REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 96 of 2012

INDUSTRIAL COLLABORATTIVE LTD……………………...…APPLICANT

AND

KENYA ANTI CORRUPTION COMMISSION……………….RESPONDENT

(An application for stay of execution and stay of further proceedings in the High Court pending the hearing and determination of an appeal from the Ruling of the High Court of Kenya at Nairobi (Mbogholi J) dated 9th November,2010

in

ELC Civil Suit No.101 of 2007)

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RULING OF THE COURT

The respondent, **Kenya Anti Corruption Commission,** approached the seat of justice in the High Court of Kenya at Nairobi, Land and Environmental Division, vide ELC Suit No.101 of 2007, in its capacity as a plaintiff, by way of a plaint dated the 9th day of May, 2007 filed against the applicant, **Industrial Collaborative Limited,** the defendant, seeking various reliefs.

On the said plaint, the respondent anchored an application by way of notice of motion brought under **Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law, dated the 27th day of October,2009 seeking orders that the respective applications which sought to strike out the plaintiff's suits in respect of the under listed cases be heard together. The cases are:

1. **ELC No.101 of 2007 KACC versus Industrial Collaborative Limited.**
2. **ELC No. 103 of 2007 KACC versus Brooke side Studios Limited.**
3. **ELC No. 105 of 2007 KACC versus Coroli Zanne Gathoni Kuria & 2 others.**
4. **ELC No. 106/2007 HACC versus Itammer Heads Limited & 2 others.**
5. **ELC No.107/2007 KACC versus Catherine Njeri Kuria and 2 others.**
6. **ELC 67/2007 KACC versus Abishax Heights Limited.**
7. **ELC No. 535 of 2007 KACC versus David Gachina Murithi & 3 others.**

8. **ELC No.116 of 2007 KACC versus Wariwax Generator Limited.**

9. **ELC No. 1117 of 2007 KACC versus Satellite industrial Supplies Limited.**

10. **ELC No.1118 of 2007 KACC versus Parkside Medical centre Limited.**

11. **ELC No.1993 of 2007 KACCC versus Noel K. Wambua.**

12. **ELC No. 124 of 2007 KACC versus Jamma Consolidated Limited.**

13. **ELC No.402 of 2007 KACC Versus Emrose Academy Limited & 3 others.**

14. **ELC No.29 of 2007 KACC versus Yellow Horse Inn Limited & 3 others.**

Vide prayers 2 and 3 thereof, the defendant asked the Superior Court to direct that arguments and submissions urged by the parties in respect of Nairobi HCC ELC No. 101 of 2007, **Kenya Anti Corruption Commission versus Industrial collaborative Limited,** be adopted in all the matters listed in 1 to 1(15) above, and that the court be pleased to make a consolidated ruling in respect of all the applications listed in 1 above. In the alternative vide prayer 4 thereof that, the court be pleased to order a consolidation of the matters listed above for the purpose only of hearing and determination of the respective applications seeking to strike out the plaintiff's suit, upon such terms as the Honourable court may deem fit and lastly, that costs be provided for.

The grounds in support of the application were set out in the body of the said application as well as the supporting affidavit deponed by one **Francis Gikonyo**. In summary, Mr. Gikonyo stated that the consolidation and hearing of all the applications together is permissible in law, practical and will not occasion any prejudice to any party.

The said application was opposed. It was heard before **Msagha, J.** who delivered a ruling on the 9th day of November, 2010. In the said ruling the learned trial Judge delivered himself thus:-

"It is true that all the pending applications are premised on **order VI rule 13 of the Civil procedure Rules where some applications require affidavits in support while the rest do not. If the applications are consolidated, it is true that there will be expedition in terms of disposal thereof and, since the main issue is that of dismissal, I see no prejudice whatsoever that will be occasioned to the defendants. If anything, the grounds advanced are similar and the orders sought are in consonant with the provisions of section 1A of the Civil Procedure Act introduced by Act No 6 of 2009 to ensure just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.**

Accordingly, I allow the application and order that the applications herein shall be consolidated for purposes of hearing and that the ruling in ELC No.101 of 2007 shall apply across the board in all the other applications listed in the Notice of Motion from No. 2 to 14 thereof. The costs shall be in the cause. Orders accordingly"

The applicant was dissatisfied by the said ruling and filed a notice of appeal dated the 12th day of November 2010 followed by an application dated the 18th day of January,2011 in the High Court seeking an order of stay of execution of the challenged ruling, which application was disallowed by the High Court on the 16th day of February,2012.

The applicant then moved to this court and presented an application by way of Notice of Motion dated the 10th day of April, 2012 brought pursuant to **rules 5(2) (b) & 42** of the **Court of Appeal Rules**, the subject of this ruling. Four reliefs are sought namely:-

(1)This Honourable court be pleased to order a stay of execution of the ruling pronounced in ELC

No.101 of 2007 at the High Court on 9th November, 2010 and all consequential orders pending the hearing and final determination of this application.

(2)That this Honourable Court be pleased to order a stay of execution of the ruling pronounced in ELC No. 101 of 2007 at the High Court on 9th November,2010 pending the hearing and final determination of the intended appeal.

(3)That this Honourable Court be pleased to grant a stay of any further proceedings in the High Court on such terms as the court may deem just pending the hearing and final determination of this application and the intended Appeal.

(4)That costs of this application be provided for."

The application is supported by grounds in the body of the application as well as a supporting affidavit deponed by one **Simon Ndungu**, a director of the applicant. The respondent has opposed the application by way of a replying affidavit deponed by one **Anthony Ong'ondi,** an advocate in the employ of the respondent.

On the date fixed for hearing, learned counsel **Mr. Mbiriri Nderitu** of **Kariuki Muigua & Co. advocates** appeared for the applicant while **Shamalla Judith** appeared for the respondent. In his oral submissions to court, learned counsel for the applicant has urged us to allow the application under review on the grounds that the application is within the ambit of the ingredients required to be established before one can earn a relief under **rule 5(2) (b)** of the Court of Appeal Rules. His reasons for saying so are that the applicant moved with due diligence and utmost speed and presented the appeal, the appeal is arguable in that it raises issues of law as to whether in instances where a common plaintiff has filed suits against different defendants over different subject matters such suits can be consolidated. Lastly, that if the stay sought is not granted, the appeal will be rendered nugatory because the applications as well as the substantive suits will have been disposed of and diverse decisions reached which may be prejudicial to the applicant. Prejudice is likely to arise considering that in view of the diversity of the defendants and the subject matter in each suit, there may very well be instances when the court will have been required to make pronouncements peculiar to those suits individually which the court may fail to do in an attempt to apply the resulting order across the board to all the affected suits.

In opposition to the applicant's application, learned counsel for the respondent relies on the content of the respondent's replying affidavit. In her oral submissions to court, she has urged us to dismiss the application for the reason that the applicant has not demonstrated the existence of the pre-requisites for grant of the orders sought. It is contended that the intended appeal is not arguable because the application giving rise to the impugned orders was presented under **section 3A** of the Civil Procedure Act whereby the respondent invoked the Superior Court's inherent power to consolidate applications filed in 14 suits. It is their stand that the said respondent's application was sound and well founded because the 14 suits had a common plaintiff, they related to property located in the same locality, the major complaint centered on the mode of acquisition by all the defendants, the defences filed were similar in construction, all the defendants are represented by the same firm of advocates, and the applications for striking out of the plaintiff's suits filed in each of the said suits were all similar in all respects, making it imperative for the learned Judge to rightly issue the consolidation order. It is further their contention that none of the suits or applications as consolidated have displayed any individual peculiarity necessitating preferential disposal as opposed to global disposal because if there were any, then the applicant would have pointed them out to this court.

With regard to the second ingredient of the appeal being rendered nugatory, learned counsel for the respondent contended further that this too has not been demonstrated to exist because final orders had not been issued either in the main suits or the consolidated applications, both of which are yet to be heard.

Both sides cited case law to the Court. We have perused them. We wish to draw inspiration from the case of **Exclusive Estate Limited versus Kenya Posts and Tele Communications Corporations and another (2005) 1EALR 53** wherein this Court held, inter alia, that:-

"In exercising its unfettered discretion under rule 5(2) (b) of the Court of Appeal rules, the Court considers inter alia, whether the appeal or intended appeal is arguable and whether the appeal would be rendered nugatory if the order sought is not granted", similarly in the case of **J.K. Industries versus Kenya Commercial Bank Limited and East Africa Development Bank (1982-88) 1KLR 1088** the same court stated inter alia, that:-

"**An order of status quo is available where there is demonstration of existence of a reasonable argument to be put on appeal;"** and lastly **Butt versus Rent Restriction Tribunal (1982) KLR 417** wherein the Court of Appeal held, inter alia,firstly **that power of the Court to grant or refuse an application for a stay of execution is a discretionary power with the only caveat that the discretion should be exercised in such away as not to prevent an appeal.** Secondly, **that the general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion. Thirdly, that a judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings;** fourthly, **that the court in exercising its discretion whether to grant and or refuse an application for stay will consider the special circumstances and unique requirements of each case"**

We have accordingly taken note of the above guiding principles and applied them to the content of both rival pleadings and arguments set out above and we proceed to make findings on the same. We have perused the intended grounds of appeal as displayed in the body of the application and we are in agreement that indeed they raise arguable points. It is now trite that an arguable point it does not mean a point which must succeed but one which is capable of raising a reasonable argument. Secondly, that only one arguable point will surfice. Herein we have noted issues such as whether existence of vague prayers in some suits operate to negate the consolidation order, whether the respondent by anchoring the application before the Superior on section 3A of the Civil Procedure Act as opposed to the Civil Procedure Rules dealing with consolidation of suits stood non suited, whether the alleged existence of varying causes of action against varying defendants operate to negate the consolidation order and whether the consolidation order denied the parties to each of the consolidated applications a right to a fair hearing solely on the ground that the ruling in ELC 101/2007 would apply across the board in all the suits in which the consolidated applications were filed.

As for the second ingredient of the intended appeal if ultimately successful being rendered nugatory, we wish to take note of the fact that both parent suits and the applications which were consolidated by the challenged Superior Court ruling are yet to be heard, the parent suits share a common plaintiff with a common prosecuting counsel, and that these suits though variously filed against different defendants share a similar thread of complaint directed at the mode of acquisition of the individual properties peculiar to each defendant but sharing a common locality. Likewise, the defences on which the consolidated applications for striking out of the plaints were anchored were also variously filed against each individual and different defendant, save that it has been contended by the respondents' counsel and not denied by the applicants' counsel that the defences are similarly structured and also share a common defending counsel.

The net effect of a denial of a stay order by this court would simply be that the consolidated applications, which the applicant has not stated that they should not be heard and disposed of on their merits, will be heard and disposed of on their merits. We are alive to the applicants' contention that there may very well arise issues peculiar to some of the consolidated applications, issues not common to the rest of the applications. The applicant's fear stems from an apprehension that these may be overlooked to the prejudice of the applicant. We however note that the applicant has not pointed out any of these peculiar issues in relation to any of the consolidated applications. That notwithstanding and although it may very well be that such issues may very well arise, we have not been told that the Judge who will be seized of the applications will not be competent enough to handle those issues appropriately as and when they arise and in the process ensure that ends of justice are met to all the participating parties.

The upshot of the foregoing assessment is that we do not find the ingredient of the intended appeal

being rendered nugatory if ultimately established. Since it is a requirement that both ingredients have to be demonstrated to exist before one can earn a relief under **rule 5(2) (b)** of the Court of Appeal Rules, we decline to grant the applicant the orders of stay of execution and of proceedings sought in the application dated 10th of April,2012. It is accordingly dismissed. Costs of the application to abide the out come of the intended appeal which we have been told has already been filed.

Dated and delivered at Nairobi this 22nd day of February, 2013.

R.N. NAMBUYE
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JUDGE OF APPEAL

D.K.MUSINGA
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JUDGE OF APPEAL

K. M'INOTI
…………….

JUDGE OF APPEAL

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