IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, KEIWUA & NYAMU JJ.A.)

CIVIL APPLICATION NO. NAI 131 OF 2010 (UR 97/2010)

BETWEEN

KENYA HOTEL PROPERTIES LIMITED…….………………………….APPLICANT

AND
WILLESDEN INVESTMENTS LTD…………………….....…...…………RESPONDENT

**(An application for stay proceedings and an injunction pending the hearing and determination of the
appeal against the ruling of the High Court of Kenya at Nairobi (Muchelule, J) dated 27th May 2010**

in

H.C.C.C. NO. 35 of 2010
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RULING OF THE COURT

This application is by way of notice of motion and is expressed as having been brought "Under **sections 3A** and **3B** of the Appellate Jurisdiction Act and **rules 5(2) (b)** of the Court of Appeal Rules." The applicant, Kenya Hotel Properties Limited seeks the following orders:-

"1. An injunction be granted restraining the respondent, its servants or agents from executing the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited pending the determination of the present appeal.

2. The Court do order a stay of any proceedings, by way of execution or in any other manner whatsoever, in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited and Milimani HCCC No. 24 of 2008 Willesden Investments Limited v City Council of Nairobi pending the hearing and determination of the appeal.

3. The Court do order that the proceedings in the superior court be typed expeditiously and the appeal be heard on priority basis once filed and lodged in the Court of Appeal.

4. The appeal by the appellant and that to be lodged by the Kenya Anti- Corruption Commission be consolidated and heard together in the interests of justice.

5. The parties be at liberty to file written submissions in support of their respective appeals.

6. The court be at liberty to make any further orders in the interests of justice.

7. Costs be in the cause".

The application which is supported by the affidavit of one Marianne Ndegwa Jordan is based on the following grounds:-

"(a) The judge contravened the rules of natural justice by failing to accord all the parties the right to be heard on all pending applications.

(b) The applicant has an arguable appeal as set out in the draft Memorandum of Appeal.

(c) Unless a stay is granted, the appeal shall be rendered nugatory as the respondent is incapable of refunding the decretal amount.

(d) The respondent absolutely failed to file any Replying Affidavit to counter the following grave issues of fact that had been raised:

i. Whether it is registered as Willsden Investments Limited or Wills Den Investments Limited. A search revealed that other companies had been registered bearing the same name. Is the respondent a duly registered legal entity?

ii. Whether it was registered as a tax payer in light of the fact that the Kenya Revenue Authority confirmed that the respondent did not appear in its records.

iii. Whether it had paid any land rent or rates as evidence adduced showed that no payment had been made.

iv. Why it took no steps for more than 3 years to seek to reclaim the suit land from the City Council of Nairobi who have been in occupation since September 2004.

v. Whether its advocates were conflicted (sic) having been appointed as directors at one time.

(e) The oxygen principles require all parties to be put at an equal footing. The applicant was denied a fair hearing to ventilate the above issues. The superior court acted in violation of the oxygen principles.

(f) The judge contravened the applicant's constitutional right to a fair hearing by striking out the suit when serious issues had been raised by both the appellant and the Kenya Anti-Corruption Commission.

(g) The superior court erred in law by holding that the suit was res judicata when this was not an issue before the court when determining the Notice of Motion Application dated 2nd March 2010.

(h) The superior court erred in law by failing to consider that both the Kenya Anti-Corruption Commission and Willesden Investments Limited were claiming the decretal amount in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited.

(i) The judge erred in law by failing to consider that the rival claims over the decretal sum amounted to an inter-pleader scenario.

(j) The superior court erred in law by failing to accord the Appellant the constitutional right and opportunity to seek a nullification of the proceedings in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited if a determination was made that the land

was illegally acquired and no benefit could flow from an illegality.

(k) The superior court erred by going against the oxygen principles by failing to allow the parties a just and proportionate playing ground in the legal arena.

(l) The judge erred in law by failing to follow the due process of the law contrary to sections 75 and 77 of the Constitution of Kenya by striking out a suit that sought to determine the legal ownership of land and the right to the benefit of a decree based on an a potentially(sic) acquired land".

It is to be observed that this application is seeking an injunction and orders of stay of proceedings in respect of two suits filed in the superior court – **Milimani HCCC No 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited and Milimani HCCC No 24 of 2008 Willesden Investments Limited Vs City Council of Nairobi.**

A brief background to this application is necessary in order to appreciate the nature of the dispute before the courts. As regards the first case which we shall refer to as HCCC NO 367 of 2000 the record shows that the suit was concluded in the High Court vide the judgment by Mutungi J. delivered on 14th December 2006. In concluding his judgment the learned Judge said:-

"In the result I hold that the plaintiff has proved its claim on a balance of probabilities. Accordingly, I enter judgment in favour of the plaintiff against the defendant. I award the following to the plaintiff against the defendant:

(a) Mesne profits from January 1994 to February 1998, both months inclusive, in the sum of Kshs.54,902,4000 with interest at court rates from January 1994 till payment in full.

(b) General damages for trespass for Kshs.10,000,000/= with interest from the date of this judgment at court rates till payment in full.

(c) Kshs.6,000,000/= as damages for loss of business opportunity, with interest at court rates, from the date of this judgment till payment in full.

(d) Costs of this suit, with interest at court rates, from the date of filing of the suit till payment in full".

Kenya Hotel Properties Limited was dissatisfied by the judgment of the superior court and filed an appeal in this Court being Civil Appeal No 149 of 2007. That appeal was considered by this Court and the matter concluded by the judgment of this Court delivered on 2nd April, 2009. In concluding its judgment this Court stated:-

"Our understanding of the above persuasive authorities is that once the learned Judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Kshs. 10 million under the subhead "trespass", since both mean one and the same thing. We would therefore set aside the award of Kshs.10,000,000/= for trespass, and also set aside the award of Kshs.6,000,000/= which counsel for the respondent conceded.

We find the respondent did not claim any special damages and we find no basis for prayer (e) of the grounds of appeal.

In view of the foregoing the award for general damages for trespass in the sum of Kshs.10 million and the award of damages for loss of business opportunity in the sum of Kshs.6 million cannot stand. Consequently those awards are set aside.

The award of Kshs.54,902,400/= is reduced to Kshs.22,729,800/= with interest at court rates from January 1994 to the date of full payment. The appellant shall have half the costs of this appeal and half the costs in the superior court".

With the foregoing it would appear that the dispute in the first case (HCCC NO 367 of 2000) came to an end. But that was not to be so in view of this application before us.

As regards the second case (HCCC No. 24 of 2008) it was Willsesden Investments Limited which sued City Council of Nairobi alleging trespass on the land in dispute already adjudicated upon in which both the High Court and this Court ruled in favour of Willsesden Investments Limited. There was the High Court Civil Suit No 35 of 2010 in which Kenya Anti-Corruption Commission sued Willsesden Investments Limited as 1st defendant, Ben Muli (2nd Defendant) Jatin Patel (3rd defendant) Hitesh Rathood (4th defendant) Martha Kimwele (5th Defendant), Kenya Hotel Properties Limited (6th defendant) and Wilson Gachanja (7th Defendant). The City Council of Nairobi appears to have been joined as an interested party. In this case (HCCC 35 of 2010) it is the plaintiff's case that the suit property was previously part of Kaunda Street and therefore a public road which was not available to allocation and yet the 7th Defendant had gone ahead and illegally and fraudulently allocated it to an entity known as Center Park Limited and issued a grant to the 1st defendant. It is claimed that the allocation and grant offended the provisions of Local Government Act (Cap 265), Physical Planning Act (Cap 286) and Government Lands Act (Cap 280). The plaintiff (KACC) seeks a declaration that the allocation and grant were null and void and sought their cancellation and/no revocation. A permanent injunction was also sought against all the defendants.

Various applications were made but of relevance to this application before us is the application by the 1st Defendant (Willsesden Investments Limited) in that suit (HCCC No 35 or 2010) filed in the superior court on 3rd March, 2010 seeking striking out of the 6th Defendant's suit. The application was placed before Muchelule J. for consideration. The learned Judge considered the submission made before him and in a ruling delivered on 2th May, 2010 ordered that the 6th defendant's suit be struck out. In his ruling the learned Judge went over the history of the two cases (HCCC No 367 of 2000 and HCCC No 24 of 2008). In the course of his ruling the learned Judge said:-

"It is common ground that case No. 367 of 2000 was heard and determined by the High Court. There was an appeal to the Court of Appeal which has been concluded. Such a case cannot be consolidated with the present suit or with case No. 24 of 2008 both of which are pending".

In concluding his ruling the learned Judge said:-

"I have had anxious consideration of the material before me, the submissions of the learned counsel and the principals of law applicable. I have come to the conclusion that this suit is raising issues which have been determined by the High Court and Court of Appeal. The issues are *res judicata.*

In conclusion, the suit and the applications by the Plaintiff and the 6th Defendant are all dismissed and/or struck out with costs".

The applicant in the present application is Kenya Hotel Properties limited. It now seeks the orders that we set out at the commencement of this ruling. It is important to appreciate that the applicant (which was the 6th defendant in HCCC NO 35 of 2010) seeks to appeal against the ruling of Muchelule, J and that before its appeal is finally heard and determined it seeks the injunctive orders and stay of proceedings. This being an application under **rule 5(2) (b)** of this court's Rules, it is upon the applicant to satisfy us not only that the intended appeal is arguable, and is not frivolous but also that the same intended appeal if successful, will be rendered nugatory if stay orders are not granted at this stage.

In **Ishmael Kagunyi Thande Vs Housing Finance Company of Kenya Ltd – Civil Application No Nai 157 of 2006** (unreported) this Court said:-

"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 that 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 that appeal will be rendered nugatory". {See Githunguri vs. Jimba Credit Corporation Ltd. No. 2 (1988) KLR 838, J. K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982 – 88)}".

It was upon the applicant to satisfy us on these two principles. When the application came up for hearing on 23rd September 2010 Mr. Allen Waiyaki Gichuhi appeared for the appellant, Mr. Fred Athuok for the 1st respondent, Mr. Jairus Ngaah for Kenya Anti-Corruption Commission, Mr P.C. Njuguna for Wilson Gachanja (7th Defendant in the suit in the superior court) and Mr. D.O. Oyata for 2nd, 3rd and 4th respondents. It was the submission of Mr. Gichuhi that the intended appeal is arguable as the issue of legality of the title was never considered. Mr. Gichuhi pointed out that the ruling by Muchelule, J was on an interlocutory application and that pleadings had not closed. On the nugatory aspect of this matter Mr. Gichuhi pointed out that the respondent had no capacity to refund the decretal amount. Mr Gichuhi referred us to his list of authorities in support of his submission.

In his reply Mr. Athuok pointed out the fact that the order by Muchelule, J was to the effect that the suit by 6th defendant was struck out and hence there was nothing to be stayed. It was also pointed out that in this application the applicant seeks a raft of other reliefs which do not fall under **rule 5(2) (b)** of this Court's Rules. Finally, Mr. Athuok submitted that in this application was intended to delay a matter which has been finalized by this Court. He therefore asked us to dismiss the application with costs.

On his part Mr. Ngaah said that he had filed an application under **rule 5(2)(b)** of this Court's Rules being Civil Application No 127 of 2000.

Mr Njuguna opposed the application on the ground that Muchelule, J dismissed the suit which the applicant wants stayed. Mr. Njuguna submitted that there was nothing to be stayed. It was his view that this application was a gross abuse of the court process as there can be no stay against a dismissal order.

Mr Oyatta addressed us at length taking us through the three cases. He submitted that the issue of ownership of the plot was finalized by both the High Court and this Court. He further submitted that Muchelule, J heard the parties on the issue of jurisdiction and dismissed the suit. It was pointed out that the applicant was a party which had lost and now seeks to ride on another party's back. Finally Mr. Oyatta was of the view that this application was a serious abuse of the court process.

We have considered the rival submissions in this application and it would appear that the applicant has sought an injunction and a stay order of proceedings. We hope our narration of the events in the two cases (HCCC No 367 of 2000 and HCCC no 24 of 2008) has set out the background to this application. It must be pointed out that this application arises out of HCCC no 35 of 2010. Let us now consider what we are being asked to grant in this application. The first relief is the order of injunction to restrain the respondent, its servants or agents from executing the decree in Milimani HCCC NO 367 of 2000 pending the determination of the appeal. We have already given the background to HCCC No 367 of 2000 and the position is that the dispute in that suit was finalized by this Court in its judgment delivered on 2nd April 2009. That being the case there can be no case of an injunction being issued against the respondent Willesden investment Limited. The dispute between the applicant and the respondent has been finalized and it cannot be re-opened.

The second relief sought in this application is a stay of proceedings by way of execution or in any other manner whatsoever in HCCC No 367 of 2000 and HCCC no 24 of 2008. As we have already stated the dispute in HCCC No 367 of 2000 has been finalized. As regards HCCC No 24 of 2008 the dispute is between Willesden Investment Ltd and the Nairobi City Council. Apparently, the applicant herein Kenya Hotel Properties Limited is not a party to that suit. Indeed, Muchelule, J in the course of his ruling alluded to this state of affairs when he said, *inter alia:*

"The Defendant has filed no suit against the 1st defendant in which the property is the subject matter or at all. 367 of 2000 is a finalized case. 24 of 2008 is between the 1st defendant and City Council of Nairobi. The application for injunction was only not only misplaced but was also

incompetent and ought to be struck out.

In our view, the second relief cannot be granted in respect of the second case (HCCC No 24 of 2008). The third order sought from this Court is that the proceedings in the superior court be typed expeditiously and that the appeal be heard on priority basis. Clearly that is not a matter for **Rule 5(2)(b)** of this Court's Rules. We decline to do that which is not within our mandate.

The fourth relief sought in this application is that the appeal by the appellant (applicant?) and that lodged by the Kenya Anti-Corruption Commission be consolidated and heard together. That is not a matter that can be brought under **rule 5(2) (b)** of this Court's Rules.

The fifth relief is that the parties be at liberty to file written submissions in support of their respective appeals. This is a noble request but perhaps unnecessary especially in view of **Rule 100** of this Court's Rule which provides:-

"100. (1) Any party to an appeal who does not intend to appeal in person or by advocate at the hearing of the appeal may lodge in the appropriate registry written submissions of the arguments in support of or in opposition to the appeal or the cross-appeal if any, as the case may be and shall before or within seven days after lodging it serve a copy of it on the other party or on each other party appearing in person or separately represented.

(2) The written submissions shall be lodged by –

(a) an appellant, within fourteen days of lodging his memorandum of appeal;

(b) a respondent, within thirty days of service on him of the memorandum and record of appeal.

(3) An appellant who has lodged written submissions under sub-rule (1) may, if served with notice of a cross-appeal, lodge supplementary submissions of the arguments in opposition to it within fourteen days of service.

(4) A party who has lodged written submissions under this rule may, with leave of the Court, address the Court at the hearing of the appeal".

Going back to the ruling of Muchelule, J which will be the subject of intended appeal it is to be observed that the entire suit by the plaintiff therein (KACC) and the application by the 6th Defendant (the applicant herein) were dismissed and/or struck out with costs. That is why we agree with the submissions of both Mr. Athuok and Mr. Njuguna that there was nothing capable of being stayed.

In <u>Western College of Arts and Applied Sciences v Oranga and others</u> **[1976] Kenya L.R. 63 AT P. 66** Law VP said:-

"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction".

It would appear that we are faced with a similar situation since the applicant herein is dissatisfied with the order of Muchelule, J arising from the ruling delivered on 27th May, 2010. The applicant intends to appeal against that order which was an order dismissing its application and also striking out the entire suit. Clearly there is nothing capable of being stayed by this Court.

In his submissions, Mr Athuok stated that the applicant had failed to disclose to this Court that it had applied and obtained a stay order from the High Court (Njagi, J). This is supported by the affidavit of Ben Muli who has attached the order of Njagi J. given on 28th May, 2010. This is a practice that must not only be discouraged but condemned. In **Romanus Okeno v Bank of Baroda Kenya Ltd Civil app. No Nai 1 of 2010** (unreported) an application under **rule 5(2) (b)** was dismissed for constituting an abuse of the court process and engaging both courts (High Court and Court of Appeal) at the same time. Having taken into account the background to this application, the reliefs sought and the rival submissions by counsel appearing for the parties, we are satisfied that this application is void of any merit and that it was, indeed, an abuse of the court process. We have no hesitation in rejecting it. Accordingly, we order that this application by Kenya Hotel Properties Limited dated 8th June 2010 and filed in this Court on 9th June 2010 be and is hereby dismissed with costs to the 1st, 2nd, 3rd and 4th respondents.

Dated and delivered at Nairobi this 28th day of January 2011.

E. O. O'KUBASU
....
JUDGE OF APPEAL

M. Ole KEIWUA
....
JUDGE OF APPEAL

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

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

DEPUTY REGISTRAR