



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 71 OF 2015 (UR 60 OF 2015)

BETWEEN

MUHORONI SUGAR COMPANY LIMITED..... APPLICANT

AND

EQUIP AGENCIES LIMITED RESPONDENT

(An Application for stay of proceedings pending the lodging, hearing and determination of the intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi, (Ogola, J.) dated 29th November, 2010 in CIVIL SUIT NO. 497 OF 2008)

RULING OF THE COURT

The applicant, **Muhoroni Sugar Company Limited** filed a Notice of Motion application dated 18th March 2015. The Motion was premised on **Rule 5 (2) (b)** of this Court's Rules. It sought the following orders:-

“1. The proceedings of the superior court in Nairobi (Milimani) Commercial High Court Civil Case No. 497 of 2008 be stayed pending the hearing and determination of an appeal from the ruling and orders of the superior court given on 30th January 2015.

2. The costs of this application be provided for.”

The background to the motion is that the respondent **EQUIP AGENCIES LIMITED** filed an application on 18th July 2014 seeking an order to amend its plaint. The applicant opposed the application for amendment on the reasoning that if the amendment was to be allowed it would suffer prejudice as the transaction to be brought on board by the amendment occurred way back in 2005. It was the applicant's further contention that if the amendment was to be allowed, it would have lost an opportunity to plead limitation.

In spite of this opposition, in a ruling delivered on 30th January, 2015 Ogola J allowed the respondents' application. The applicant was aggrieved by the ruling of the High Court and filed an appeal.

In his memorandum of appeal filed on 16th March 2015 the applicant contended that it would suffer prejudice by the amendment as it would not be able to plead limitation; that the respondent acted in bad

faith in waiting for interest to accumulate for 10 years; and that if the determination of the case was to be prolonged, (inevitably by the amendment) then it might not be able to have all its witnesses as it is likely that some of the employees may leave the applicant's employment.

In support of the Motion before us, **ANDERSON OLOO**, the General Manager of the applicant swore an affidavit dated 16th March 2015. The gist of the affidavit was that the applicant was opposed to the respondent's application seeking leave to amend its plaint in Milimani HCCC No. 497 of 2008. He further deponed that should the applicant be allowed to amend its pleadings then it would suffer prejudice as the transaction to be brought on board by the amendment occurred in 2005, a period of about 10 years now.

The Motion was opposed by the respondent. An affidavit in opposition to the Motion was sworn on 4th June 2015 by **DIVYESH INDUBHAI PATEL**. He deponed that the Notice of Appeal was defective and denied that the applicant would suffer any prejudice by the amendment.

During the hearing of the Motion before us Mr. Otieno, learned counsel for the applicant urged us to find that the applicant has an arguable appeal as the amended plaint included interest of 3% from 2005; that in allowing this amendment the learned judge had sanctioned the negligence on the part of the respondent in failing to include this interest at the time of filing the original plaint.

On the nugatory aspect, Mr. Otieno contended that the respondent's financial position is unknown and it is likely that their intended appeal would be rendered nugatory.

In response Miss Migiro submitted that the amendment did not include a new cause of action and that the applicant was not likely to suffer prejudice. On the nugatory aspect, the learned counsel submitted that the applicant can be compensated by an award of costs.

The applicable principles in an application under Rule 5(2)(b) of this Court's Rules are now fairly well settled. Firstly, the court has to be satisfied that the intended appeal is arguable and secondly that the intended appeal if successful, would not be rendered nugatory.

As was observed by this Court in **Ishmael Kagunyi Thande vs Housing Finance Kenya Ltd** – Civil Application 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 vs Jimba Credit Corporation Ltd No. 2 [1988] KLR 838 & J. K. Industries Ltd vs Kenya Commercial Bank Ltd [1982-881].”

The sum effect of the above is that a litigant has to establish an arguable point as well as demonstrate that the appeal would be rendered nugatory unless a grant of stay is ordered.

In the instant case the applicant has moved this court on the basis that the learned judge ought not to have allowed the respondent to amend his pleadings.

Amendment of pleadings is governed by O.8 of the Civil Procedure Rules. The rules provide for amendment of pleadings without leave as well as with leave once the pleadings have closed. The general tenor and import of the rules is that amendments of pleadings is not to be denied unless on very good reasons. O. 8 rule 3 (1) as follows:-

“Subject to Order 1 rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

0.8 Rule 3 (2) further provides:

“Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.”

It therefore follows that the courts have wide discretionary powers of amendment and further the amendment is permissible even after the period of limitation has set in as provided in 0.8 Rule 3 (2).

The applicant herein was aggrieved by the leave granted to the respondent to amend his plaint. We are skeptical about the arguability of the intended appeal. However whether the judge erred or not will be ventilated in the appeal and we do not wish to say anymore at this time.

Having come to the above conclusion, we do not see the need to delve into the issue of whether the appeal would be rendered nugatory unless an order for stay is granted. In any event the applicant will not have lost its opportunity to argue this point in an appeal they may wish to prefer upon the determination of the case before the High Court. We also do not deem it necessary to address the issue raised by the respondent that the Notice of Appeal is defective. Suffice to state then if that be the case, then the same cannot be raised in an application under **Rule 5(2) (b)**.

The Notice of Motion application is dismissed with costs.

Dated and delivered at Nairobi this 10th day of July, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

