



IN THE COURT OF APPEAL

IN NAIROBI

(CORAM: GITHINJI, OUKO & SICHALE, JJ.A.)

CIVIL APPLICATION NO. NAI. 192 OF 2012 (UR 142/2012)

BETWEEN

KENYA AIRPORTS AUTHORITY APPELLANT

AND

WORLD DUTY FREE COMPANY LIMITED T/A

KENYA DUTY FREE COMPLEX RESPONDENT

(An application for stay of execution pending the hearing of the appeal against the ruling and order of the High Court of Kenya at Nairobi (Mabeya J.) delivered of 3rd July 2012

in

H.C.C.C. NO. 372 OF 2012)

RULING OF THE COURT

The genesis of this dispute is a written agreement made on 27th April 1989 between the Government of the Republic of Kenya represented in this matter by the Kenya Airports Authority (the applicant) and the respondent, World Duty Free Company Limited T/A Kenya Duty Free Complex in which diverse leases were granted to the latter culminating with leases dated 29th January 2003 for a period of 10 years but expressed to take effect from 10th July 2002. By those leases the Government demised premises at the Jomo Kenyatta International Nairobi (J.K.I.A.) and Moi International Airport, Mombasa, (M.I.A.). A dispute has arisen leading to the filing in Court of Nairobi HCCC No. 372 of 2012 by the respondent in which it seek:-

- i. a declaration that it is entitled to the renewal of the aforesaid leases dated 29th January 2003 upon their expiration on 10th July 2012.***
- ii. a mandatory injunction to compel the applicant to renew the leases in question.***
- iii. an order that the said lease be deemed to be renewed for a further term of 10 years each from 10th July 2012 upon the same terms and conditions set out in the leases of 29th January 2003.***

- iv. **a prohibitory injunction to restrain the applicant from repossessing or attempting to repossess the demised premises.**
- v. **a prohibitory injunction to restrain the applicant from granting or attempting to grant leases to any third party or in any manner utilizing the premises leased to the respondent.**
- vi. **general damages for breach of contract in respect of the leases dated 29th January 2003.**
- vii. **costs of the suit, and**
- viii. **interest**

Simultaneous with the plaint the respondent brought a notice of motion seeking temporary prohibitory and conservatory orders. Subsequently, the applicant raised a preliminary objection to the entire suit on the grounds that **Section 33** of the Kenya Airports Authority Act – Cap 398 Laws of Kenya, which requires such disputes to be referred to arbitration has been violated by the filing of the suit; that the provisions of the Arbitration Act, 1995 do not apply in suits brought under **Section 33** of the Kenya Airports Authority Act hence preservative or injunctive orders sought in the suit are inapplicable and finally that no notice as required by **Section 34 (a)** of the Kenya Airports Authority Act was served on the applicant.

After hearing the arguments on the objection and reviewing decisions of both this Court and those of the High Court, Mabeya, J in his ruling rendered on 3rd July 2013, found with regard to **Section 33** aforesaid, that the courts in this country are unanimous that where it is shown that a matter in dispute between any party and the applicant is properly under **Section 33 (1)** of the Act, then the court lacks jurisdiction to entertain the dispute and the suit has to be struck out. The learned judge found on the basis of decided cases that **Section 33 (1)** applies to both tortious and contract claims. Having stated the foregoing the learned judge concluded;-

“The courts in the cases that I have hitherto referred to tended to make sweeping holdings that once a dispute is under Sections 12, 14, 15 and 16 of the Act, Section 33 of the Act applies. With due respect, I do not think so. One needs to consider the Section carefully to be able to know what the intention of Parliament was. The rules of constructing Acts of Parliament are well known that in construing a Section in an Act of Parliament, the plain meaning of words used in the Section must be considered.....

In my view therefore, Section 33 does not apply to all or every dispute under Section 12, 14, 15 and 16 of the Act. In order for that Section to apply, such a dispute must arise as a result of the following:-

- i. **The Authority exercising its powers under Sections 12, 14, 15 and 16 of the Act,**
- ii. **A person suffers damage as a result of such exercise of power, and**

That is the only time that Section 33 of the Act would apply.”

With that the learned judge dismissed the objection holding that the suit not being one for compensation but relating to various leases, the court had jurisdiction to entertain it. On the second objection, the learned judge found sufficient evidence that the notice required under **Section 34** was duly served on the applicant.

Aggrieved by that decision the applicant intends to challenge it in an appeal to this Court signified by a notice of appeal. In the meantime, it has filed an application by way of a notice of motion under **Rule 5 (2) (b)** of the Court of Appeal Rules seeking, in the main, one relief, that there be an order of stay of the proceedings in Nairobi High Court Civil Suit No. 372 of 2012 **“and any subsequent orders”** arising therefrom until the final determination of the intended appeal.

The applicant contends that the intended appeal is arguable and that if the proceedings and orders made subsequent to the impugned ruling are not stayed the appeal will be rendered nugatory, irrelevant and academic. The application was opposed by the respondent by a replying affidavit sworn on its behalf by Arif Hafiz, its Managing Director. It is deposed in that affidavit that the relief sought in the application is unclear and cannot be granted for the reason that the applicant is asking for a stay of proceedings and orders “subsequent” to the ruling of 3rd July 2012; that **Rule 5 (2) (b)** does not provide for such a relief; that the invocation of **Articles 29 and 31** of the Constitution is an attempt by the applicant to misuse the court process. The respondent further states that the intended appeal is not arguable and that if the order of stay of proceedings is not granted, the appeal will not be rendered nugatory; that the issues that are likely to be raised in the intended appeal have been overtaken by events following the ruling of the High Court on 17th November 2012 granting the respondent’s prayer for a temporary conservatory prohibiting injunction restraining the applicant from repossessing or leasing to any third party, or interfering with the premises demised under the leases dated 29th January 2003. It is the respondent’s view that the learned judge of the High Court correctly found that **Section 33(1)** of the Kenya Airports Authority Act does not apply to all forms of dispute involving the applicant; that for the reason that **Section 33 (1)** of the Act provides that a party in dispute with the applicant is denied access to the courts, the **Section** is unconstitutional as it contravenes **Articles 19, 21, 23 and 165** of the Constitution; that the respondent complied with **Section 34** of the Act by serving a notice on the Managing Director of the applicant of its (the respondent’s) intention to sue. We have considered the arguments together with the 11 authorities cited by counsel for both parties.

We need to indicate at this stage that this application was argued one after the other with similar one arising also from the decision of Mabeya, J. in Nairobi HCCC No. 252 of 2012 rendered on 10th July 2012. The ruling in that application will be rendered today immediately after this. We also apologize to the parties and their counsel for the delay in the delivery of this ruling which was argued on 30th January 2013 but could not be delivered on 15th March 2013 as scheduled due to the fact that two of the judges who were in this matter have since been posted to Malindi pursuant to the Judiciary’s policy of decentralization of the Court.

During the hearing of the application, the subject of this ruling, it was conceded that since the High Court has heard the respondent’s application for injunction and granted prohibitory orders against the applicant the prayer for stay of execution has been spent. In any case the Court in dismissing the objection did not make any orders capable of staying.

Learned counsel for the applicant however maintained that the High Court did not make any order in respect of the prayers for mandatory injunction directing the application to renew the leases for a further term of 10 years; that the man suit is still pending and any further proceedings by the High Court will be a further violation of **Section 33 (1)** hence the need to stay the proceedings. We are invited to exercise our discretion under **Rule 5 (2) (b)** of the Court of Appeal Rules and other provisions of the Constitution which we think are not relevant to the matters raised in the application.

From the long line of authorities cited by counsel for both parties, the common vein running through them and the jurisprudence underlying those decisions with regard to this Court’s power under **Rule 5 (2) (b)** (the twin principles can be summarized as follows:-

- i. Under Rule 5(2) (b) the court exercises independent and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court.

See **Ruben & 9 Others v Nderitu & Another** (1989) KLR 459.

- ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

- iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.

iv. In considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.

- v) An applicant must satisfy the Court on both limbs of the twin principles.
- vi) On whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised.

Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

viii) In considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. **Damji Pragji** (supra).

ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

Stanley Kang’ethe V. Tony Ketter, Civil Application No. 31/2012.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.

International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR pg 404.”

Although the applicant raised two broad issues in its notice of preliminary objection before the High Court, it appears to us that the only ground it wishes to canvas in the intended appeal is whether the High Court has jurisdiction under **Section 33 (1)** of the Kenya Airports Authority Act to entertain a dispute involving the applicant. The Section provides that:-

“33. (1) In the exercise of the powers conferred by Section 12, 14, 15 and 16, the authority shall do as little damage as possible; and, where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.”

Bearing in mind the principles we have set out above, we reiterate that even a solitary ground is sufficient

to satisfy the first limb as to the arguability of the appeal.

On whether the intended appeal, if successful will be rendered nugatory in the event proceedings in the High Court are not stayed, we note that the applicant objected to the suit being instituted in the High Court on account of jurisdiction. It is that question alone that will be the subject of the intended appeal to this Court. That being the case, can it be said that the success of the intended appeal will be rendered nugatory if the proceedings before the High Court are not stayed? We think so.

The appeal if successful will serve no purpose at all if the High Court were to proceed when its jurisdiction is being challenged. Have we not repeatedly, guided by the decision of this Court in **Owners of the Motor Vessel “Lilian S” V. Caltex Oil (K) Ltd** [1989] KLR 1, said that:-

“.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....?”

Having found that the intended appeal is arguable, we hold that further proceedings in the High Court while its jurisdiction is being challenged in the intended appeal will render the appeal, if successful a mere academic exercise. We reiterate what this Court said in **Sheshi C. Patel V. Damayanti Navin Shah and Another**, Civil Application No. 236 of 2006 that:-

“On the second principle, i.e. whether or not the results of the appeal if it succeeds would be rendered nugatory if this application is refused, it cannot be gainsaid that if this application is refused, the suit would be heard in the superior court and the parties would be deprived of the benefits that might accrue from the arbitration process. It might be difficult if not impossible to get the matter to arbitration once it is heard by the superior court, as there will remain nothing to go to arbitration by then. Common sense commands that as the question of whether to refer the matter to arbitration or not is still to be the subject of an appeal or intended appeal in this Court, the hearing in the superior court must be stayed to abide the outcome of this Court’s decision on the intended appeal.”

We can only add to this statement that a stay in the nature sought herein will be granted where such stay is necessary to prevent multiplicity of proceedings. The applicant has satisfied both limbs of the twin principle and is therefore entitled to orders of stay. Accordingly, we order that there will be an order of stay of further proceedings in Nbi. HCCC No. 372 of 2012 pending the filing (within 14 days of the date of this ruling), hearing and determination of the intended appeal.

Costs to be in the appeal.

Dated and delivered at Nairobi this 20th day of September, 2013.

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mgkm