



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, MWILU & GATEMBU, JJ.A.

CIVIL APPLICATION NO. NAI. 118 OF 2012

IN THE MATTER OF INTENDED APPEAL

BETWEEN

HELLEN MAKONEAPPLICANT

AND

BRENDA MICHIEKARESPONDENT

(Being an application for injunction and stay of further proceeding in the High Court Civil Suit No. 452 of 2011 at Nairobi pending hearing and determination of an intended appeal from the Ruling of the (Lady Justice J.N. Khaminwa) delivered in the suit on 15th March 2012

in

HCCS No. 452 of 2011

RULING OF THE COURT

1. **HELLEN MAKONE**, the Applicant, brings the application now under consideration praying for an injunction and stay of further proceedings in High Court Civil Suit number 452 of 2011 pending the hearing and determination of an Intended Appeal against the Ruling of the Hon. Lady Justice Khaminwa that struck out the Applicant's defence as raising no triable issues and filed merely to delay the determination of the suit. The application is expressed to be brought under the provisions of Rules 47(1) and 5(2)(b) of the Rules of this court and pursuant to Sections 3A and 3B (presumably of the Appellate Jurisdiction Act, the application is silent on that).
2. The Applicant brings the application on the grounds that she has an arguable Appeal which raises fundamental questions of law and fact and that the intended Appeal will be rendered nugatory if the orders sought are denied.

3. In the affidavit filed in support of the application, the Applicant depones that although the Respondent who is her sister did indeed send her USD 5,700 from the United States of America to identify and purchase a property in Runda, that had not materialized. Further, that the Applicant had never been served with either the Plaint or the Summons to Enter Appearance and only learned of the interlocutory judgment from the Respondent's Advocates, upon which she quickly made an application, in vain, to set aside the interlocutory judgment. The Applicant believes that she has a good defence as no sale agreement was ever executed between the Respondent and herself and further that she does not hold the Respondent's power of Attorney.

4. Learned counsel Mr. Ongoto for the Applicant, submitted that the court below found the Applicant's defence to be a sham yet receipt of the money was acknowledged with the rider that it was not enough to buy a half acre of land in Runda. He added that pleadings were never served and the defence was good, raising as it did, triable issues.

5. Mr. Wandati, learned counsel for the Respondent was of a contrary view, stating that there was on record a regular judgment obtained in default of Appearance and Defence. Adding that the application seeking to set aside that judgment was correctly dismissed, learned counsel submitted that the Applicant did not challenge the issue of service before the High Court. He did not see that there was an arguable appeal and opposed any stay of proceedings as sought.

6. We have given the Application due consideration. We clearly understand our role in this kind of application to be, as stated in an army of authorities, that of granting an injunction and/or stay, when and if not granting the same would render an arguable appeal nugatory. The authority of **ISHMAEL KAGUNYI THANDE V HOUSING FINANCE COMPANY OF KENYA LIMITED, Civil Application no. 157/2006 NAI**, repeated the guiding principles in the following words;

“The jurisdiction of the court under Rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show 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 the appeal will be rendered nugatory.”

We shall endeavor to exercise our judicial discretion appropriately, guided by the above stated principles.

7. A successful applicant must satisfy the court that he/she meets the two limbs of the guiding principles. Suffice to refer to one such authority, that of **R V KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31** wherein this court delivered itself thus;

“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.”

8. We are conscious of the fact that an arguable appeal is not one that must necessarily succeed but that it remains one that deserves the court's consideration – see **DENNIS MOGAMBI MONGARE V ATTORNEY GENERAL & 3 OTHERS, Civil Appl. No. Nai 265/2011 (UR 175/2011)**

9. Sections 3A and 3B of the Appellate Jurisdiction Act relied upon by the Applicant provide for the **oxygen principle**, being that the overriding objective of the Act and the Rules made under the Act is to facilitate the just, expeditious, proportionate and affordable resolution of appeals with the court striving to achieve the furtherance of the overriding objective. The **oxygen principle** is not a panacea for all ills and in every situation but that a foundation for its application must be properly laid – see **MSK v SNK [2010] e KLR**.

10. Having set out the facts and basis of the application as well as the applicable law, we now turn to the issue of whether or not the Applicant has shown that she is deserving of the grant of the orders sought. It was not contested before the High Court that the interlocutory judgment was entered in default of Appearance and defence. The Applicant contended that she was not served with court process but did not effectively challenge the evidence of service that was presented before the learned judge. It was open to her to challenge the alleged service in any one of several ways, to name only but two, to examine the alleged process server on oath or even to show that she was not where she was said to have been served so as to discredit that alleged service. Tentatively, we take the view that the High Court judge cannot be faulted for Ruling that the evidence of service was not challenged. We are alive to the fact that it is not for us, at this stage, to determine the intended appeal. However, the applicant appears to have made no attempt to show what triable issue(s) in the defence the High Court judge failed to consider. In these circumstances we are not persuaded that the applicant has demonstrated before us that she has an arguable appeal.

11. Even if the applicant had satisfied us that there is an arguable appeal, there is nothing to show, that the intended appeal would be rendered nugatory unless we granted the reliefs sought. In any event having shown, as we have done earlier in this Ruling, that the existence of an arguable appeal has also not been established, satisfying the latter requirement of being rendered nugatory, which in this matter has also not been satisfied in our considered view, would not avail the Applicant the orders sought. And further being minded of the fact that final pronouncements on the quality of the intended appeal must not be made at this interlocutory stage, we are nevertheless of the view that the applicant has not attained the requisite threshold to benefit from the orders sought.

12. In the result the Notice of Motion filed herein on 12th January, 2012 is found lacking in merit and is hereby accordingly dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 12th day of July, 2013.

J.M. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL