



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 167 OF 2012

KENYA RAILWAYS CORPORATION APPLICANT

AND

ERDEMANN PROPERTY LIMITED RESPONDENT

(An application for stay of proceedings in HCCC No. 294 of 2012 and stay pending an appeal of the Ruling/Order issued by the High Court of Kenya at Nairobi (Mabeya, J) dated 8th June, 2012

in

H .C. C. C. No. 294 of 2012)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules (“the Rules”) for stay of proceedings in High Court Suit No. 294 of 2012, and for stay of the order of the High Court (Mabeya, J) made on 8th June, 2012 pending the hearing and determination of an intended appeal.

The facts giving rise to this dispute are briefly as follows:

By a plaint dated 14th May, 2012 and filed in the High Court at Milimani Commercial Court in Nairobi, the respondent, Erdemann Property Limited, claimed, among other things, an order for specific performance of its contract with the applicant, Kenya Railways Corporation, for the sale and purchase of the property known as L. R. No. 209/11953 (the suit property) for the price of Kshs.1.765 billion plus special damages of Kshs.11,627,374,587.95. In the alternative, the respondent claimed special damages of Kshs.26,007,614,587.95. It also prayed for:

“A permanent injunction to restrain the 1st Defendant whether by itself, its servants, agents, auctioneers or employees from selling, transferring, alienating or in any other manner disposing of property L. R. No. 209/11953 to any person other than the Plaintiff.”

Contemporaneously, with the filing of the plaint, the respondent filed a notice of motion under a certificate of urgency dated 23rd May, 2012 seeking, among other things, orders to restrain the applicant from “selling, transferring, alienating or in any other manner disposing of” not just the suit property, but several other properties owned by the applicant.

The learned Judge, after hearing submissions made by the respondent’s counsel, issued ex-parte orders restraining the disposition of several properties for a period of 14 days, and directed that the

application be heard inter-partes.

Meanwhile, on 30th May, 2012, the applicant filed a motion before the same Judge seeking discharge of the injunctive orders, mainly on the grounds that the orders had affected the applicant's business operations; that it prevented them from dealing with its properties; that the order contravened **section 88** of the Kenya Railways Corporation Act; and that the order unfairly injuncted many other properties, not the subject of litigation before the Court. That motion was heard inter-partes, and in a ruling delivered on 8th June, 2012, the learned Judge upheld his decision to injunct the properties of the applicant, albeit reducing significantly the number of the properties covered by the injunction, although going beyond the suit property, the subject of the dispute. Here is how the learned Judge expressed himself:

***“That being the case, I am in agreement with the able submissions of Miller that having the restraining order to cover all the immovable properties of the 2nd Defendant throughout the country may cause some injustice. On the other hand, the Plaintiff has a vested interest in that it was able to convince the court that it was just and fair to issue the conservatory order of 23rd May, 2012. I am convinced that in arriving at any decision in this matter, it is imperative that this court applies the letter and spirit of the said Sections 1A and 1B of the Civil Procedure Rules. The interest of both parties must be put on the scales of justice.*”**

The Court of Appeal in E. Muiru Kamau and Another vs National Bank of Kenya Ltd (2009) eKLR, observed as under:-

‘The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.’ (Emphasis supplied)

Accordingly, having found that it is unjust to cover all the 2nd Defendant's immovable properties with a blanket injunction, in order to strike a balance between the interests of both parties, in the exercise of this court's jurisdiction under Sections 1A & 1B, I allow the application dated 30th May, 2012 to the extent that order number 4 of the Order made on 23rd May, 2010 is varied and all the properties set out therein forthwith discharged from the restraining order save for the following properties LR. Nos. 209/11379, 37/28, 37/31 and those identified as Kileleshwa K6 – K21, Riverside, Lavington and Elgon Road, respectively. These properties shall remain under injunction until further orders of the court. Since the application was partially successful, costs will be in the cause.”

It is against that ruling that an appeal is intended, and for now the applicant seeks a stay of the aforesaid order, and stay of any further proceedings in the High Court, pending the hearing and determination of the intended appeal.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

In his submissions before us, Mr. Cecil Miller, learned counsel appearing with Mr. Peter Wena, for the applicant, argued before us, as he did before the High Court, that the High Court erred in granting restraining orders over the applicant's properties as it contravened the provisions of **section 88** of the Kenya Railways Corporation Act; that the said orders had paralysed the applicant's operations, rendering its ability to deal with several of its properties; that it was unfair and unjust to injunct many other properties which were not the subject of litigation before the High Court; and that damages was an

adequate remedy in the event that the applicant lost its case before the High Court. Mr. Miller argued that unless the orders sought were granted, the intended appeal would be rendered nugatory because the applicant will be compelled to breach its contractual and statutory obligations with respect to the injuncted properties.

Mr. King'ara, learned counsel for the respondent, submitted that the orders sought to be impugned did not contravene the aforesaid **section 88** as the orders were merely to "preserve" the properties, and not to "attach" them. According to him, **section 88** applied to "execution" of a judgment, and not to "preservation" of the assets to satisfy the judgment.

Mr. Milimo, for the intended 2nd respondent, argued that the learned Judge having made some crucial findings relative to the tender process, there is unlikelihood of a fair hearing taking place, and asked us to order stay of the proceedings in the High Court.

So, is this appeal arguable? Clearly, the fact that counsel are diametrically opposed on the effect and purport of **section 88** of the Kenya Railways Act, and whether indeed the properties of the applicant corporation can be "preserved" or "attached" makes this an arguable appeal. Secondly, whether the judge had the jurisdiction to go far beyond the orders sought in the plaint, and to injunct several of the applicant's properties, not the subject of dispute, and not even sought in the plaint, is an arguable point. An arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. We are satisfied that the intended appeal is arguable.

On the second point of whether the appeal will be rendered nugatory unless we grant the stay, we are satisfied that, indeed, it will be rendered nugatory. Clearly, without those orders, the applicant will be compelled to breach its contractual and statutory obligations, arising from its inability to deal with several of its properties, which have been injuncted.

Accordingly, we are of the view that it is fair and just in the circumstances of this case, that we grant prayer 2, that there be a stay of the Order issued by the High Court on 8th June, 2012 in Civil Suit No. 294 of 2012 pending the hearing and determination of the intended appeal. We do not, however, grant prayer 1, as we see no justification for the same, and we direct that the proceedings continue in the High Court to its logical conclusion.

Dated and delivered at Nairobi this 28th day of September, 2012.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR