REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 63 of 2012

CASE TRADING COMPANY LIMITED……...…….APPLICANT

AND

VISHAK BUILDERS LIMITED……..……1ST RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LIMITED.....…2ND RESPONDENT

(Being an application for stay of execution & proceedings pending the filing, hearing and final determination of an intended appeal from the orders of the High Court of Kenya at Nairobi (Ogola, J) dated 8th December, 2011

in

HCCC NO. 77 OF 2011)

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RULING OF THE COURT

Before us is an application by way of a notice of motion dated 6th March, 2012. The application is expressed to be brought under ***Rule 5 (2) (b) of the Court of Appeal Rules*** for stay of execution and stay of proceedings pursuant to the orders from the Ruling of 8th December, 2011, by Ogola, J in **HCCC NO. 77 OF 2011**.

By an agreement [the agreement] made on the 18th day of December, 2006, between the 1st defendant [applicant herein] and the plaintiff [the 1st respondent herein], the latter contracted the 1st respondent to construct on its behalf and benefit forty [40] housing units on ***L.R. No. 209/13535*** [the suit property]situated along Lang'ata Road, Nairobi. The property was charged in favour of the 2nd respondent for KShs.75 million by a charge dated 24th August, 2008. It is alleged that it was expressly provided in clause 34 of the said agreement that the applicant would pay to the 1st respondent such sums as would from time to time become due and payable under the said agreement. The 1st respondent contends that the applicant failed to pay costs as and when they fell due in breach of the said agreement. It was the breach of this clause that prompted the filing of the suit in the High Court. The 1st respondent's main contention at the High Court was that they were owed KShs.17,940,979.81, together with interest thereon, for breach of contract by the applicant. The applicant filed a defence and counter claim dated 20th May, 2011. It counter claimed for KShs.19,597,720/= with interest thereon until payment in full. The said amount was made up of *mesne* profits and repairs and replacement of doors to the apartments in the

suit property which the 1st respondent is alleged to have locked and taken the keys necessitating the applicant to incur repair and replacement costs thereon. The applicant also argued that the 2nd respondent had priority over the property by virtue of the charge registered in its favour. Accordingly, the 2nd respondent's rights cannot be subordinated to any party.

In the suit filed in the High Court on 2nd March, 2011, the 1st respondent sought an order of injunction to restrain the applicant from selling, offering for sale, charging and/or in any other manner, interfering with the suit property unless and until the applicant settles the claim herein. In the alternative, the 1st respondent prayed for security for the amount claimed.

The issues as framed by the High Court were as follows:

1.***Whether there was a breach of contract as alleged;***

2.***Whether injunctive orders could issue in this matter; and***

3.***Whether security for the claim could issue.***

The High Court held that if proved, the breach of contract could easily be compensated for by damages, the 2nd respondent being a bank could easily compensate the 1st respondent. Further, the court found that the 2nd respondent is the legal owner of the property and it would be against the law to issue an injunction against it.

The High Court considered the prayer for the provision of security and found that certain sums were due to the 1st respondent arising from the said contract. The applicant on the other hand, had demonstrated that it had been increasingly unable to meet its obligations under the contract. Further, the 2nd respondent had stated that the maximum amount of the charge was KShs.75 million which had already been fully utilized. The court concluded that the 1st respondent was owed an explanation as to how its claim for breach of contract would be paid in the prevailing circumstances. Accordingly, the learned judge ordered that security in the sum of KShs.17,940,979.81 be provided by the applicant by depositing the said sum in an interest bearing account in the joint names of the counsel for the applicant and the 1st respondent.

Aggrieved by the said decision, the applicant filed the instant application. The application dated 6th March, 2012, seeks:

1.To stay the execution of the order made by the High Court on 8th December, 2011, requiring the applicant herein to deposit the sum of KShs.17,940,979.81 in an interest earning account in the joint names of both parties' counsels.

2.To stay all other proceedings pursuant to the ruling and order by Honourable Justice Ogolla delivered on 8th December, 2011, pending the hearing and determination of an intended appeal.

For the purpose of this application, two main issues concern us:

(i)*Whether the intended appeal is arguable; and*

(ii)*Whether the intended appeal if successful, is likely to be rendered nugatory should a stay order be refused.*

When the application came up for hearing before us on 16th January, 2013, Mr Mungu learned counsel, appeared for the applicant while Mr Nyaanga learned counsel, appeared for the 1st respondent.

Mr Mungu contended that the learned Judge of the High Court did not take into account the defence and

counterclaim. He emphasized that it was important for the defence and counterclaim to be considered to determine whether there was a *prima facie* case. He argued that the decision by the High Court to order the applicant to furnish security of KShs.17,940,979.81 by depositing the same in an interest bearing account in the joint names of both counsel was made without full facts. He submitted that the applicant cannot make the deposit as ordered by the High Court without adversely affecting its business. The applicant will, therefore, suffer irreparable loss and damage if a stay of execution is not granted. He argued that failure to deposit the security might be construed to be a deliberate refusal to comply with an order of the court. He feared that this might cause the applicant to be shut out of further court proceedings rendering it unable to defend its suit or prosecute its counterclaim. Mr Mungu informed the Court that the 1st respondent had already applied for a formal order with the intention of enforcing it against the applicant and is also preparing to set the suit down for hearing.

He further argued that the applicant has good grounds of appeal and failure to grant an order for stay of execution will render the intended appeal nugatory.

The learned counsel for the applicant relied on the following authorities:

i.*E. Muriu Kamau & Njoroge Nani Mungai Trading as Muriu Njoroge & Co Advocates V National Bank of Kenya Ltd, Civil Application No. NAI 258 of 2009 [Ur 180/2009];*

ii. *Oraro & Rachier Advocates V Co-Operative Bank of Kenya Ltd, Civil Application No. NAI 358 of 1999 [149/99 Ur]; &*

iii.*Harit Sheth Trading as Harit Sheth Advocate V Shamas Charania, Civil Application No. NAI 68 of 2008 [UR 26/2008]*.

Opposing the application, Mr Nyaanga argued that there is no arguable appeal. He pointed out that the 1st respondent in its reply to the applicant's defence and counter claim dated 20th June, 2011, had clearly challenged the applicant's counter claim. It was their contention that the counter claim was entirely misconceived, frivolous and vexatious. He contended that the intended appeal will not be rendered nugatory if the orders sought are not granted.

He submitted that the 1st respondent was entitled to retain possession of the suit property until payment in full. In contravention of this provision, the applicant forcibly and illegally entered the suit property by evicting the 1st respondent and commenced disposing off the housing units without paying the 1st respondent the full amount due and certified by the project architect. He further submitted that several demands were made to the applicant to pay the amounts due and payable but the applicant had failed and/or refused to pay the amounts due and payable.

Mr Nyaanga contended that it was only fair and just for the High Court to have granted the orders sought to protect the 1st respondent from imminent, irrecoverable to irreparable loss. He contended that the court had never denied the applicant audience and would not do so on account of failure by the applicant to deposit the security ordered by the superior court. He further contended that the intended appeal, if successful, will not be rendered nugatory as the learned judge ordered that the security should be deposited in a joint interest bearing account in the joint names of counsel for the applicant and the 1st respondent. Accordingly, the funds will be available, secure and earning interest pending the determination of the intended appeal. Mr Nyaanga urged this Court to dismiss the application with costs to the 1st respondent.

We have carefully considered the application, the grounds in its support, the affidavits, the submissions by the learned counsel and the law.

The principles applicable to the determination of applications under ***Rule 5 (2) (b) of the Rules*** are well settled. This Court clearly elucidated the said principles in the case of ***REPUBLIC V KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS, (2009) KLR 31*** as follows:

"The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [emphasis added] [See also this Court's decisions in the cases of ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD*** *(2002) 1 EA 227 &* ***GITHUNGURI V JIMBA CREDIT CORPORATION LTD & OTHERS*** *(NO. 2) 1988 KLR 828;* ***WARDPA HOLDINGS LTD & OTHERS V EMMANUEL WAWERU MATHAI & HFCK*** *(CIVIL APPEAL NO. 72 OF 2011 [unreported]."*

In addition to the above, the Court is also obligated by statute to consider and apply the overriding objective of litigation, that is, to facilitate the just, expeditious, proportionate and affordable resolution of the appeal - ***Sections 3A and 3B of the Appellate Jurisdiction Act***.

The learned counsel for the applicant argued that in their view, the applicant's defence and counter claim establishes a *prima facie* case and is arguable and, it therefore follows that the intended appeal is arguable. On the point as to whether the intended appeal is arguable, we reiterate what this Court recently said in ***DENNIS MOGAMBI MANG'ARE V ATTORNEY GENERAL & 3 OTHERS, CIVIL APPLICATION NO. NAI 265 OF 2011 [UR 175/2011]***:

"… an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration. …"

On the first limb, the issue of whether the 1st respondent owes the applicant the amounts claimed in the counter claim is in our view, arguable.

On the basis of the material on the record, we are convinced that the intended appeal is not frivolous and is arguable. We are of the view that the applicant has satisfied the requirement of arguability.

On the nugatory aspect, it is trite law that this Court must weigh and balance the competing claims of both parties and that each case must be decided on its own peculiar facts. We note that the learned Judge ordered that the deposit should be placed in an interest earning account in the joint names of counsel for the applicant and the 1st respondent. It, therefore, follows that the deposit will be readily available upon determination of the intended appeal.

As this Court held in ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LIMITED***:

"In determining the second limb of the test, the court in ***ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED*** *(supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case* ***(ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED*** *(supra) explained and followed).* ***Rules 5 (2) (b)*** *conferred on the court original jurisdiction based on the exercise of discretion by the Judges of the court."*

Once again, we are guided on this by this Court's decision in ***AFRICAN SAFARI CLUB LIMITED V SAFE RENTALS LIMITED, NAIROBI CIVIL APPEAL [APPLICATION] NO. 53 OF 2010 (Unreported)***, where the Court stated:

"… with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales. … We think that the balancing act as described in the analysis of the parties before us, is in keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable. … We believe that the rules of procedure including ***rule 5 (2) (b)*** *have considerable value in terms of administration of justice but new challenges brought about by the enactment of the oxygen principle brings into focus the fundamental purpose of civil procedure which is to enable the court deal with cases justly and fairly."*

We believe that in balancing the competing claims as we have done above we have also met the principal aims of the overriding objective. We note that the security deposited will be readily available upon determination of the intended appeal. The intended appeal, therefore, will not be rendered nugatory.

From the circumstances of the application before us, the applicant has demonstrated that the intended appeal is arguable but has failed to demonstrate that the intended appeal will be rendered nugatory if the instant application is dismissed. The applicant has, therefore, failed to demonstrate the existence of both limbs as required by ***Rule 5 (2) (b)***.

The upshot is that we decline to grant an order for stay of execution and stay of proceedings pending the filing and final determination of the intended appeal. The application is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 19th day of April, 2013.

W. KARANJA

……..

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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