



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, ONYANGO OTIENO & AGANYANYA, JJ.A.)
CIVIL APPLICATION NO. NAI. 199 OF 2010 (UR. 143/2010)

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPLICANT

AND

KENYA PLANTERS CO-OPERATIVE UNION & 2 OTHERSRESPONDENT

*(An application for leave to appeal from the ruling and order of the High Court of Kenya at Nairobi
(Apondi, J.)*

dated 28th July, 2010

in

H.C.C.C. NO. 779 OF 2009)

RULING OF THE COURT

In a notice of motion dated 19th July 2010 and filed on 20th July 2010, the first respondent in this notice of motion before us dated 10th August 2010 and filed on 11th August 2010, Kenya Planters Co-operative Union Limited sought on the main two injunction orders and an order prohibiting all further registration or change of registration in respect of parcel of land known as 209/8658 on behalf of the applicant, Kenya Commercial Bank Limited. The applicant was not amused by this action particularly as it claimed the first respondent had filed a similar matter which was brought as Petition No. 700 of 2009 in the Constitutional and Judicial Review Division of the superior court, in which, according to the applicant, the matters in issue were the same. It filed a notice of preliminary objection against the first respondent's notice of preliminary objection read as follows:-

“TAKE NOTICE that at the hearing of plaintiff's notice of motion application dated 19th July 2010, the 1st defendant shall raise a preliminary objection on the following grounds:-

1. The plaintiff's notice of motion is frivolous and vexatious.

2. The plaintiff's application is subjudice and contravenes the provisions of section 6 of the Civil Procedure Act.

3. The application is an abuse of the process of the court since the plaintiff has sought similar reliefs in High Court Petition No. 700 of 2009, which is pending determination.

4. The plaintiff has failed in its duty to assist the court in the furtherance of the overriding objective set out under section 1A and 1B of the Civil Procedure Act.”

Muga Apondi J. heard the preliminary objection. In a ruling dated and delivered on 27th July, 2010, the learned Judge dismissed the preliminary objection and condemned the applicant to pay the costs of that objection.

The applicant felt aggrieved by that decision and wishes to appeal against it but as the order is not appealable as of right, the applicant sought leave to appeal but the superior court declined to grant it. It then moved to this Court by way of the aforesaid notice of motion in which it is seeking three main orders as follows:-

“2. That this Honourable Court be pleased to grant the applicant leave to appeal from the ruling and order given at Nairobi by the Honourable Mr. Justice Apondi on 28th July, 2010.

3. That this Honourable Court be pleased to grant such further orders that it may deem just and expedient to grant.

4. That the costs of this application be provided for.”

The application is based on the grounds that the intended appeal is arguable as it relates to proceedings in which the respondent has filed two parallel applications in two courts of concurrent jurisdiction, and already as a result of the same, two conflicting decisions have been rendered and the pattern is likely to be repeated unless the appeal is filed and this Court intervenes and arrests the situation, but as the applicant has no automatic right to appeal, leave is thus required. There is an affidavit in support of the application sworn by the Relationship Manager of the applicant. In response, the respondent, in a replying affidavit sworn by its Managing Director, opposes the application stating what we may in a summary state that the applicant has on several occasions he cited, deliberately applied delaying tactics in his conduct of the case.

It is not in dispute that the applicant had no automatic right to appeal from the decision of the learned Judge of the superior court as the order made dismissing its preliminary objection was an order in respect of which one had no right of appeal except with the leave of the court. It was alleged by Ms. Odari, the learned counsel who held brief for Mr. Kamau, the learned counsel for the applicant, and it was not disputed, that being aware of that legal position, the appellant through its counsel, applied to the same Judge of the superior court for leave to appeal but that application was declined and that is what necessitated its coming to this Court.

We have considered matters raised in the preliminary objection that was before the learned Judge of the superior court. We have perused and considered the draft memorandum of appeal that was annexed to this notice of motion. We have also considered anxiously the ruling of the superior court subject of the application and we have considered the replying affidavit and submissions by both counsel. Without saying any more for fear of prejudicing the intended appeal, we do not think matters raised are frivolous. That is not to say they will succeed on appeal. All we say is that they are arguable. Further, with reference to the provisions of the recently introduced **sections 3A** and **3B** of the Judicature Act, we are of the view that it would be wrong to drive a litigant from the seat of justice on technicalities. The applicant wants to be heard on his appeal and it should not be denied that right. That it had applied what the respondent calls delaying tactics in this matter may be true, but those are matters that will have their day when the intended appeal comes up for hearing and when hopefully the respondent will convince the Court that the learned Judge was right in dismissing the preliminary issue as one of the aspects of

delaying tactics. Certainly those are not matters before us in this application.

In short, the application succeeds. The applicant is granted leave to appeal against the learned Judge's ruling dismissing its notice of preliminary objection, which ruling was according to the record dated 27th July 2010 and not 28th July 2010 as stated by the applicant. Costs of the notice of motion to abide the outcome of the intended appeal. Orders accordingly.

Dated and delivered at Nairobi this 13th day of April, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR