



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: O’KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.)
CIVIL APPLICATION NO. NAI. 87 OF 2010 (UR. 63/2010)

BETWEEN

CITY COUNCIL OF NAIROBI.....APPLICANT

AND

BESPOKE INSURANCE BROKERS.....RESPONDENT

(An application for stay of execution pending the hearing and determination of the appeal from the ruling and orders of the High Court of Kenya (Khaminwa, J.) dated 16th March, 2009

in

H.C.C.C. NO. 590 OF 2005)

RULING OF THE COURT

This is an application by way of Notice of Motion brought under **Rule 5(2) (b)** of the Court of Appeal Rules in which the applicant, **City Council of Nairobi**, seeks the following orders:-

- “1. THAT the service of this application be dispensed with in the first instance this application be certified urgent owing to the urgency disclosed in the certificate of urgency.**
- 2. THAT this honourable court be pleased to order a stay of execution of the order of the superior court given on 16th March, 2009 in Nairobi Milimani High Court Civil Case No. 590 of 2005 pending the hearing and determination of the applicant’s appeal.**
- 3. THAT the application for stay of execution be set down for inter-partes hearing at a date to be directed by this honourable court.**
- 4. THAT the applicants be at liberty to apply for further orders and or direction as this honourable court may deem fit and just to grant.**
- 5. THAT costs of this application be provided for.”**

The application which is supported by the affidavit of N.M. Mung’ala, who is the Ag. Director of Legal

Affairs of the applicant is based on the following grounds :-

“(a) Vide a ruling delivered herein on 16th March, 2009, the superior court dismissed the applicants’ application dated 17th November, 2008 wherein the applicant had sought to set aside ex-parte proceedings of 21st October, 2008 and to be accorded an opportunity to defence (sic) the suit by adducing viva voce evidence.

(b) The applicant being aggrieved by the said ruling has already lodged and served a notice of appeal the record of appeal (Civil Appeal No. 117 of 2009) which appeal is (sic) raises arguable points of law and fact and which intended appeal has a high chance and probability of success.

(c) The respondent has already filed Nairobi HCC Misc Cause No. 696 of 2009 a judicial review application wherein it seeks to compel the applicant to satisfy the decree of the superior court.

(d) The applicants are reasonably apprehensive that unless this court grants the orders sought herein, the respondent shall proceed to execute the said orders against the applicant’s and the intended appeal if successful, will be rendered nugatory.

(e) The sum at stake ordered to be paid to the respondent is Kshs.27,914,769.10 plus interest at court rates from the date of filing suit as well as taxed costs of the suit, which sum is so substantial, that the same would bring the operations of the applicant to a complete standstill, and further render the pending appeal nugatory.

(f) The application meets all the criteria for the grant of a stay pending appeal and it is in the interest of justice and fairness that the courts do grant the applicants the orders sought herein.”

The background facts to this application appear quite simple and straightforward. The respondent herein, **Bespoke Insurance Brokers Ltd.** was the plaintiff in the superior court in **Civil Case No. 590 of 2005** at the High Court of Kenya at Nairobi Commercial & Tax Division – Milimani.

The record shows that on 21st October, 2008 judgment was entered in favour of the plaintiff (*the respondent herein*). By an application dated 17th November, 2008, the applicant herein (*the defendant in the superior court*) applied for setting aside of the judgment pursuant to **Order IXB** rule 8 of the Civil Procedure Rules and **section 3A** of the Civil Procedure Act.

The application for setting aside was considered and the learned judge of the superior court (Khaminwa, J.) found that the application was supported by incompetent affidavits and that there was no good reason for non-appearance on the part of the applicant. Having so held, the learned judge proceeded to dismiss the application.

In the course of her ruling delivered on 16th March, 2009, the learned judge expressed herself thus:-

“It is to be seen in this case that the hearing date was communicated to the defendant. In this case the hearing notice was served upon the counsel for defendant but on the hearing date the defendant or its representative did not appear in court. The explanation offered for failure to appear are not satisfactory and since the advocate conducting the matter had no current practicing certificate, it can only be concluded that he intended to delay the hearing of plaintiff’s case indefinitely.

I have perused the defendant’s case now again and at the time the judgment was made, the court was of the view the defendant had no defence to the plaintiff’s case.

I therefore exercise my discretion in favour of the plaintiff/respondent and dismiss the application as without merit.”

The applicant intends to challenge the foregoing by way of appeal and before that appeal is finally heard

and determined, the applicant seeks the reliefs set out at the commencement of this ruling.

When the application came up for hearing on 3rd October, 2011, Ms. P. Sewe, appeared for the applicant, while Ms. Anne Mumbi, appeared for the respondent.

In her submissions, Ms. Sewe argued that the applicant had an arguable appeal in that her client was not aware of the case as there was a mix up in the hearing dates. She further submitted that the respondent's case was not an open and shut case. She emphasized that the amount involved was a colossal sum which the applicant holds for the public. Citing overriding objectives of litigation, Ms. Sewe was of the view that it will be more costly to commence proceedings to recover the money involved and for that reason, this application ought to be allowed.

In opposing the application, Ms. Mumbi started by submitting that there was undue delay in bringing this application since the ruling was delivered on 16th March, 2009 and this application was filed over a year later i.e. on 20th April, 2010. Ms. Mumbi went on to submit that the applicant is seeking to stay a dismissal order. Finally, Ms. Mumbi told us that the applicant intended to settle the balance and that what actually remained to be paid was the interest as the principal amount had been paid.

We have set out the background facts of this application and the submissions by counsel for both parties. It is trite law that the jurisdiction of this Court under **Rule 5(2)(b)** of this Court's Rules is both original and discretionary. It is also trite that for an applicant to succeed, he must demonstrate that the appeal or intended appeal is not only arguable but also that unless the orders sought are granted, the appeal or intended appeal, if successful, the success would be rendered nugatory. In **BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES [2004 1 KLR 194 at p. 196** this Court said:-

“The powers of the Court under rule 5(2)(b), aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable, and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”

It is to be noted that in the present application, the applicant is seeking a stay of execution of the order made on 16th March, 2009. That order dismissed the applicant's application to set aside ex parte judgment. It is also to be noted that the learned judge had considered the applicant's defence and found it unmeritorious. The learned judge simply dismissed the applicant's application for setting aside an ex parte judgment. As a result of that order of dismissal there was nothing to stay as the learned judge did not order any of the parties to do anything or to stop doing anything.

In **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES V. ORANGA & OTHERS [1974] KLR 63** at p. 66 Law V-P 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 instance 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.”

Taking into account what we have stated above, we are of the view that this application was brought without merit as the amount in dispute had been settled save interest on the principal sum and also more so for the fact that there is nothing to stay as a result of the learned judge's order of 16th March, 2009. That being our view of the matter, we order that this application be and is hereby dismissed with costs.

Dated and delivered at NAIROBI this 21st day of October, 2011.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR