



**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: TUNOI, GITHINJI & AGANYANYA, J.J.A.)

CIVIL APPLICATION NO. NAI. 267 OF 2009 (UR. 185/2009)

BETWEEN

BONTEMPI LUIGI

ELIZABETH NGEGE APPLICANTS

AND

SHARRIF MOHAMED A. OMAR

BOUGANVILLAE COTTAGES LIMITED RESPONDENTS

(Application for stay of execution of the order pending the lodging, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Azangalala, J.) dated 31st July, 2009

in

H.C.C.C. NO. 255 OF 1995)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** and **Rule 1 (3)** of the Court of Appeal Rules for stay of execution of the order and ruling of the superior court (Azangalala, J.) dated 31st July, 2009 pending hearing and determination of the appeal against the order and the ruling.

The 1st and 2nd applicants were the 1st and 4th defendants respectively in *Mombasa High Court Civil Suit No. 255 of 1995* filed by the 1st and 2nd respondents herein as 1st plaintiff and 2nd plaintiff respectively.

The 1st respondent (Omar) was originally the sole plaintiff in the suit and the 2nd respondent **Bouganvillae Cottages Ltd.** (Company) was originally sued as the 2nd defendant, while **Bruno Turato** was the 3rd defendant. The judgment of the superior court delivered on 26th July, 2007 shows that by an application dated 3rd October, 2002, the 1st applicant applied for an order that the company be removed as 2nd defendant instead and be made the 2nd plaintiff in suit and that the superior court allowed the application, on 30th October, 2002. The judgment also shows that the 1st respondent had not sued **Bruno Turano** (3rd defendant) and rather it is said **Bruno Turano** who applied to be joined as a 3rd defendant to protect his interest in plot No. 3074 Malindi. Lastly, a copy of the plaint filed by 1st respondent shows that the 1st applicant was also sued on behalf of his son **Bontempi Claudio** who had given the 1st applicant a power of attorney.

There is no sufficient material in the record of the application other than a copy of the plaint and the judgment of the superior court to show fully the nature of the dispute in the superior court. From the documents available, the respondents claimed in a nutshell, *inter alia*, that, the company was owned by Omar (1st plaintiff); Luigi (1st defendant) and Claudio each holding 150 shares; 25 shares and 25 shares respectively; that Luigi was paid Shs.17,500,000/= by Temple Point Hotel also known as Salama Beach Hotel at Watamu on behalf of the company being fees for supervision of the construction of the hotel but failed to account to the company for the money; that Luigi also received, one plot No. – 3074 Watamu from Aspain Properties on behalf of the company being payment for construction work done by the company but Luigi developed the plot and sold it for Shs.2,300,000/= and failed to account to the company for the money; that the company bought plots Nos. 3034, 3044 and 3045 Malindi from Luigi and constructed residential cottages known as Bougainvillae Cottages Ltd.; that the cottages were run by Luigi who later leased the cottages to Groziozi Co. Ltd. but had failed to give accounts of income and rent to the company; that Luigi bought and developed plot No. 3104 Malindi for his wife **Elizabeth Ngege** (2nd applicant) using the company's funds. The reliefs sought in the plaint were:

- (a) Accounts for all the money received fraudulently for and on behalf of the company.
- (b) Accounts of the company be taken and 1st applicant Omar be paid a proportionate share of the profits as per his shares,
- (c) A declaration that plot Nos. 3074 and 3104 Malindi are held by Luigi and Elizabeth in trust for the company, and
- (d) An injunction to restrain Luigi and Elizabeth from dealing with the two plots.

It is apparent from the judgment of the superior court that Luigi denied the claims and contended, among other things, that he executed the works for Temple Point hotel and Aspain properties in his personal capacity through his company Bougainvillaea Civil and Engineering's Works and not on behalf of the company; that he purchased plot No. 3074 using his own money; that he solely incorporated the company; that Omar did not make any financial contribution towards the purchase of shares in the company; that he surrendered the shares to Omar to make the company have an African face in accordance with government policy, and that Bougainvillaea cottages belongs to him and not to the company. Elizabeth on her part claimed that she bought plot No. 3104 for Shs.100,000/= which she raised from her flower business.

It is apparent from the judgment that **Rossella Pontiggia Turato** – the wife of **Bruno Turato** – gave evidence at the trial and claimed that her husband bought plot No. 3074 for 275,000,000 Italian Lira (from Luigi) and that her husband was an innocent purchaser for value. She counter-claimed for transfer of the plot to her husband.

The superior court (Sergon, J.) entered judgment for Omar and the company and granted all the reliefs sought with costs and dismissed Claudio's counter-claim with costs.

The applicants being aggrieved by the decision of the superior court filed a notice of appeal. Thereafter, they filed an application for stay of execution which was heard and allowed on 29th November, 2007 on condition that Luigi and Elizabeth should deposit Shs.25,000,000/= and Shs,100,000/= respectively in an interest earning account in the joint names of the respective advocates within 15 days.

The aforesaid ruling shows that the application for stay of execution was prompted by further orders made after the judgment on 6th November, 2007 requiring the two applicants to deliver vacant possession of plots Nos. 3074 and 3104 to the company and in addition to comply with the order for accounts within 15 days. In fixing the amount at Shs.25,000,000/=, the court said:

“From the evidence tendered and submissions given, it is clear that the 1st defendant at the end of

the day will be required to surrender a colossal sum of money after accounts have been undertaken to the plaintiffs”.

The applicants subsequently filed an application seeking a review of the amount of security saying that Luigi had no means to pay Shs.25,000,000/=. The application was listed for hearing before Sergon, J. However, the applicants counsel asked the learned judge to recuse himself alleging bias. The learned judge though refuting allegation of bias nevertheless recused himself.

The application was subsequently heard by Azangalala, J. who by a ruling dated 31st July, 2009 allowed the application partially by reducing the amount of security to be provided from Shs.25,000,000/= to Shs.15,000,000/=. In reducing the security Azangalala, J. appreciated that the decree was not strictly a money decree and that the requirement that security of Shs.25,000,000/= be deposited may operate to deny the applicants their undoubted right to urge their intended appeal.

The 1st applicant finding the sum of Shs.15,000,000/= ordered was beyond his means filed a notice of appeal against the ruling of Azangalala, J. The notice of appeal is the basis of the present application.

The application for stay of execution is supported by the affidavit of Luigi who deposes, among other things, that the conditional stay of execution given by Sergon J. and Azangalala, J. is oppressive and will render the appeal nugatory; that the judgment is not a monetary decree; that the intended appeal against the judgment of Sergon, J. is not frivolous; that the sum of money that he has been ordered to deposit is colossal and beyond his means thereby denying him justice, and, that, he would suffer great loss and irreparable damage if stay is not granted as the suit property has been the matrimonial home for many years.

The 1st respondent Omar has filed a replying affidavit specifying the grounds on which the application is opposed. He deposes in respect of plot No. 3104 that although the plot was bought at Shs.100,000/= a bungalow has been erected thereon and that the approximate value of the property is Shs.10,000,000/=; that the applicants have been living in the house without paying rent since before 1995; that, if adequate security is not provided and the appeal fails, the respondent would not be able to recover the loss, and, that stay, if granted would permit the applicants to reside in the premises until the appeal is determined.

Regarding the state of the other properties, the 1st respondent has annexed a copy of his affidavit sworn on 22nd August, 2008 and photographs in support of an application in the superior court showing that the house on plot No. 3074 was vacant and extensively damaged and that some of the cottages on plots Nos. 3043, 3044 and 3045 were destroyed, furniture and fittings removed and some of the premises converted to cattle shed and shed for making pottery.

The respondents have also annexed an affidavit sworn by Luigi on 5th September, 2008 in reply to his affidavit in which Luigi admits that both the premises on plot No. 3074 and the cottages are vandalized and in a stage of disrepair but claimed the house on plot No. 3074 was damaged in the course of burglary.

The application seeks a stay of execution of the order and ruling of Azangalala, J. which reduced the amount of security to Shs.15,000,000/= pending appeal from that ruling. Although a notice of appeal has been filed against the ruling, it is improbable that the applicants will file the appeal against the ruling as relates only to execution of a decree. Indeed it would be neither logical nor time saving to file such an appeal. It seems that the purpose of the application is for the applicant to be granted a stay of execution unconditionally.

However, the court has jurisdiction to grant a stay of execution of judgment and decree of the superior court (Sergon J.) dated 26th July, 2007 pending appeal. The applicants have already filed a notice of appeal against the judgment of Sergon, J. stating in the replying affidavit that the intended appeal against

the judgment is not frivolous. The applicants should have instead filed an application for stay of execution pending appeal from the judgment and decree of Sergon, J. However having regard to **Article 159 (2) (d)** of the Constitution which enjoins courts to administer justice without undue regard to procedural technicalities; the overriding objective in **Sections 3A** and **3B** of *Appellate Jurisdiction Act*, and the fact that the applicants have also invoked the inherent jurisdiction of the court under **Rule 1 (3)**, we treat the application as an application for stay of execution of the judgment and decree of Sergon, J. delivered on 26th July, 2007 pending appeal.

The applicants have to satisfy us, among other things, that the intended appeal is not frivolous, and, that, unless stay is granted, the appeal, if ultimately successful, would be rendered nugatory.

The applicants have filed a draft memorandum of appeal containing the grounds of the intended appeal. It is clear from the judgment of the superior court that the facts on which the suit was based were all controverted by Luigi. The findings of fact on the disputed facts are the subject of the intended appeal. The subsequent order of the trial judge requiring the applicants to transfer the properties in dispute within a limited time and the order that accounts be provided within a specified time are also the subject of the intended appeal.

The contention by Luigi that the company ceased operation several years ago and the joinder of the company as a 2nd plaintiff are also contentious issues which will be raised in the appeal.

In the light of the foregoing, we are satisfied that the intended appeal is not frivolous.

On whether or not the appeal would be rendered nugatory if stay is not granted, Sergon, J. made a finding in the ruling dated 29th November, 2007 that the applicants would suffer substantial loss, if the order for stay is not granted as they are likely to be evicted from the suit premises. As this Court said in **Mukuma vs. Abuoga** [1988] KLR 645 substantial loss has to be prevented by preserving the status quo as such loss would render the appeal nugatory.

It is conceded in particular that the applicants have constructed a house on plot No. 3104 where both applicants live and that the premises are worth about Shs. 10 million. It is also conceded that Luigi and his son Claudio are also shareholders in the company which was awarded the suit premises by the superior court, meaning that they are entitled to a share of the premises.

Thus, if the property is transferred to the company and the applicants are evicted, the appeal if successful would be rendered nugatory.

Similarly, in respect of plots Nos. 3074, 3104, 3043, 3044, 3045, Luigi and his son Claudio are also shareholders in the company which was awarded the suit properties. Again, if the properties are transferred to the company (and there is dispute whether it exists or not) the appeal, if successful, would be rendered nugatory.

We recognize that in exercising our discretion under **Rule 5 (2) (b)** we are required in accordance with the overriding objective to facilitate, *inter alia*, proportionate justice. We are thus required to ensure that justice is also done to the respondents. We could like the superior court impose conditions. However, we are of the view, that the condition imposed by both Sergon, J. and Azangalala, J. was onerous and incapable of being satisfied by the 1st applicant. Furthermore, there was no justification for imposing such an onerous condition, as the decree was not specifically a money decree and as the account had to be taken to establish what amount, if any, was payable to the company. It seems that the order for deposit of such a large sum of money was both speculative and pre-emptory and was tantamount to refusal of stay. It is also clear that the 1st applicant is not deriving any income from the premises in dispute. The cottages are admittedly vandalized and are not being used. The house on plot No. 3074 has also been vandalized and is vacant. It is only the house on plot No. 3014 which is being occupied by the applicants as a matrimonial house. In the circumstances, it is not just to require the applicant to deposit money as security.

The position of the respondents could be secured by preserving the suit properties pending appeal.

In the result, we allow the application to the extent that:

“The execution of the judgment of the superior court (Sergon, J.) delivered on 26th July, 2007 and subsequent orders made on 6th November, 2007 requiring the applicants to give vacant possession of plot Nos. 3074 and 3104 and also to give accounts are stayed pending appeal from the said judgment”.

However, the applicants are:

“hereby restrained from transferring, charging or in any other manner whatsoever dealing with the suit properties, namely, plot Nos. 3043, 3044, 3045, 3104 and 3074 pending the determination of the appeal”.

Costs of the application shall be in the appeal. Orders accordingly.

Dated and delivered at Mombasa this 4th day of March, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR