African Safari Club Limited v Safe Rentals Limited (Civil Application 53 of 2010) [2010] KECA 270 (KLR) (28 May 2010) (Ruling)

African Safari Club Limited v Safe Rentals Limited [2010] eKLR

Neutral citation: [2010] KECA 270 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 53 OF 2010

JW NYAMU, JA

MAY 28, 2010

BETWEEN

AFRICAN SAFARI CLUB LIMITED ..... APPLICANT

AND

SAFE RENTALS LIMITED ..... RESPONDENT

(An application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Mombasa (Sergon, J.) dated 23rd July, 2009 in H.C.C.C.NO.130 OF 2006)

RULING

1. This is an application for stay of execution. It has been brought under rule 5(2) (b) of this Court's rules. It arises from the judgment and decree of the superior court delivered by Sergon, J. in Mombasa on 23rd July, 2009 in High Court Civil Case No. of 2006. The applicant seeks an order for stay of execution of the decree pending the determination of an intended appeal, the notice of which was lodged on 27th July 2009. The application is based on the grounds set out in the body of the application and in the supporting affidavit of Frank H. Neugebauer who is the managing director of the applicant company.

2. The historical background to the case is short and as reflected in the pleadings the applicant had entered into an agreement dated 30th November, 1988 with the respondent providing for the installation of safe deposit boxes by the respondent in various hotels owned by the applicant. The applicant company operates several hotels and lodges within the Coastal region and in the hinterland, whereas the respondent company is in the business of safe rentals. The initial agreement is said to have run for 5 years covering the period 1988 to 1993 and pursuant to a renewal clause in the initial agreement, the agreement also covered the period 1993 to 1998. The dispute the subject matter of this application relates to the further period of 5 years from 1998 including the commissions payable. The respondent

in the superior court took the position that the relationship between the parties continued to be regulated by the same agreement for the period after 1998 but the applicant maintained that the agreement between the parties terminated by effluxion of time on 29th November 1998 which was the termination date.

3. Under the terms of the agreement the respondent installed metal safety deposit boxes (the safes) at the applicant's hotels to enable the applicant in turn to rent the safes to individual guests on behalf of the respondent, in return for a commission on the rental revenue raised. As regards the commission payable, the respondent had contended that the parties had by the exchange of correspondence agreed on a 10% discount on the daily rental charge of Kshs.100 and a commission of 25% on the amount due, but the applicant had contended that after the renewal of the further period, the commission was to increase beyond 25% and that only a 10% discount had been agreed on.

4. After a full hearing, the superior court (Sergon, J.) sitting in Mombasa delivered a judgment against the applicant in favour of the respondent in the sum of Kshs.141,862,365.98. Dissatisfied with the judgment, the applicant filed a notice of appeal as already stated and further moved the superior court for an order of stay of the execution of the decree. On 23rd February 2010, Azangalala, J. gave an order on stay on these terms:-

> "The applicant to pay Kshs.7,218,664 into an interest earning bank or financial institution account in the joint names of the advocates of the parties within 30 days from the date hereof.The applicant to provide a guarantee from a reputable bank or reputable financial institution or a performance bond or guarantee from a reputable insurance company for the sum of Kshs.134,643,701.98 within the same period of thirty days (30) from the date hereof.I order that there be a stay of execution pending compliance with 1 and 2 above.I further order that there be a stay of execution pending the intended appeal if the applicant complies with 1 and 2 above.In default of compliance with 1 and 2 above within the time appointed, the applicant's Notice of Motion shall stand dismissed with costs.Costs of this application shall otherwise abide the results of the appeal.Each party has liberty to apply.

5. Aggrieved by, inter-alia the above order of the superior court, the applicant has come to this Court under rule 5(2) (b). It has in particular asked this Court to exercise its original jurisdiction pursuant to the rule and grant a stay of execution.

6. The applicant was represented by Ms Sijeny advocate while the respondent was represented by Mr.Kishore Nanji advocate.

7. It was urged on behalf of the applicant that the intended appeal is meritorious and a copy of the memorandum was exhibited; that the decretal sum is by any standards colossal and therefore likely to cause substantial loss to the applicant and in particular the payment would ground the applicant's business; that were the amount to be paid it would not be recoverable since the respondent had not shown that it had the resources to make a refund in the event of the applicant's appeal succeeding; that although the applicant at the point of the application for stay in the superior court was unable to provide security in a financial form to the full extent of the decree, it was possessed of other tangible assets such as a yatch valued at Kshs.50 million, and immovable property located at the Coast with a value of Kshs.50 million and in this regard, it was prepared to deposit the documents of title in respect of the two securities and finally, that the applicant has been in the tourism business for fourty (40) years and over this period it has been managing 7 hotels and lodges employing over 700 Kenyans, but due to the recent economic recession worldwide including the advent of an unfavourable political climate in 2007, the applicant had as a result run into serious financial difficulties culminating in the filing against it, of winding up petition, a fact well within the knowledge of the respondent. Concerning the terms

of the stay order granted by the superior court, the applicant's counsel submitted that the conditions imposed by the court would render enjoyment of the stay impossible since providing security of the nature ordered by the court would have the same effect as the actual payment, as no financial institution would be prepared to guarantee the payment without the applicant supporting the guarantee either with a cash deposit or pledging an existing equivalent deposit held by a financial institution.

8. For the respondent Mr. Nanji, submitted that in the first place, no appeal has been filed in this Court against the order of stay granted by the superior court (Azangalala, J.) and that the notice of appeal filed is against the final judgment delivered by Sergon, J. and that the applicant had therefore disobeyed the superior court orders contrary to section 1A(3) and 1A of the *Civil Procedure Act* and section 3A(3) 3A(1) of the *Appellate Jurisdiction Act* and for this reason the application should be dismissed; that since the superior court order was granted subsequent to the decree, it would be inappropriate for this Court to be called upon to exercise a parallel jurisdiction; that a winding up petition namely, Winding-Up Cause No. 1 of 2009 had been filed against the applicant and it had secured a repayment agreement with a total of nine creditors who had filed proofs in the winding up cause and that it was clear from the agreement entered into with the creditors that the applicant was in the process of disposing of some of its assets with a view to liquidating the debts owed to the creditors; that the applicant had not demonstrated that it might suffer substantial loss were it to comply with the court's order and in any event, the terms of the order did not entail a payment over to the respondent, but a deposit of Kshs.7,218,664 in the joint names of the advocates representing the parties together with a supporting guarantee from a reputable bank or a financial institution or a performance bond or guarantee from a reputable insurance company to cover the decretal amount to the extent of approximately Kshs.139 million; that the applicant had not demonstrated that it had run into financial difficulties or that the conditions attached to the stay order would render enjoyment of the stay impossible in the absence of any audited financial statements and that the sum of Kshs.7,218,664 awarded to the respondent represents the net sum received by the applicant from the applicant's customers in various hotels in trust for the respondent, which sum the applicant had failed to account for the respondent and therefore in the circumstances, the court's order was fair and finally that the conditions pertaining to providing of a guarantee, insurance bond or a performance bond were meant to secure the respondent's position so as to ensure that the appeal would not be rendered nugatory as the decretal sum would be available if required and that the applicant would not be required to have a cash collateral because it could offer tangible assets to secure a guarantee or a performance bond. Mr. Nanji further stated that there was a parallel stay application pending for disposal in the superior court.

9. This being an application under rule 5(2)(b) of the Court's rules the two conditions to be satisfied by an applicant are first, that it has an arguable appeal, in other words, the appeal is not frivolous and second, if a stay is not granted, the appeal, if successful would be rendered nugatory. It is beyond question that these two requirements have served the cause of justice in this field of law for a long time and will continue to do so. However, after the enactment of the overriding objective, we believe that the Court is now required to take a much broader view of justice and therefore, the two requirements can no longer be regarded as exhaustive. Rule 5(2) is subject to the overriding objective and therefore this Court in exercising its power under the rule, must give effect to the overriding objective – the reason for this is that the court derives the power to prescribe the two requirements from rule 5(2)(b) and also from the *Appellate Jurisdiction Act*.

10. As regards the first requirement concerning the arguability of the intended appeal, the same has been graciously conceded by Mr. Nanji and for this reason, we consider it unnecessary to go into it. However, as regards the second requirement as stated above, going by what is exhibited the applicant has already made arrangements to pay approximately Kshs.25 million to the creditors interested in the winding up cause as stated above and for this reason, we think that the applicant would suffer no extra-ordinary

hardship if we were to order that it pays Kshs.7,218,664 to the respondent within a reasonable time this being prima facie what the applicant is said to have received from the installation of the safes and we think that this would enable the respondent to take its rightful place in the long line of creditors of the applicant company. However, as regards the requirement to provide guarantee, insurance bond or a performance bond, we find it unlikely that any bank, financial institution or an insurance company would give such a facility without the asking the applicant to deposit actual cash to the extent of the decretal amount of Kshs.134,643,701.98 or to provide a fairly realizable collateral security which might result in the operations of the applicant being grounded. In addition, the amount is colossal by any standard and therefore it is also unlikely that a reputable bank et cetera would want to give to the applicant any such facility while a winding up cause is literally dangling on its neck! Viewed from the above standpoint, we think the overall situation facing the applicant exposes it to unusual hardship. It is also evident that in the face of the winding up cause, the applicant might not be able to satisfy the decree in the short term at least if it does not succeed in the intended appeal and at the other end of the pendulum the respondent has also not demonstrated by any tangible evidence that it would be in a position to refund the decretal amount should the required realizable securities be put in place.

11. Turning to the position of the respondent, there is no doubt it has in its hands a substantial money decree and although it would under normal conditions be entitled to the fruits of its judgment, unless the judgment is secured, it might end up with a paper decree depending on how the situation unravels. However, we note that the respondent as a prudent judgment creditor did make inquiries concerning its judgment debtor, which inquiries revealed the existence of a winding up cause where at least nine (9) creditors have shown interest in it, and where over 25 million is owed and where the only thing which is shielding the applicant from a winding up order is a repayment proposal with the nine creditors including the petitioner, a situation which still exposes the respondent to the continuing risk of a creditor taking over the prosecution of the winding up cause, the existence of the repayment proposal with the nine creditors notwithstanding. It follows therefore that, the respondent's submission that the applicant has not demonstrated substantial loss or that it is not possessed of means to comply with the court order cannot be correct in the circumstances. There cannot be any doubt that in the circumstances, the respondent position is as risky as those of the creditors described in the Winding Up Cause and if the applicant company cannot presently pay Kshs.25 million to creditors who currently have a stake in the winding up cause, it is unlikely to pay either now or in the immediate future, the much greater decretal amount of Kshs.141,862,365.98. The respondent therefore faces an intricate dilemma in that should a stay order be declined it would still have to face a serious problem of recovery of the decretal amount and should the stay order be granted, it would, on the ground be compelled to enter into an acceptable repayment arrangement with the applicant just like the other creditors in the Winding Up Cause because the respondent cannot be favoured in the event of a winding up order or as a result of the respondent itself taking over the Winding Up Cause No. 1 of 2009 because a winding up order is aimed at benefitting the general body of creditors.

12. The respondent's counsel placed a lot of weight in the recent decision of this Court namely, HUNKER TRADING COMPANY LTD vs ELF OIL LIMITED (2010) e KLR. While we agree that the cited case shares similarities with the current case, at the same time there are several critical differences, first the application in the HUNKER case was brought under section 3A,of the *Appellate Jurisdiction Act* while this one has been based on Rule 5 (2)(b), second, the applicant in that case had not complained to this Court that the conditions imposed in the superior court orders were onerous and unfair and further that the non compliance with the order was never explained at all whereas in this case, the applicant has challenged the order and further stated it would not be possible to comply with the order which involves a colossal sum of money; fourth, in the first case, there was total neglect of the superior court order which act constituted an abuse of the court process and the Court found that

failure to comply with the order was a misuse of the court's resources in terms of time and resources – see the case of ROMANUS OKENO v BANK OF BARODA KENYA LTD C.A.NO.NAI 1 of 2010 (unreported), where an application under rule 5(2)(b) was dismissed for constituting an abuse of the court process in engaging both courts at the same time. For the foregoing reasons, we do not agree that the two cases are similar. The matter before us is distinguishable from the HUNKER case (supra) and as we have repeatedly emphasized the application of the overriding principle has to have the backing of a factual or legal foundation and what is important is to do justice on the basis of the facts of a particular matter. This is the choice we have made in this matter.

13. With the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put the hardship on the scales. On this point, the offer by the applicant of the security of the yatch and the immovable property, although not ideal, would in our view place the respondent in a much better position in that the two assets which have a combined value of Kshs.100 million will be placed in the hands of the respondent company with a possibility if the intended appeal does not succeed realizing the assets should it make arrangements of registering appropriate charges against them after the necessary documents are deposited with the Deputy Registrar, of course, barring any winding up order being made during the intervening period. We think that the balancing act as described in the analysis of the positions of the parties before us, is in keeping with one of the principal aims of the O2 principle of treating both parties with equality or in other words placing them on equal footing as far as it is practicable, pending the determination of the intended appeal on merit. This we think is what the special circumstances of the situation before us and justice demand. We believe that rules of procedure including rule 5(2)(b) have considerable value in terms of administration of justice but the new challenge brought about by the enactment of the O2 principle brings into focus the fundamental purpose of civil procedure which is to enable the courts to deal with cases justly and fairly.

14. We believe that in the circumstances placed before us, our endevour to analyse the unique hardships of the two parties before us and especially the existence of a Winding Up Cause against the applicant and as a result, placing the parties on an equal footing as far as practicable pending the hearing of the appeal has enabled us to give effect to the overriding objective and to attain what we think in the circumstances, meets the ends of justice and fairness.

15. In the result, we allow the application by granting an order for stay of execution on these terms:-

> The applicant to pay to the respondent Kshs.7,218,664 within 35 days from the date hereof.The applicant to deposit within 14 days from the date hereof with the Deputy Registrar its title in respect of the immovable property located at the Coast valued at kshs.50.000,000 and as described to the court by the applicant's counsel, and further deposit with the Deputy Registrar the ownership documents in respect of the yatch described in the affidavit in support of the application valued at Kshs.50 million and the deposit in respect of the two properties should be on the further condition that the two assets are free from any encumbrances.That should the applicant in any way pursue the pending stay application in the superior court the orders granted herein shall automatically lapse.That should the applicant fail to meet any of the above conditions or any part thereof, the application shall stand dismissed with costs.In the meantime, the costs of the application to abide the outcome of the appeal.It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR