IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & MWILU, JJ.A)

CIVIL APPLICATION NO. 74 OF 2015 (UR 63 OF 2015)

BETWEEN

HOUSING FINANCE COMPANY OF KENYA..................APPLICANT

AND

SHAROK KHER MOHAMED ALI HIRJI................1ST RESPONDENT

WATTS ENTERPRISES LIMITED.......................2ND RESPONDENT

(Application for stay of execution pending appeal from the Judgment and Decree of the

High Court of Kenya at Nairobi (Honourable Lady Justice J. N. Khaminwa)

dated 29th November 2010)

in

HCCC NO. 223 OF 2006)

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RULING OF THE COURT

1. This is an application by **HOUSING FINANCE COMPANY OF KENYA**, the applicant, under rule 5(2) (b) of the Rules of this Court for, *inter alia*, an interim stay of execution pending the determination of an intended appeal against the decision of the superior court below (Khaminwa J, as she then was) given on 29th November, 2010, in which judgment was entered in favour of the 1st Respondent in the sum of Shs.20,434,226.54 with interest at 26% per annum from 19th January 2000 until payment together with costs of the suit. The application is based on the grounds on the face of it and supported by an affidavit of **Martin Machira**, an Advocate and legal manager – litigation with the applicant. The respondent, **Sharok Kher Mohammed Ali Hirji** filed a replying affidavit to the application.

2. In brief, the facts as they relate to this application are that the respondent instituted the proceedings before the High Court as the donee of a Power of Attorney dated 24th February 2003 and registered as P/A No.37723/1 from **Firoz Nurali Hirji** (hereinafter referred to as Firoz). **Firoz** was the registered proprietor of property known as **LR No.7785/310** (suit premises) situated within Runda Estate of Nairobi (the suit property). Firoz obtained a financial facility of Shs.600,000/= from the applicant secured by way

of charge over the suit premises. The applicant sought to exercise its statutory power of sale and sold the suit premises on 17th January 2000 following default by Firoz. In the suit before the High Court, Firoz disputed the validity and lawfulness of the sale including the conduct of the applicant and the sale price of Shs.6,050,000/= which Firoz felt was below the market price, estimating the market value to be Shs.20,000,000/=. It was contended that certain financial accommodation and repayment proposals had been made and/or entered into between the applicant and Firoz which would have otherwise forestalled the applicant's actions in exercising its power of sale over the suit premises.

3. The applicant sought further orders relating to conditional stay of execution upon the applicant depositing with the court an unconditional bank guarantee on 20th November 2012, and orders lifting the stay orders issued on 13th October, 2014 following an application by the 1st Respondent.

4. **Mr. D.K. Musyoka** teaming up with **Mrs. N.W Karanu** appeared for the applicant while **Mr. Ochieng** holding brief for **Mr. Taib** appeared for the respondent. By consent of the parties, we granted leave and admitted such further affidavits as had been filed by the parties respectively prior to the hearing date. The respective counsel also filed their lists of authorities.

5. Mrs. Karanu, learned counsel for the appellant submitted that the appeal was arguable as the trial judge had failed to recognize that the 1st respondent had been refunded Shs.5,079,159/= from the sale proceeds of Shs.6,050,000= the Judge having considered the value of the house at the time of sale at Shs.20,000,000/=. In addition, counsel submitted that the judgment was re-opened by Justice Gikonyo in varying the interest rate from simple to compound yet the court had by its judgment issued on 29th November 2010, become *functus officio* and no application for review had been made or the issue of interest pleaded. Counsel also faulted the 1st respondent's extraction of the decree and commencement of execution proceedings without seeking leave of court contrary to **section 96 of the Civil Procedure Act**. Counsel further raised an issue of the colossal escalation of costs from the Shs.20,000,000/= value attributed to the house and the over Shs.700,000,000/= now being sought by the 1st respondent. In support of this argument against justification for the award of compound interest, counsel referred us to this court's case of **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya [2015] eKLR** where the judges noted that a person who was not a trader could recover substantial rather than nominal damages in contract.

6. On whether the success of the appeal would be rendered nugatory if the stay of execution was refused, counsel submitted that the decretal sum was Shs.722,581,646/= and there was no demonstration of capacity by the respondent to refund should the appeal succeed as they had argued before the high court. Although the record of appeal is yet to be filed, counsel submitted that what is required is a valid notice of appeal which the appellant has filed. Counsel relied on the case of **Peter Njuguna Njoroge v Zipporah Wangui Njuguna [2013]eKLR** where the court addressed itself to the validity of appeals in determining applications under rule 5(2)(b) and the remedies that are available for failure to file a record of appeal. Counsel concluded that the applicant is ready and willing to give security of Shs.20,000,000/= less the Shs.5,079,159/= paid as soon as so ordered.

7. Mr. Ochieng, learned Counsel for the 1st respondent opposed the application and argued that the two limbs of arguability and nugatory must be jointly proved. On whether the appeal is arguable, counsel argued that the applicant had no basis obtaining the stay having obtained a stay of execution from the High Court five years ago and thereby failing to comply with the stay terms. Counsel further argued that the applicant had not raised any issue with the finding by the trial court that the applicant had failed to issue notice prior to raising interest for the 1st respondents facility which formed the basis of the entire impugned judgment.

8. In opposing the applicant's argument on whether the appeal would be rendered nugatory, **Mr. Ochieng** submitted that there was nothing to render nugatory as no record of appeal had been filed. Counsel was categorical that the applicant does not intend to appeal and the application should be dismissed.

9. In his reply, **Mr. Musyoka** urged the court to exercise its original jurisdiction under rule 5(2)(b).

Counsel informed us that the ruling of Gikonyo J., has to be read together with that of the trial judge, Khaminwa, J. and that no separate appeal would be required. Regarding the nugatory aspect of the appeal, counsel referred us to **paragraph 12** of the applicant's further affidavit deponed by **Martin Machira** on 10th June 2015 which dealt with the capacity of the 1st respondent to refund.

10. The principles governing the exercise of the court's jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)**, thus: -

> ***"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-***
>
> 1. ***That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
>
> 2. ***That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."***

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See **Republic v. Kenya Anti-Corruption Commission & 2 others [2009]** KLR 31).

11. Before we address ourselves to the principles, respective counsel addressed us on whether our jurisdiction has been properly invoked in light of the record of appeal not having been filed. This court has previously stated that underlying the two principles for the grant of an injunction or stay which this court considers the issue on whether or not to grant an order is the assumption that the party applying for an order of stay has either appealed or intends to appeal. (See **Jacinta Wairimu Njoroge v Julia Wanjiru & 4 others [2008] eKLR).** With respect to submissions by counsel for the 1st respondent on this issue, it is not in dispute that a notice of appeal was filed by the applicant on 6th December 2010. This in our minds amounts to a clear intention to appeal by the applicant. The 1st respondent, and rightly so, did not ask us to determine the validity of the notice of appeal. This court in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another** did not see any reason for determining the validity or otherwise of a notice of appeal when considering an application under rule 5(2)(b), the validity of the notice of appeal being covered under the provisions of **rule 80** of this court's rules. The jurisdiction under rule 5(2) (b) only arises where the applicant has lodged a notice of appeal, (see the **Safaricom Ltd v. Ocean View Beach Hotel Ltd & 2 others, Civil Application No. 327 of 2009 (UR)** and that that rule is a procedural innovation designed to empower this court to entertain interlocutory applications for preservation of the subject matter of the appeal where one has been filed or is intended (see also **Africa Eco-Camps Limited v Exclusive African Treasurers Limited [2014] eKLR**).

12. On the first aspect as to whether the intended appeal is arguable and not frivolous, we restate this court's decision in **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** wherein the Court addressed what is 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"***

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicant. (See **Kenya Railways Corporation v. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No.NAI.256 of 2013)**.

13. From our perusal of the Notice of Motion and the grounds on the face of the application, affidavits in

support thereof and the draft memorandum of appeal, we are convinced that the are several arguable points that have been raised. These include the validity of the power of attorney and whether the same could be used to deal with the suit property, the damages awarded and whether the same had been proved, the applicable interest rate and the computation thereof, whether the trial judge should have considered the refund made to the 1st respondent and whether the trial judge made wrong factual and legal conclusions. In her submissions, **Mrs. Karanu,** counsel for the applicant made reference to the refund of Shs.5,079,159/= made to the 1st respondent from the sale proceeds while counsel for the 1st respondent made reference to the determinations contained in the judgment on aspects of change of interest rate. Similarly, paragraph 9 of the respondent's replying affidavit raises issues as to whether the guarantee availed by the applicant before the High Court was sufficient.

14. These are issues which in our view would best be addressed on merit at the hearing of the intended appeal. We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court's decision in **CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4** as follows:

> ***" . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."***

15. Turning to the second limb as to whether the appeal could be rendered nugatory if stay orders are not granted, we note that this is a money decree. Whereas the judgment was for an aggregate sum of Shs.20,434,226.54, the amount due as sought in the warrants of attachment and sale of property in execution of the decree is Shs.722,581,646.60. This is a colossal sum and there is reasonable apprehension as to the ability of the 1st respondent to repay the same in the event that the appeal is successful as no material is availed in proof thereof. In relation to a money decree, this Court in the case of **Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 *of* 2006 (UR 178/06)** stated thus:-

> ***"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a*** *"man of straw"* ***but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree".***

The 1st respondent did not indicate his willingness and/or ability to repay the decretal amount in the event the appeal was successful. Considering that the computation of the decretal sum is subject to the intended appeal, we are of the view that there is a likelihood of the appeal being rendered nugatory if we do not intervene at this stage.

16. In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of the applicant in this application.

Accordingly, we order that the Notice of Motion dated 12th March, 2015 is allowed, subject to the condition that, the applicant deposits security in the sum of Shs.20,434,226.54 being the decretal sum as

awarded by the trial court in an interest earning account with a reputable bank other than the applicant in the joint names of the respective advocates within sixty (60) days from the date of this judgment. The costs of the application will be in the intended appeal.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR