



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, M'INOTI AND J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI. 35 OF 2014 (UR. 27/2014)

BETWEEN

GOVERNORS BALLON SAFARIS LIMITEDAPPLICANT

AND

SKYSHIP COMPANY LIMITED1ST RESPONDENT

COUNTY COUNCIL OF TRANSMARA2ND RESPONDENT

(Being an application for stay of further proceedings pending the hearing and determination of an intended appeal in the High Court of Kenya at Milimani (Mabeya, J.) dated 22nd November, 2013

in

H.C.C. CASE NO. 461 OF 2008)

RULING OF THE COURT

The short application that falls for our consideration in this application is whether, as sought by *M/s Governors Balloon Safaris Limited* (GBS) in its motion dated 25th February 2014, we should stay further proceedings in Nairobi High Court Civil case No.461 of 2008 pending the filing and hearing of an intended appeal against the decision of that court (Mabeya, J.) made on 22 November, 2013.

Rule 5(2)(b) of this Court's rules confers on us the power to grant or refuse to grant such an order and the twin guiding principles to apply in deciding the application are that the intended appeal, even on a solitary issue, is one which is arguable or not frivolous, but not necessarily one that will succeed, and that the intended appeal, if successful, shall be rendered nugatory if the order is not granted. The onus is on the applicant to establish both these requirements to the satisfaction of the court. See **Reliance Bank Ltd v Norlake Investments Ltd. [2002] 1 EA page 227.**

What is the background to the application?

The applicant, GBS, who are represented in the litigation by M/s Shapley Barret & Company Advocates, and the 1st Respondent, *M/s Skyship Company Limited* (Skyship), represented by M/s Majanja Luseno & Company Advocates, are in the same business of rendering Air Services for passengers using hot air balloons (Balloon Services). They are both licenced by the Kenya Civil Aviation Authority (KCAA) to do so at the famous Maasai Mara Game Reserve. The game reserve is part of the Trust Land within the administrative jurisdiction of the 2nd Respondent, **County Council of Transmara** (as it then was before the new Constitution) (Transmara), represented by M/s Kemboy & Company Advocates.

GBS says, in March, 2001 it took over the business of Balloon Services from another company which had signed a contract with Transmara on 1st August, 2000, for exclusive rights to carry out the business within the area adjacent to Little Governor's Camp in Maasai Mara for a period of 33 years. The assignment of the business was assented to by Transmara and there was a covenant between the two that no one else would be permitted to carry out similar business within a radius of 15 km of the Camp (the exclusive zone). In the year 2008, GBS learned with horror that Transmara had, contrary to the terms of their agreement, permitted Skyship to operate the same business within the exclusive zone. It transpired that the two had signed a contract on 1st March, 2007. GBS rushed to court and filed **HCCC No 461 of 2008** (Nairobi case) on 14th August, 2008 seeking injunctory reliefs against both Transmara and Skyship and a declaration that the contract purportedly entered into by them was null and void.

Contemporaneously with the suit, GBS took out a Chamber Summons seeking a temporary injunction pending the hearing of the suit. That application was dismissed by Lessit, J. on 11th September, 2008 and there was no appeal.

Skyship had contended in their defence to the suit that it had a lawful Licence from KCAA to operate Balloon Services and GBS had no powers to regulate or restrict the areas of operation. The licence was granted after rejection of objections raised with KCAA by GBS. It also averred that it had a valid contract with Transmara to operate within the game reserve and that its operational base was on private land outside the game reserve.

For its part, Transmara contended that it had no contract with GBS and never assented to any assignment of contract as pleaded by GBS. GBS's operations were therefore illegal, and they counterclaimed for *mesne profits* and restraining orders to stop further operations by GBS. Transmara further acknowledged as valid the agreement signed between it and Skyship.

The pleadings were closed and the suit was ripe for hearing by 8th December, 2008.

Several months later, in August, 2009, Transmara fell out with Skyship and purported to rescind the balloon services agreement on the pretext that it was void and invalid *ab initio* for want of approvals by the relevant County Council officials. Skyship rushed to the High Court in Kisii and filed **HCCC No 182 of 2009** (Kisii case) against Transmara seeking an injunction pending arbitration proceedings which the agreement provided for.

Both suits were still pending when, on 16th April, 2010, Skyship filed an application dated 31st March, 2010 in the Nairobi case invoking **Order 16 Rule 5** of the **Civil Procedure Rules 2010**, seeking an order for dismissal of the suit for want of prosecution. It was based on the ground that GBS had gone to sleep and taken no further steps to prosecute the Nairobi case after the closure of pleadings in December, 2008 and an order of the court made on 28th April, 2009 adjourning the suit.

The application fell before Njagi, J. for hearing and he recorded oral submissions of counsel but was thereafter unavailable to consider the application and render a Ruling. Mabeya, J. took over and, with the consent of the parties, considered the application and delivered his ruling on 22nd November, 2013. For reasons stated therein, the application was allowed and the suit by GBS was dismissed with costs. GBS was aggrieved, hence the intention to appeal to this Court and the application now under consideration.

In submissions before us, Learned counsel for GBS Mr. Oyatsi, referred us to a draft memorandum of appeal raising no less than eight grounds which he contends were all arguable. He submitted that the very existence of two suits, and the subject-matter in those suits, raised contentious and serious issues of deception, obstruction of justice and contempt of court which could only be thrashed out by sustaining the Nairobi case rather than dismissing it on technicalities. The apparent delay in prosecuting it, in his submission, was explicable and was caused by Skyship who surreptitiously filed the Kisii case raising the issue of the propriety of its Balloon Services agreement which was also in issue in the Nairobi case. The conduct of the parties must therefore be assessed by the court.

As for the nugatory aspect, Mr. Oyatsi submitted that Skyship and Transmara had submitted an astronomical bill of costs for taxation at Kshs.70 million and if allowed it would destroy GBS long before the appeal is heard.

Learned counsel for Skyship, Mr. Amoko, submitted that the intended appeal was a non-starter since, as correctly found by the High court, there was no explanation given for the delay in prosecuting the Nairobi case. The reference made to the Kisii case and alleged issues of deception and contempt of court were a red herring since that case had nothing to do with GBS who ought to have continued with their case, but did not, on the pretext that they were awaiting the conclusion of the Kisii case.

On the nugatory aspect Mr. Amoko submitted that the bill of costs had not been taxed and even if it had, there was a remedy of stay of execution which GBS had not sought. It cannot render the outcome of the intended appeal nugatory.

Finally, learned counsel for Transmara Mr. Kemboy submitted that GBS did nothing in the High Court to address the issue of delay and the overriding objective of civil litigation, and there was no possibility therefore that the intended appeal would be arguable. Taking cover in the Kisii case, as GBS did, was ridiculous. He concurred with Mr. Amoko's submission that there was a remedy if the bill of costs was taxed and that there was nothing to render the success of the intended appeal nugatory even if it was arguable.

We have considered the application, the affidavits on record, the submissions of counsel and the authorities cited. In the end, we are of the view that the intended appeal is not frivolous. In dismissing the suit by GBS, the High Court said nothing about the counter-claim of Transmara in the same suit which may well be subsisting. The claim by GBS that there were cross-cutting issues relating to the agreements alleged to have been entered into by both companies with Transmara is not an idle one and is capable of argument on appeal. Since one *bona fide* issue would avail the applicant, we find on the first limb, that the application has merit.

Will the success of the intended appeal be rendered nugatory if we do not grant the order for stay of proceedings in the Nairobi case?

We do not think so. Firstly, as far as we can see, the only proceedings targeted here are on taxation of some bills of costs. There is no mention of other proceedings relating to the counter claim by Transmara. GBS is at liberty to oppose the taxation in the normal manner. There are also provisions for review if a party is not satisfied with the taxation and in the end, if there is an intention to execute, there are provisions for stay of execution which may be invoked. The remedy of stay of proceedings is thus inappropriate in the circumstances of this case and we decline to exercise our discretion in favour of the applicant.

In the result, we order that the notice of motion dated 25th February 2014, be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of June, 2014.

P.N. WAKI

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR