



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 260 OF 2008

EDWARD LENJO MUSAMULI APPLICANT

AND

AMESNET ENTERPRISES LTD RESPONDENT

(An application for an order of stay pending hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Mombasa (Sergon, J) dated 24th July, 2008

in

H. C. C. C. No. 86 of 2008)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules (“the Rules”) for stay of proceedings pending the hearing and determination of an intended appeal.

By a plaint dated and filed on 17th April, 2008 in the superior court, the respondent (plaintiff in the superior court) claimed from the applicant the sum of Kshs.4,350,000/= being agent’s commission relating to the sale of the respondent’s property known as L. R. 1480/11/M.N. situate at Mwakirunge in Mombasa (“the suit property”). His claim is based on his appointment as the applicant’s real estate agent to subdivide and sell the suit property, and his successful identification of the purchaser, the Government of Kenya, through the Ministry of Lands & Settlement (GOK). According to the plaint, GOK purchased the suit property for the sum of Kshs.85 million; paid a deposit of Kshs.60 million; and the balance remaining to be paid is Kshs.25 million. He claims that his agreed fee representing 5% of the purchase price plus Kshs.100,000/= mobilization fee, totaling Kshs.4,350,000/=, remains unpaid.

In a defence dated and filed on 7th May, 2008, the applicant (defendant in the superior court) denied the claim. The suit has not been heard in the superior court. However, pending the hearing and determination of the suit, the respondent applied for an order of attachment before judgment under **Order 38 rules 5 and 12** of the Civil Procedure Act or for an order that the applicant furnish security in respect of the sum claimed by him. His main ground, in support of that application, was that the suit property was the applicant’s only known property, and once disposed, he was unlikely to recover his claim. In finding

for him, and granting him the order sought, the superior court expressed itself thus:

“It is apparent from the submissions and the material placed before this court that the defendant has not disputed the allegation that the only known property he owns, is L. R. No. 1480/11/M.N. That property has been sold to the Government of Kenya at a price of Kshs.85 million. It is also not in dispute that the defendant has received a sum of Kshs.60 million leaving a balance of Kshs.25 million. I must state from the beginning that the aforesaid property cannot be attached without involving the purchaser which has paid a substantial part of the consideration. The prayer for attachment before judgment therefore fails. I however find the application for provision of security to be well founded. It is clear that the defendant has disposed of the only known property and he is about to get the final payment of the consideration. A fair order in the circumstances of this application is order which I hereby command the defendant to furnish security in the sum of Kshs.4,350,000/= which sum should be deposited in an interest earning account in the joint names of the advocates or firms of advocates appearing in the matter within 30 days from the date hereof. In default, the plaintiff will be at liberty to obtain summary judgment since the defendant will have lost the opportunity to defend the suit.”

It is against that decision that the applicant intends to appeal, and for now he seeks a stay of further proceedings in the superior court.

In his submission before us, Mr. B. O. Odongo, learned counsel for the applicant, argued that in ordering the applicant to deposit the security in a joint account, the Court incorrectly and gratuitously “advised” the respondent to apply for summary dismissal in the event such security was not deposited within the 30 days as aforesaid. This, he argued, was beyond the Court’s jurisdiction; manifested judicial bias; and infringed the applicant’s constitutional rights to defend the claim against him. He submitted that unless the order sought by the applicant was granted, execution would issue, and the intended appeal would be rendered nugatory.

Mr. S. M. Mutisya, learned counsel for the respondent, submitted that the appeal was not arguable; that despite receiving Kshs.60 million in deposit, the applicant had failed to deposit the required security; and that the appeal could not be rendered nugatory as the funds would remain in a joint account pending final determination of the intended appeal.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable, and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

Whether the superior court acted outside its jurisdiction in imposing a condition that the applicant says denied him the right to defend the claim against him, may well be an arguable point. An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. It would not be appropriate to say more on that for doing so would not only be pre-emptory but also might cause embarrassment to the judges who will ultimately deal with the appeal. Suffice to say at this stage that we are prepared to assume that it is arguable.

On the second point of whether the success of the appeal will be rendered nugatory unless we grant a stay, we are satisfied that the same will **not** be rendered nugatory. The security ordered by the court is to be deposited in a joint account of both counsel pending final determination of the intended appeal. That essentially protects both the parties.

Accordingly, we dismiss this application with costs to the respondent.

Dated and delivered at Mombasa this 12th day of March, 2010.

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR