



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & NYAMU, J.J.A)
CIVIL APPLICATION NO. NAI. 17 OF 2011 (UR. 12/2011)

BETWEEN

NILESTAR HOLDINGS LTD. 1ST APPLICANT
MADATALI HASHAM ABRAHAM..... 2ND APPLICANT
As the executor of the Estate of the late
ROSHEN MADATALI ABRAHAM3RD APPLICANT
JALALEDIN EBRAHIM 4TH APPLICANT
AND
GREEN VALLEY LIMITED 1ST RESPONDENT
MARGARET WAIRIMU MAGUGU 2ND RESPONDENT
ARTHUR KINYANJUI MAGUGU 3RD RESPONDENT

(An application for stay of execution of the orders of the High Court of Kenya at Milimani Commercial Court (Muga Apondi, J.) dated 24th November, 2010

in

H.C.C.C. NO. 439 OF 2004)

RULING OF THE COURT

Although the dispute herein appears to be between limited liability companies, the main actors on both sides are two octogenarians who, we are told, are sickly:- **Arthur Kinyanjui Magugu** (Magugu) and **Madatali Hashan Abraham** (Madatali). Madatali is a director of **Nilestar Holdings Ltd.** (Nilestar) whose other directors were his late wife **Roshen** and their son **Jalaledin**. They are the applicants before us. Magugu on the other hand is a director of Green Valley Ltd (Green Valley) while his wife, **Margaret**, is the only other director. They are the respondents herein.

The applicants seek the following orders under **rule 5 (2) (b)** of the rules of this Court:

“2. *THAT the honourable Court be pleased to order a stay of any proceedings in Milimani HCCC No. 439 of 2004 Green Valley Ltd and two others versus Nilestar Holdings Limited and three others pending the hearing and determination of the appeal.*

3. *THAT the honourable court do order a stay of execution of the orders issued by Hon. Mr. Justice Muga Apondi on 24th November, 2010 in HCCC 439 of 2004 Green Valley Ltd and two others versus Nilestar Holdings and three others.*

4. *THAT the honourable (sic) be pleased to order a refund to the applicants of all the rents collected by the firm of Gichuki Kingara and Company from L.R. Nos. 209/908 and L.R. No. 209/918 from July, 2010 to the date of ruling.*

5. *THAT the honourable court be at liberty to make any further orders in the interests of justice.*”

The relationship between the parties goes back more than 25 years in 1986/87 and relates to two prime properties in the Central Business District, on Kenyatta Avenue, Nairobi: - **LR. No. 209/908 and 209/918** (“*the suit premises*”). The suit premises are registered in the name of Nilestar and are the only assets of the company. Magugu says in 1986, he had agreed with the three shareholders of Nilestar that they would sell and transfer their shares to him for the consideration of Kshs.25 million and he paid them Shs.19 million in part performance of the agreement. A disagreement arose thereafter and Magugu filed suit in the High Court in 1989 (**HCCC 1181/89**) which, according to him is still pending. In 1996, however, another agreement was entered into whereupon the three shareholders of Nilestar were to sell and transfer their shares to Green Valley and Margaret for the consideration of USD. 1.4 million. That sum would include Shs.19 million which had earlier been paid by Magugu. Green Valley paid another USD 170,000 and were ready to pay the balance of USD 1,230,00 to complete the transaction when the shareholders of Nilestar refused to honour the agreement. They rescinded it and purported to forfeit the sum of Kshs.19 million and USD 170,000 (less USD 28,157 refunded under the forfeiture clause). The respondents thought the purported rescission and forfeiture were, *inter alia*, illegal, fraudulent and unconscionable, and they filed suit in December, 1996 seeking, *inter alia*, an injunction to stop the applicants from selling or alienating the suit premises, a declaration that the purported rescission and forfeiture of Kshs.19 million and USD 141,843 was unlawful, inequitable and unjust enrichment; an order to compel the applicants to pay the respondents quarterly rent Shs.1,216,000 in respect of the suit premises, and an order for specific performance of the entire agreement.

The applicants did not dispute that the suit premises were the only property of Nilestar. But they denied that there was any agreement to sell it, pleading that the only agreement was between the shareholders of Nilestar, on the one hand, and Green Valley and Margaret, on the other, for sale of shares. They said Magugu was not a party thereto and pleaded that the suit was ill-conceived and vexatious. They further pleaded that the agreement of 1996 had specific clauses which the two respondents did not comply with, hence, the rescission and forfeiture which were lawful. As for the alleged earlier agreement of 1986/87 with Magugu which was the subject matter of HCCC 1181/89 they pleaded that the suit was settled and terminated by consent of the parties. They prayed for dismissal of the suit.

For some reason the suit does not appear to have come up for hearing until the year 2010 when it fell before Muga Apondi J who partly heard two witnesses. On 29th June, 2010, however, the respondents filed a notice of motion seeking several orders, among them; a prohibition against the Government from processing renewal of the leases relating to the suit premises; a restraining order to stop the applicants from dealing with the shares of Nilestar, and an order that all rentals collected from the suit premises be made to the respondents forthwith, pending the hearing and determination of the suit. The basis for seeking the orders was the discovery by the respondents that despite the pendency of the suit, the applicants had applied to the Commissioner of Lands for extension of the two leases which were due to expire, and had sought removal of caveats registered by the respondents. It was also alleged that the applicants were making clandestine arrangements to transfer their shares to other parties. As for the monthly rental payments, the respondents contended that it was part of the agreement of 1996 that the rentals were due to them but the applicants were instead collecting them. The application was heard *inter partes* and the orders sought by the respondents were granted. Those are the orders which aggrieved the applicants and which they seek to have set aside in the intended appeal. Before then they seek the four main orders reproduced above.

Those orders may be granted if the applicants show not only that the intended appeal is not frivolous or is arguable even on a solitary ground, but also that unless the orders sought are granted, the success of the intended appeal shall be rendered nugatory. The court is also under statutory duty under **sections 3A and 3B** of the Appellate Jurisdiction Act, which is also invoked, to consider and apply the overriding objective of the Act, which is to facilitate the just, expeditious, proportionate and affordable resolution of appeals.

Mr. Kinoti Mbobua, learned counsel for the applicants was alive to these principles and in his

attempt to surmount the first hurdle, he referred us to the affidavit in support of the application and particularly submitted that the High Court had gravely erred in issuing final orders in respect of payment of rent, and granting mandatory orders when the issue was still live in the suit before it. A sum in excess of Shs.3 million had already been collected by the respondents since the order was made but, he submitted, no outgoings were being paid in respect of the suit premises. He submitted that the applicants ceased to have any fair trial before the High Court once a finding was made that rent was payable, since interpretation of the disputed agreement had been made at an interlocutory stage. As for the nugatory aspect Mr. Mbobua submitted that the rental income was the only source of income for Nilestar and Mandatali who was aged 90 years, and there was no evidence that the respondent would reimburse the rentals accruing at Shs.380,000/= every month.

In response to those submissions Mr. Kingara, learned counsel for the respondents, submitted that the applicants brought the orders on themselves since they were proceeding surreptitiously to affect the subject matter of the suit to the prejudice of the respondents. In his view, the orders prohibiting the processing on new titles and transfer of shares were not assailable. As for the order sought for stay on proceedings, he submitted that it was pointless considering that Magugu was old and sickly after suffering a stroke, while Mandatali also confesses he was sickly and helpless at 90 years of age. It was in their interest, therefore, that the suit be heard and determined expeditiously. The fear of bias as alleged by the applicants was also no longer valid since Apondi J has since been transferred and the matter is likely to proceed before another judge of the High Court. As for the mandatory order for payment of rent, Mr. Kingara submitted that it was well merited since there was no denial that Magugu had paid in excess of Shs.25 million for property which he was not enjoying. At any rate, he submitted, the applicants had filed other applications in the High Court in relation to rental payments and the tenants themselves have filed suits of their own. Finally on the nugatory aspect, Mr. Kingara submitted that there was no threat against the suit property since both parties are involved in the extension of the leases. He further contended that Magugu was a former Minister and there is no averment that he was incapable of refunding any monies collected by him.

We have given anxious consideration to the application and it is our view that it is not a frivolous issue to question the mandatory orders given at an interlocutory stage of proceedings, regarding enforcement of one of the clauses in a disputed agreement between the parties. Both parties claim an equal right to the rents accruing from the suit premises until such time as the suit is heard and determined. We have seen the 11 issues framed for determination before the High Court, and, in our view, the validity of the Agreement and the right to benefit from the various clauses thereunder is central to those issues. There may well have been no justification therefore to determine with finality, the application of one of those clauses in the agreement before all the evidence was adduced and assessed. We have also examined the affidavit in reply to the motion and we find no deposition that the rentals made out would be available for refund if the applicants succeed on appeal. In all the circumstances of this case, the order that commends itself to us is to direct that the rentals accruing from the suit premises, from the date of the order of the High Court, be deposited in an interest earning bank account in the names of the Advocates for both parties. All lawful outgoings in respect of the suit premises shall periodically be paid out of that account pending determination of the intended appeal or the suit whichever is the earlier. We decline to issue a stay of execution of orders No. 1 and 2 of the orders of the High Court given on 24th November 2010 and issued on 4th February 2011 since, in our view, the success of the intended appeal would not be rendered nugatory if they are not granted. We further decline to grant the order for stay of proceedings in the High Court as we think in the special circumstances of this case, it is in the interest of the parties that their evidence be recorded and considered expeditiously. Those shall be our orders in this motion. Costs of the motion shall be in the intended appeal.

Dated and delivered at Nairobi this 3rd day of February, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR