



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & ONYANGO OTIENO, JJ.A.)

CIVIL APPLICATION NO. NAI. 121 OF 2009 (UR.77/2009)

BETWEEN

JOSEPH MUIRURI GITHONGO.....APPLICANT

AND

MOHAMED MUIN AHMAD MALIKRESPONDENT

(Application for stay of proceedings pending the hearing of an intended appeal from the ruling of the High Court of Kenya

at Nairobi (Lesiit, J.) dated 20th March, 2009

in

H. C. C. C. NO. 285 OF 2003)

RULING OF THE COURT

In a plaint dated 31st March 2003 and filed in the High Court on 18th May 2003, the respondent in this application **Mohamed Muin Ahmad Malik** sought judgment against the applicant herein **Joseph Muiruri Githongo** for Kshs.32,000,000/= being part of the balance of the loan borrowed from the respondent's principal whose details were known to the applicant with interest thereon at 14% per annum from 1st December, 1996 until payment in full, together with costs of the suit and interest thereon and also together with the interest which had not been repaid despite several demands. The applicant, despite being served with summons to enter appearance, did not enter appearance and the respondent obtained ex-parte judgment on 1st July 2003 against the applicant on account of non appearance. Vide Chamber Summons dated 2nd February 2004, the applicant moved to the Court seeking inter alia, that the judgment dated 1st July 2003 be set aside and vacated and all consequential orders be set aside and vacated. In the affidavit in support of that application, the applicant admitted having taken a loan from the respondent's disclosed principal of Ksh.22,500,000/= part of which he claimed to have repaid to the extent of Ksh.5,000,000/=. A draft defence together with a copy of an agreement were annexed to that application. Written submissions were made by the advocates for both parties who also made short oral submissions highlighting the written submissions. Warsame J., in a ruling delivered on 15th May 2008 concluded:-

“Now taking into consideration the circumstances in this matter, I am minded to give the defendant a chance on the issue of interest, therefore I direct the defendant to pay a sum of Kshs.17 million to the plaintiff within the next 7 days failure of which the defendant’s advocates will be required to release the sums held by them to the plaintiff. The issue of interest and other issues shall await full trial of the suit.”(underlining supplied)

On 21st May 2008, six days after Warsame J.’s ruling, the applicant filed defence dated 20th May 2008. That defence raised several issues. One of the issues raised is at paragraph 7 of that defence. There, the applicant stated:-

“Further, if an agreement was made between the plaintiff’s alleged principal and the defendant, which is denied, the claim for the sum of Kshs.7,500,000, demanded as interest on the alleged loan of Kshs.30,000,000 is unenforceable as it is extravagant and unconscionable, and in the nature of a penalty.”

Together with that defence, the applicant also filed a chamber summons seeking that the plaint be struck out for disclosing no reasonable cause of action, and all monies paid to the respondent be refunded to the applicant. The respondent’s response was a chamber summons dated 16th June, 2008 in which the respondent sought orders that:-

“The defence herein filed on 21st May, 2008 be struck out with costs for disclosing no reasonable or any defence.”

This application was based on the allegation that the defence was filed in total defiance of the ruling and orders made by Warsame J. This application came up for hearing before Lesiit, J who after full hearing stated in her decision delivered on 20th March 2005 as follows:-

“In conclusion therefore, I find that the defence as filed cannot stand. I will allow the plaintiff’s application dated 16th June 2008 and strike out the defence filed on 21st May, 2008 with costs to the plaintiff.”

The applicant felt aggrieved by that ruling. He intends to appeal against it and on 27th March 2009 he filed notice of appeal. He also brought this notice of motion before us dated 5th May 2009 in which he is seeking orders that:-

“1. This Honourable Court be pleased to grant a stay of proceedings pending the final hearing and determination of the applicant’s intended appeal against the decision of the High Court of Kenya at Nairobi (Honourable Lady Justice Lesiit) given on the 20th day of March 2009 in High Court Civil case No. 285 of 2003.

2. Such orders be made as the Court deems fit and just.

3. The costs of and incidental to this application abide by the results of the said appeal.”

The grounds in support of the application are that the intended appeal is arguable and several aspects demonstrating arguability of the intended appeal are cited, and that the results of the intended appeal will be rendered nugatory unless the application is allowed, and if the application is refused, the respondent will proceed with the formal proof of the suit without the applicant’s defence and may proceed to execute the order obtained. As the principal is not made a party, though disclosed, it may not be possible to recover whatever money is paid to the respondent who is acting on behalf of a disclosed principal.

Mr. Kapila, the learned counsel for the applicant, in his submission before us raised one main arguable point which was that Lesiit J. erred in striking out the entire defence on the basis of Warsame J.’s ruling whereas that ruling allowed the applicant to pursue the issue of interest and other issues to await the full trial. On the nugatory aspects, Mr. Kapila contended that the amount involved was large and secondly,

that as the principal on behalf of whom the respondent acted was not made a party, if the suit proceeded without defence on record and the orders for payment are made, it may not be possible to recover the money once paid to the principal through the respondent as agent.

Mr. Osmond the learned counsel for the respondent, in response, conceded that the intended appeal was arguable, but submitted that the results of that appeal will not be rendered nugatory by our refusal to allow the application as the principal was disclosed and there would be no problem recovering whatever money that was paid. We note that the parties agree that Ksh.17,000,000/= which was the balance on the original loan had been paid pursuant to the orders of Warsame J. It is therefore mainly the interest that is still being claimed by the respondent.

As Mr. Osmond concedes that the intended appeal is arguable and in fact says the learned Judge (Lesiit J.) made a mistake in striking out the entire defence including those parts we have cited above which were raising issues of interest and which issues Warsame J. had allowed to go to trial, we do not see any need to go into that first principle as we also agree that indeed there is an arguable point, namely, whether the entire defence should have been struck out or not.

On the nugatory aspects we observe that if we refuse this application, the respondent will set the suit down for formal proof before the superior court and may end up getting orders for interest at the rates put forward by him. Thereafter he may execute for that amount, which we are told is in excess of Ksh.7,500,000/=. As the respondent is acting on behalf of a disclosed principal who is not a party, that money may be paid over to the principal and it may not be easy for the applicant to access it as to do so may very well mean taking other steps in the entire matter. We are satisfied that the applicant has demonstrated that were his intended appeal to succeed, the results thereof may be rendered nugatory by our refusal to grant this application.

Thus in our view, the two principles on which the Court is to be satisfied on before an application brought under **rule 5 (2) (b)** of this Court's Rules, is granted, namely that the appeal already filed or intended to be filed is arguable, that is that it is not frivolous, and that the results of the appeal or intended appeal were it to succeed would be rendered nugatory by our refusal of the application have been satisfied - see **Reliance Bank Limited vs. Norlake Investments Limited (2002) 1 EA 227.**

The application succeeds. The proceeding before the superior court in Civil Case No. 285 of 2003 are hereby stayed pending the final hearing and determination of the applicant's intended appeal against the decision of the High Court at Nairobi given on 20th March, 2009. Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 18th day of March, 2011.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR