)** is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal.

10. The principles guiding the court in the exercise of this discretion have been laid down by this Court in **STANLEY KANGETHE KINYANJUI V TONY**

KETTER & 5 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. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.

ii. *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.*

iii. *The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.*

iv. *In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.*

v. *An applicant must satisfy the court on both of the twin principles.*

vi. *On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.*

vii. *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. Joseph Gitahi Gachau & Another v.

Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of

2008.

viii. *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. Damji Pragji (supra).*

ix. *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.*

x. *Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.*

xi. *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.”*

11. We have considered the respective position of the parties. It is not in

dispute that the applicant lodged a notice of appeal on 30th March, 2015 and therefore, has expressed its intention to appeal against the High Court decision

dated 25th March, 2015. What this court is called to determine is whether the intended appeal if successful will be rendered nugatory if orders sought are not

granted and whether the applicant has demonstrated that the intended appeal is arguable. We are alive to the fact that an arguable appeal is one which

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ought to be argued fully before court, not one which must necessarily succeed.

(See *JOSEPH GITAHU & ANOTHER V PIONEER HOLDINGS LIMITED & 2*

OTHERS, CA NO. 124 OF 2008). The applicant argues that the mandatory injunction granted was not deserved by the respondent for the reason that the alleged contract was not signed by it and the alleged contract also has no commencement date. We, therefore, are satisfied that the applicant has an arguable appeal *inter alia* as to whether there was a valid contract between the parties.

12. As to whether the appeal, if successful, will be rendered nugatory unless

we grant the orders sought, we think the balance tilts in favour of maintaining the status quo pending the hearing and determination of the intended appeal as was the case in *TOTAL KENYA LTD V KENYA REVENUE AUTHORITY* where the court held that:

“Rule 5 (2) (b) emphasises the centrality of loss to the parties on both sides of the appeal. That is what the court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory.”

During the hearing of the application, it was confirmed to us that the applicant is still in possession of the suit property and the respondent has already applied for eviction orders. It is not clear whether the said orders have already been granted or not but we are satisfied that the intended appeal, if successful would be rendered nugatory if a stay order is not granted as there is a likelihood that the applicant may be evicted.

13. In the circumstances, we are persuaded that the applicant has satisfied

the two conditions for the grant of a stay of execution pending the hearing and determination of the intended appeal.

14. Accordingly, we allow the application and order that the orders issued by the High Court, *Mutungi, J* dated 25th March, 2015, be and are hereby stayed pending the hearing and determination of the intended appeal herein. Costs shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 31st day of July, 2015.

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

J. O. ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR