



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, OUKO & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NAI. 11 OF 2013 (UR 8/2013)

BETWEEN

AFAPACK ENTERPRISES LIMITED.....APPLICANT

AND

PUNITA JAYANT ACHARYA (Suing As The Administrator

Of The Estate Of The Late Sushila Anantrai

Raval).....RESPONDENT

(An application for stay of proceedings and injunction pending the filing and hearing of an intended appeal to be lodged in the Court of Appeal against the entire decision contained in the ruling and the order to be extracted by the High Court of Kenya at Nairobi (Odunga, J.) dated 27th September 2012)

in

H.C.C.C. No. 530 of 2009)

RULING OF THE COURT

The application before us relates to the decision dated 27th September, 2012 made by Odunga, J. an application dated 16th July, 2012 seeking review of an order by Mwera, J. refusing to set aside interlocutory judgment and to grant leave to the defence in Nbi HCCC No.53 of 2009.

Briefly, the facts of the case were that the respondent's late father **Mr. Anantrai Raval** and the applicant **M/s Afapack Enterprises Limited** entered into a tenancy agreement dated 31st August, 2004. The agreement which was for a period of two years created a controlled tenancy that was subject to the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya (The Act)**.

Sometimes in March, 2008, the respondent sought to increase the rent of the premises by 25%, and on 9th July 2008 the respondent filed Tribunal Case No. 443 of 2008 before the Business Premises Rent Tribunal (The Tribunal), challenging the rent increase. While this reference was pending before the

Tribunal, on 15th February, 2009, the respondent issued another notice, this time, to terminate the tenancy dated seeking the eviction of Mrs. A. Fazal C/O Afapack Enterprises Limited from the suit premises.

The applicant immediately instructed its former advocates, Messrs Swaleh Mwangi and Co. Advocates to object to the notice of termination, and to file a reference to the Tribunal in accordance with the provisions of the Act. Despite the instructions from the applicant to file a reference to the Tribunal, the former advocates failed to do so, and instead withdrew, supposedly by consent, the Tribunal Case No.443 of 2008, being the reference in respect of rent increase.

On 21st October 2009, upon being served with summons and pleadings in Civil Suit No.530 of 2009, the former advocates for the applicant entered appearance on behalf of the applicant, but again failed to file a defence within the stipulated period. Subsequently, an interlocutory judgment was entered against the applicant on 20th December, 2010. On 4th March, 2011, without the applicant's knowledge, the former advocates filed an application supported by an affidavit sworn by **Saad M. Saad** seeking to set aside the interlocutory judgment entered on 20th December, 2010 and to allow the applicant to file its defence out of time, which application was dismissed by Mwera J (as he then was), on 11th October, 2011, for reasons that the applicant's former advocates had attempted to mislead the Court by making false declarations.

The applicant, being aggrieved with the decision, filed a Notice of Motion dated 16th July 2012 wherein it sought a review of the decision of Mwera J. The application was heard by Odunga J, who dismissed the application, and stated thus,

“In this case it is clear that the defendant has not been diligent enough in pursuing its rights. The conduct of the defendant clearly shows that it was not concerned with the consequences of the failure to file a reference. It only jerked into motion when confronted with the reality that without the reference the chance of successfully defending the suit were minimal. That is not the kind of person in whose favour judicial discretion ought to be exercised. I am not satisfied that the new facts alluded to by the defendant could have been discovered despite the exercise of due diligence.”

Being dissatisfied with the decision of the court, the applicant filed this application which is before us under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders that: -

1. *This application be certified urgent and heard ex parte in the first instance.*
2. *Alternatively, this application be certified urgent and it be heard inter partes on a priority basis on such a date as the court may direct.*
3. *This honourable court be pleased to issue an order staying the proceedings in the superior court in Nairobi High Court Civil Case No.530 of 2009 – Punita Jayant Acharya vs Afapack Enterprises Limited pending the filing, hearing and determination of the intended appeal.*
4. *The costs of and incidental to this application abide the result of the intended appeal.*

The application is premised on nine grounds on its face and on a supporting affidavit sworn by **Alifya Abdulhussein**. In summary she has deponed that, following receipt of a plaint, an interlocutory application for injunction and a summons to enter appearance in HCCC No.530 of 2009, Punita Jayant Acharya vs Afapack Enterprises Ltd, the applicant immediately instructed the former Advocates to enter appearance and defend the suit on its behalf. That the advocates filed a preliminary objection, grounds of opposition and a replying affidavit on 10th November 2009, but unbeknown to her, the former advocates failed to file a defence, and nor did the former advocates file a reference to the Tribunal. That the interlocutory judgment in respect of the Civil Suit No 530 of 2009 was entered to her prejudice, and without taking into account that the status of the case was not within the applicant's knowledge. That she did not become aware of the true status of her case until 12th July 2012 when she met with her advocates on record Messrs Kilukumi & Company for a pretrial conference to prepare for formal proof scheduled

for 19th July 2012. That an application had since been filed by Adach & Company Advocates on 13th July 2012, seeking leave to file a reference out of time.

The respondent contended in a replying affidavit sworn by **Punita Jayant Acharya** that, in the suit pending before the High Court was in respect of formal proof with respect for an order for vacant possession of the suit premises, and that no valid grounds to stay the High Court proceedings has been adduced by the applicant.

When the application came up for hearing Mr. Esmail submitted that the suit was arguable, in that the applicant's former advocates Swaleh Mwangi had prejudiced the applicant's case by failing to file a reference to the Tribunal, and a defence in the High Court, that the application was meritorious for reasons that the appeal was grounded on whether an eviction could be granted on the basis of the defective notice of termination of the tenancy, contrary to the provisions of the Act.

On the issue whether the appeal would be rendered nugatory if the stay was not granted, Mr. Esmail contended that once the respondent's suit for formal proof was heard and determined, the applicant would be evicted, which would terminate the protected tenancy status enjoyed by the applicant. Mr. Esmail urged the court to allow the appeal with costs, in terms of the prayers as new evidence had come into the knowledge of the applicant and, the conduct of the matter by the former advocates that was prejudicial to the applicant, and ought not to be visited upon the latter.

On their part the respondent through its learned counsel Ms. Odari opposed the application, and argued that no new evidence had been placed before the Court as required by **Rule 45** of the **Civil Procedure Rules**; that no reference had been filed by the respondent was an uncontroverted fact; and it was therefore submitted that, the learned Judge was correct in finding that no new evidence had been placed before the court; that in response to the argument that the notice to terminate the tenancy was defective, Ms. Odari contended that this issue had not been raised at the time; that therefore, before the notice lapsed, a reference ought to have been filed in the Tribunal, and that the failure of the respondent to file the reference, had resulted in the termination notice taking effect.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application for stay of proceedings and reiterate that, this in considering whether to stay proceedings under **Rule 5(2)(b)** of the **Court of Appeal Rules**, this court has steadfastly held that, in an application such as the one before us, the applicant must satisfy two requirements:

- i. *That the intended appeal is arguable and not frivolous. **J.K. Industries vs Kenya Commercial Bank and Another (1182-88) 1KAR 1088**, and*
- ii. *That unless a stay or an injunction or whatsoever is sought is not granted the intended appeal if successful will be rendered nugatory.*
- ii. As to whether the application is arguable and not frivolous, without delving into the merits of the appeal, as this will be canvassed before another bench, we take the view that, there are legal issues that require to be determined arising out of the notice of termination of the tenancy. For instance, one issue raised was that the Applicant has argued that, the notice was addressed to "**Mrs. A Fazal c/o Afapack Enterprises Limited**", yet Afapack Enterprises Limited and not **Mrs. Fazal** was the actual tenant. Another issue was that, the notice was to take effect from 15th April 2009, but as the tenancy was from month to month, the applicant contended that, the notice did not comply with **Section 4(4) of the Act** and therefore it was for these reasons that the applicant considered the notice of termination of tenancy to be defective. We take the view that these are indeed valid questions that require to be determined in the main appeal, and as such, we consider that the appeal is arguable.

The other aspect that we are required to consider is whether, the eventual success of the intended appeal, were it to succeed would be rendered nugatory. Mr. Esmail has submitted that the applicant is a controlled tenant within the meaning of the Act, and if a stay of proceedings is not granted, the respondent will set down the matter for formal proof, whereupon, once the orders sought are obtained, will lead to the

eviction of the applicant from the premises. As a consequence the applicant would cease to occupy the premises, and lose its status of a protected tenant.

Ms. Odari on the other hand has argued that the appeal will not be rendered nugatory as the applicant still maintains possession of the suit premises, despite the orders of the court. She further argued that in any event, if the applicant was evicted, it could always seek damages in the High Court, and that to grant a stay would be more prejudicial to the respondent.

As of necessity, it is expedient at this point to consider the prayers that are before us. The first two prayers need not concern us, however the third prayer is for an order staying the proceedings in the superior court in *Nairobi High Court Civil Case No.530 of 2009 – Punita Jayant Acharya vs Afapack Enterprises Limited* pending the filing, hearing and determination of the intended appeal, whilst the fourth is in respect of costs. The question that arises is, if the orders were not granted, would this render the intended appeal if it were to succeed, nugatory? We think that this would indeed be the case. This is for reasons that, the hearing and determination of respondent's suit for formal proof is imminent. The orders sought are for the eviction of the applicant as prayed. If obtained, this will result in the eviction, and therefore the irreversible interruption of the applicant's existing controlled tenancy status. We therefore consider that a stay of proceedings is of necessity in the circumstances of this case. Be that as it may, in order to forestall any prejudice that the respondent may suffer whilst awaiting for the appeal to be heard and determined, we also consider it imperative that the applicant continue to pay rent as stipulated.

Accordingly, we order that, a stay of the proceedings is hereby granted in terms of prayer three of the Notice of Motion dated 15th January 2013 but, subject to the continued and uninterrupted payment of rent to the respondent by the applicant, and that costs be in the intended appeal.

Dated and Delivered at Nairobi this 11th day of October, 2013

G. B. M. KARIUKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a truecopy of the original.

DEPUTY REGISTRAR

/jkc