IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, WAKI & VISRAM, JJ.A.)

CIVIL APPLICATION NO. NAI. 99 OF 2011 (UR. 67/2011)

BETWEEN
STEPHEN KIPKENDA KIPLAGAT
PAUL LILAN and
PHILEMON KOETH t/a KIPKENDA, LILAN & KOECH, ADVOCATES.....APPLICANTS

AND

UFANISI CAPITAL AND CREDIT LIMITED.....RESPONDENT

(Application for stay of execution and or stay of proceedings pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Dulu, J.) dated 8th April, 2011

in

H.C.C.C. NO. 529 OF 2010 (O.S.)
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RULING OF THE COURT

In this application brought under **Rule 5 (2) (b)** of this *Court's Rules* and **Sections 3A** and **3B** of the Appellate Jurisdiction Act, the applicants seek, in the main, the following order:

"2. THAT this Honourable Court be pleased and grant an order for stay of execution and or stay of proceedings in the Superior Court pending the hearing and determination of the Applicants/ Defendants' intended appeal".

The facts giving rise to the litigation in the High Court, and to the intended appeal herein, are briefly as follows:

The three applicants here are advocates and were partners in the law firm of **Kipkenda, Lilan & Koech** at the material time. In January, 2010, they represented the respondent, **Ufanisi Capital and Credit Ltd.**, in the sale of the respondent's property L.R. No. 209/2582 to Superior Home Ltd. for Kshs.145 million. In accordance with the Agreement for Sale dated 27th January, 2010, the purchase price was to be paid as follows:

1. Deposit of Shs. 30 million directly to the respondent.

2. Balance of the purchase price of Shs.115 million to the applicants as stakeholders.

The funds were eventually paid in accordance with the agreement. The respondent gave written instructions to the applicants on how the sum of Shs.115 million received by them was to be disbursed. There is no dispute that as of 16th September, 2010 the applicant held Shs.94,500,000/= to the credit of the respondent. By an undated letter, which was received by the applicants on 16th September, 2010, the respondent instructed the applicants to disburse the funds as follows:

"a. To Kimotho and Some: Kshs.30,000,000.00
b. To Mugambi Imanyara & Company Advocates: Kshs.14,000,000.00
c. Fees due to the Applicant: Kshs. 3,000,000.00
d. To be retained on behalf of the Respondent: Kshs. 5,000,000.00
e. To Respondent: Kshs.42,500,000.00"

However, according to the respondent, contrary to its written instructions, the applicants paid out a sum of Shs.35 million to Dasahe Ltd. on account of a disputed *"agency fee"*. According to the applicants, the respondent was obliged to pay the agency fee. The respondent denies the same. In any event, when the respondent found out that the applicants had made such a payment to Dasahe Ltd. it immediately filed an Originating Summons dated 8th November, 2010 in the High Court against the applicants demanding payment of Shs.31,350,000/= together with interest.

Contemporaneously with the filing of the Originating Summons, the respondent filed a chamber summons under a certificate of urgency praying, among other things, that the applicants be directed to deposit into court the sum of Shs.31,350,000/= pending the hearing and determination of the Originating Summons. In delivering the ruling, the learned Judge (Dulu, J.) stated, in part, as follows:

"The relationship between an advocate and a client is special relationship. It is based on trust, confidentiality as well as professional standards. An advocate or firm of advocates takes instructions from their clients. They are bound to act according with (sic) those instructions. If those instructions are unlawful, or impossible they are required to inform their client on the same. They are not to act against specific instructions without the information or concurrence of the client. In this particular case there is a dispute as to what instructions were given. But obviously, there is no dispute that the subject money was received by the advocates (defendant) on behalf of the client (plaintiff). The amount appears to have been paid to a third party who is not a party in these proceedings. The advocate obviously is required to account to his or their clients.

Prima facie, with the facts placed before me, I find and hold that the plaintiff/applicant has provide (sic) sufficient evidence to show that he has a prima facie case with the probability of success. They have also demonstrated that they will suffer substantial loss if no orders are granted to secure the amount of Kshs.31,350,000/=. They have shown that indeed, money was received by the defendants on their behalf. The defendant, on the other hand, appears to rely on technicalities, whose merits can only be determined after the hearing and determination of the Originating Summons. It cannot also be said that it is unusual for a firm of advocates to split. In my view, this is a matter where the balance of convenience would require the money in question to be secured. In my view the principles in the case of *Giella-vs-Cassman Brown & Co. Ltd* **(1973) EA 358 are applicable. After all when the matter is finally be (sic) determined, if either any of the parties is entitled to the amount secured, appropriate orders will be given".**

It is against that decision that an appeal is intended herein. For now, the applicants seek stay of execution of the orders made by the High Court.

Mr. M. Billing, learned counsel for the applicants, submitted before us that the intended appeal is arguable in that the learned Judge misdirected himself by holding that Dasahe Ltd. did not procure the suit property, and that no agency fee was payable to the said company; that the issues before the High Court were not *"technical"* but fundamental; that the learned Judge erred in holding that the respondent

had made out a case requiring the applicants to deposit the sum of Shs.31.5 million in court; and finally that such a payment is onerous, and would render the success of this appeal nugatory. He relied on the cases of **Oraro & Rachier, Advocates vs. Co-operative Bank of Kenya Limited**, (1999) EALR 236, *Civil Case Number 358 of 1999, Nairobi C.A No. Nai 258 of 2009 –* **E. Muriu Kamau, Njoroge Nani Mungai** both trading as **Muriu Njoroge & Company, Advocates Vs. Nationational Bank of Kenya Limited** and *Nairobi Civil Application No. Nai. 68 of 2008 (UR 36/2008) –* **Harit Sheth t/a Harit Sheth Advocate –vs- Shamas Charania**.

Hon. R. O. Kwach, learned counsel for the respondent opposed the application, submitting that the intended appeal was not arguable, that the applicants had made an unauthorized payment; and that unless the sum was secured, the respondent feared that it would not be able to recover the same at a future date. He relied on several authorities including the case of **Scott & Another vs. Kago** (1987) KLR 503, arguing that it was important to preserve the subject matter of the dispute.

On our part, we have carefully considered the conflicting claims of both parties, and especially the history of the dispute and the litigation before the High Court. We are prepared to assume, without making any definitive statements, that the intended appeal is arguable, and is not frivolous. However, we are not of the view that the success of the intended appeal would be rendered nugatory in the event we do not grant the order sought. Given the facts of the case before us, we are persuaded that the subject-matter of the intended appeal ought to be preserved in the interest of justice, and for the benefit of both parties.

Accordingly, we disallow the application. Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 29th day of July, 2011.

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

P. N. WAKI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR