



IN THE COURT OF APPEAL AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. NAI. 115 OF 2014

BETWEEN

THE PERMANENT SECRETARY MINISTRY OF ROADS 1ST APPLICANT

THE ATTORNEY GENERAL 2ND APPLICANT

AND

FLEUR INVESTMENTS LIMITED RESPONDENT

(Being an application for stay of proceedings in Nairobi High Court of

Kenya at Nairobi (Gacheru, J.) dated 23rd August, 2013

in

HCCC No. 596 of 2009)

RULING OF THE COURT

The application dated 20th May, 2014 by the two applicants, seeks the following orders:

“1.

2.

3. ***That there be a stay of proceedings in NAIROBI CIVIL SUIT ELC NO. 596 OF 2009 FLEUR INVESTMENTS LIMITED VERSUS THE PERMANENT SECRETARY ROADS AND THE ATTORNEY GENERAL pending the hearing and determination of the applicant’s appeal against the decision of the Hon. Justice L.N. Gacheru delivered on 23rd August, 2013.***

4. ***That the costs of and incidental to this application be provided for.***”

The application was supported by an affidavit sworn by **Engineer John Kipngetch Mosonik**, the Principal Secretary, Ministry of Roads and Infrastructure. The contents of the affidavit may be summarized as follows:

On 29th October, 2009 the respondent herein filed a suit, **ELC No. 596 of 2009**, against the applicants seeking special damages in the sum of **Kshs.2,557,744,900/=** for demolition of structures that had been erected on parcels of land known as L.R. No. 16510 and L.R. No. 16511 registered as IR 59780/1 and 59781/1 respectively; hereinafter referred to as **“the suit property”**. Subsequently, the claim was amended to **Kshs.7,533,839,834.25**.

The applicants filed a statement of defence denying the aforesaid claim. After some time and following investigations, the applicants took the view that the land in respect of which the respondent was claiming damages was a road reserve which had fraudulently been allocated to **Adeita Company Ltd** by the former Commissioner of Lands, **Wilson Gachanja**. Mr. Gachanja was a founder director of Adeita Company Ltd. Subsequently, that company sold and transferred the suit property to the respondent. The applicants therefore filed an application seeking leave to amend their defence and include a counterclaim against the respondent together with Mr. Gachanja and Adeita Company Limited.

In a ruling delivered on 23rd August, 2013, the application was dismissed. The trial Judge delivered herself thus:

“The plaintiff herein has brought a suit claiming special damages. In the counter-claim, the Applicant alleges ‘fraud’ and ‘misrepresentation’ on the part of the plaintiff and the intended parties that are to be enjoined (sic) in the suit.

The facts of the new claims do not arise out of the same transactions and the facts are not the same.

The court finds that allowing the said amendment herein will be prejudicial to the plaintiff as the facts of the two suits; (that is the main suit and counter-claim) are not the same.”

The court also held that the suit was filed in the year 2009 and there was delay by the applicants in bringing the application for amendment of the defence. The application was filed on 15th May, 2013, just before the respondent’s suit came up for hearing.

Being dissatisfied with the said ruling, the applicant preferred an appeal to this Court. They now seek to stay further proceedings of the High Court case pending the hearing and determination of that appeal. The applicants contended that if the application is not heard and determined before the respondent’s case proceeds further on 21st and 30th July, 2014, some of the issues raised in the case, once determined, will become *res judicata* without participation of the parties intended to be joined in the counterclaim.

The application was opposed. **Alex Trachtenberg**, the respondent’s General Manager, filed a replying affidavit and set out the facts giving rise to the High Court suit. He set out a chronology of events vide which, he alleged, the applicants have frustrated and/or delayed the hearing of the respondent’s suit now pending before the High Court by seeking numerous adjournments and filing applications on the eve of the hearing. He saw the current application as yet another attempt to delay the hearing of the High Court case. The applicants’ past conduct coupled with the unexplained delay in filing the application for stay of proceedings disentitles them to the exercise of the court’s discretion in their favour, the respondent contended.

Regarding the alleged fraud in allocation of the suit property to Adeita Company Ltd, the respondent denied any involvement in the alleged fraud, saying that the allocation was done in 1993, long before the respondent was incorporated in 1997 and eventual purchase of the suit property in 2001.

Mr. Karori, learned counsel for the respondent, submitted, *inter alia*, that the application does not satisfy the principles for grant of stay of proceedings set out in **HALSBURY’S LAWS OF ENGLAND**, fourth edition, volume 37 page

330. Regarding the implications of grant of such orders, the learned authors state:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a

party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."

Mr. Karori further submitted that the applicant was guilty of laches because the ruling sought to be stayed was delivered on 23rd August, 2013 yet the application now before this Court was filed on 21st May, 2014.

Responding to the issue of delay, **Mr. Njoroge**, the applicants' learned counsel, told the Court that shortly after delivery of the said ruling, the court file went missing from the registry and the applicants were unable to get a typed copy of the ruling, leave alone the proceedings, and that explains why the applicants attached to the application a copy of the hand drafted ruling.

We have considered the affidavits filed by the parties as well as the submissions by their respective counsel. This is an application under **rule 5(2)(b)** of the **Rules** of this Court. The principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under the aforesaid rule are well known. The applicant must satisfy the Court that the appeal or intended appeal is arguable and that the same would be rendered nugatory unless the order sought is granted. See **J.K. INDUSTRIES v KENYA COMMERCIAL BANK LTD & ANOTHER [1987] KLR 506**. The appeal by the applicants has already been filed, it is Civil Appeal No. 114 of 2014. A copy of the Memorandum of Appeal was annexed to the application before us. It consists of 8 grounds which are as follows:

- "1. The Learned Trial Judge of the High Court erred in law and in fact in failing to find that M/s Adeita Company Limited and Wilson Gachanja were necessary parties to the suit.***
- 2. The Learned Trial Judge of the High Court erred in law and in fact in failing to find that the application for amendment of defence and inclusion of a counterclaim needed to be heard first before the calling of any evidence by the plaintiff in support of his case.***
- 3. The Learned Trial Judge of the High Court erred in law and in fact in failing to find that the founding directorship of the former Commissioner of Lands in Adeita Company Limited tainted the allocation with conflict of interest and by extension made him and Adeita Company Limited.***
- 4. The Learned Trial Judge of the High Court erred in law and in fact in finding that the application was brought in bad faith and to delay the proceedings while prima facie any such allegation, even if presumed to be true, would have been outweighed by the validity of the issues raised in the application.***
- 5. The Learned Trial Judge of the High Court erred in law and in fact in allowing her discretion to be fettered by her previous decision to proceed with the hearing of the evidence of pw1 while the application was still pending.***
- 6. The Learned Trial Judge of the High Court erred in law and in fact in failing to find that allowing the amendment was vital in the clarification of all the issues between the parties to the suit.***
- 7. The Learned Trial Judge of the High Court erred in law and in fact in failing to find that joinder of the new parties and trial of the suit and counterclaim would result not in unjust delay but in a more economical utilization of scarce judicial time.***
- 8. The Learned Trial Judge of the High Court erred in law and in fact in failing to find that the suit was in the circumstances not fit for substantive hearing of evidence of witnesses while the application for amendment was still pending before the Court."***

From the above grounds, coupled with submissions by counsel, we are satisfied that the appeal is arguable; it is not frivolous. We need not say more regarding arguability of the appeal, lest we be accused of assuming the role of the bench that will hear it.

Will the appeal be rendered nugatory unless the High Court proceedings are stayed? The applicants' counsel told this Court that when the application for amendment of the defence first came up for hearing, the trial Judge refused to hear it in priority to the hearing of the main suit. Consequently, the hearing of the plaintiffs' case commenced and the respondent has already closed its case. The defence case is scheduled to be heard on 21st and 30th July, 2014. If the case proceeds on the said dates, the applicant will not be able to prosecute its intended case against Adeita Company Ltd. and Wilson Gachanja who have been shown to have been closely connected to the acquisition of the suit property before the respondent purchased it.

Mr. Karori submitted that the appeal will not be rendered nugatory by refusal to grant the order of stay of the High Court proceedings. The appeal can still be heard, even after finalization of the High Court case, he contended. He cited this Court's decision in **DAVID MORTON SILVERSTEIN vs ATSANGO CHESONI, Civil Application No. NAI 189 of 2001.**

In our view, if the orders sought are not granted, the defence case will proceed as scheduled. If the case is decided in favour of the respondent, the applicants may be forced to pay a substantial amount of money, without having granted them an opportunity to join the two proposed defendants together with the respondent in the intended counter-claim. In that case, the appeal now pending before this Court will have been rendered moot.

In **RELIANCE BANK LIMITED v NORLAKE INVESTMENTS LTD**

[2002] 1 E.A. 227, this Court held that:

"..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.

While we agree with the respondent that the applicants' conduct has slowed down finalization of the High Court case, considering the issues that are intended to be argued in the pending appeal, the amount of money claimed and the importance of bringing finality to legal disputes, we are of the considered view that the applicants ought to be afforded an opportunity to prosecute the pending appeal before the High Court proceedings are finalized, lest the appeal be rendered nugatory.

Consequently, we allow the applicants' application, with the result that further proceedings in **Nairobi Civil Suit ELC No. 596 of 2009, Fleur Investments Limited versus The Permanent Secretary Roads and the Attorney General** are stayed pending the hearing and determination of Civil Appeal No. 114 of 2014. The applicant shall however bear the costs of this application.

Dated and Delivered at Nairobi this 18th day of July, 2014.

R.N. NAMBUYE

..... **JUDGE OF APPEAL**

D.K. MUSINGA

.....

JUDGE OF APPEAL

J. MOHAMMED

..... **JUDGE OF APPEAL**

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

/dkm

DEPUTY REGISTRAR