



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, J.J.A)

CIVIL APPLICATION NAI. 73 OF 2015 (UR 62/2015)

COUNTRY MOTORS LIMITED APPLICANT

AND

TREADSETTERS TYRE LIMITED RESPONDENT

(Being an application for stay of execution pending the hearing and determination of the appeal against the ruling of (Havelock, J) dated 1st April, 2014

in

H.C. CIVIL CASE NO. 157 OF 2005)

RULING OF THE COURT

The applicant **COUNTRY MOTORS LIMITED** filed a Notice of Motion application dated 18th March 2015. The application was made pursuant to **Rule 5, 41 and 47** of this Court's Rules. It was supported by the affidavit of **P. S. PANDAL** sworn on the same date. In the main the applicant sought the following orders:-

- “2. THAT there be a stay of execution of the decree issued in MILIMANI HIGH COURT CIVIL CASE NUMBER 157 OF 2005 TREADSETTERS TYRES LIMITED VERSUS COUNTRY MOTORS LIMITED and of any warrants issued therein or extended pending inter parties (sic) hearing of this application;***
- 3. THAT an order do issue in the interim directing M/S Victoria Blue Services auctioneers to release the Applicant's attached truck registration number KAY 900J and trailer ZB 9879 on a running attachment pending the hearing and determination of this application inter parties (sic);***
- 4. THAT an Order of stay of execution do issue pending and determination of the Applicant's Appeal on condition that the decretal sum of Kshs.10,000,000/= be secured by way of a bankers guarantee.”***

The respondent did not file any replying affidavit.

The background to the Notice of Motion was that 12th July, 2013 the Deputy Registrar of the High Court issued certain orders arising from an application before her. The High Court had directed that the matter be placed before the Deputy Registrar. It was the applicant's contention that the orders of the Registrar issued on 12th July 2013 were not in consonance with the Court's ruling of 14th December, 2012. Following this ruling, the applicant filed an application dated 13th August, 2013 which came for hearing before Havelock, J. The applicant sought the following orders:

- “1.
2.
3. ***THAT an order for stay of execution of the decree herein do issue pending the hearing and determination of this application inter parties (sic);***
4. ***THAT the ruling of the Deputy Registrar made in this suit on 12th July, 2013 pursuant to the Defendant/Applicant's application dated 11th July, 2013 and all subsequent orders arising there from be set aside;***
5. ***THAT in the alternative, the Defendant/Applicant be granted leave to appeal the Deputy Registrar's ruling made on 12th July, 2013 before a Judge of this Court;***
6. ***THAT the Honourable Court do issue any further orders or grant further relief that it may deem apt in the interest of justice;***
7. ***THAT a date for inter parties (sic) be given;***
8. ***THAT the costs of this application be provided for.”***

On 1st April 2014, Havelock, J declined to set aside the ruling of the Deputy Registrar dated 12th July, 2013 and found that the ruling was in consonance with the ruling of the court dated 14th December, 2012 and further found that: ***“The warrants of attachment were amended pursuant to the directions issued by this Court on 6th June, 2013. The Deputy Registrar corrected and amended the warrants by reviewing the decretal sum and the interest thereon, as well as the taxed costs.”***

It was on the basis of Havelock, J's refusal to set aside the orders of the Registrar that the appellant filed the Notice of Appeal dated 24th November, 2014. The Notice of Appeal in part stated as follows:

“TAKE NOTICE that the Defendant herein COUNTY MOTORS LIMITED being dissatisfied with the ruling of the Honourable Justice J. B. Havelock given at Nairobi on the 1st day of April, 2014 intends to appeal to the court of appeal against the whole of the said ruling.”

From the record, it is apparent that the applicant had moved the High Court seeking leave to appeal out of time against the ruling of Havelock, J delivered on 1st

April, 2014. On 18th November, 2014 the court granted leave to the applicant to file a Notice of Appeal out of time. The leave was conditional on the applicant depositing Kshs.10,000,000.00 in an escrow account within 7 days and filing the Notice of Appeal within 10 days. The period of 7 days was extended to 30 days by consent of the parties dated 19th November 2014. However, on 11th December 2014 the applicant filed another application dated 10th December, 2014 seeking an order to allow the applicant to provide a Bank guarantee as opposed to the deposit of Kshs.10,000,000. The applicant also sought an

order of stay of execution. The Court granted an order of stay of execution on 15th December 2014 pending the interpartes hearing of the application. In the meantime the matter was fixed for mention on 11th February 2015 on which date the file was unavailable at the registry. As it would be expected the auctioneers moved in on 2nd March 2015 and attached the applicant's properties. On 3rd March 2015 the applicant moved the court and sought an order of stay which was granted on 4th March 2015 pending the interpartes hearing on 9th March 2015.

On 9th March 2015 the Court granted a conditional stay and ordered that the applicant deposits the total sum of Kshs.10,000,000 within 14 days. The applicant was aggrieved by the turn of events as his application for stay dated 3rd March, 2015 and for variation of the terms dated 10th December 2014 had not been heard.

During the plenary hearing Mrs. McAsila learned counsel for the applicant urged us to find that the applicant has an arguable appeal. She faulted the ruling of Havelock, J who had found that the Deputy Registrar was vested with powers to review the decretal sum in the warrants of attachment. According to the applicant, the Deputy Registrar was not seized of such power.

Mr. Nyaanga learned counsel for the application opposed the application. He submitted that the Notice of Appeal was against the ruling of the High Court that had found that Deputy Registrar had jurisdiction to review the decretal sum, interest and taxed costs before issuance of a warrant of attachment and had nothing to do with the prayers sought in the motion before us.

Mr. Nyaanga further pointed out that the sum of Kshs.10,000,000.00 was to be paid into an escrow account, initially within 7 DAYS and later by consent within 30 DAYS and that the appeal would not be rendered nugatory, this being a money decree and the fact that the money would be secured in the escrow account.

As stated above, this is an application under **Rule 5(2) (b)** of this Court's Rules.

The principles to be considered before the grant (or otherwise) of an order for stay are now fairly well settled by case law. Firstly an applicant has to show that he has an arguable appeal and secondly that if the appeal or intended appeal succeeds, the success would be rendered nugatory. In the case of **ISHMAEL KAGUNYI**

THANDE VS HOUSING FINANCE KENYA LTD CIVIL APPLICATION NO. NAI 157 OF 2006 (unreported) it was observed:

The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now 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 vs Jimba Credit Corporation Ltd, No. 2 [1988] KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982- 1988].)

In the instant application, the applicant's grievance as conceived in the affidavit in support of the Motion was that it had two pending applications which are yet to be determined before the High Court. The first one was filed on 10th February, 2014 seeking a variation of the order to deposit 10,000,000.00 in an escrow account. They would prefer to provide a bank guarantee. The second application is as regards stay of execution filed on 3rd March, 2015 and which was still to be heard.

The above reasons are in stark contrast with the submissions of Mrs McAsila before us. She informed us that they were aggrieved by the decision of Havelock, J delivered on 1st April, 2014 who found that the Deputy Registrar had jurisdiction to review the decretal sum, the interest as well as the taxed costs before

issuance of warrants of attachment. Firstly, whether there are two undetermined applications before the High Court in our view does not constitute an arguable appeal. The argument put forth by Mrs McAsila that they are challenging Havelock, J's ruling has nothing to do with the two undetermined applications. In short, the prayers in the Notice of Motion are unrelated to the reasons for the intended appeal as conceived in the Notice of Appeal. It is because of this that we are skeptical that the appellant has an arguable appeal. However, be that as it may, we do not wish to say anything more at this stage.

On the nugatory aspect, we note that this is a money decree. Indeed the order was that the sum of Kshs.10,000,000.00 was to be deposited in a joint account. The money being in an escrow account is a sure way of safeguarding the same until the appeal is heard and determined. The appeal if successful would not be rendered nugatory.

For the foregoing reasons this application is dismissed with costs.

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

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR