IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI. 36 OF 2010 (UR.23/2010)

BETWEEN

FIVE FORTY AVIATION LTD. ……..…...……..… APPLICANT

AND

TRADEWINDS AVIATION SERVICE LTD. ……..…….. RESPONDENT

(Application under Rule 5(2)(b) of the Court of Appeal Rules for stay of execution and stay of further proceedings pursuant to the orders of the High Court of Kenya at Milimani Commercial Courts (Muga Apondi, J.) dated 28th January, 2010

in

H.C.C.C. NO. 577 OF 2009)

****

RULING OF THE COURT

We have before us an application brought by way of notice of motion pursuant to ***Rules 5(2) (b)*** and ***42*** of the Court of Appeal Rules in which the applicant, ***FIVE FORTY AVIATION LIMITED*** seeks the following reliefs:-

> ***"1. THAT there be a stay of execution as well as all other proceedings pursuant to the ruling and order by Honourable Justice Muga Apondi delivered on 28th January, 2010 pending filing, hearing and determination of the intended appeal.***
>
> ***2. THAT the costs of and incidental to this application do abide the result of the said intended appeal.***

The application is brought on the following grounds:-

> ***"1. That this application has been filed without inordinate delay.***

2. That the Applicant has filed this application after filing the requisite Notice of Appeal and applying for proceedings and ruling as required by law.

3. That the applicant cannot make payment of the decretal sum in the superior court without adversely affecting its business.

4. That the applicant will suffer irreparable harm if stay of execution is not granted.

5. That the balance of convenience also favours a stay of execution order being granted in favour of the applicant.

6. That the applicant has good grounds of appeal as contained in the draft Memorandum of Appeal annexed to this Application.

7. That failure to grant the orders of stay of execution would render the intended appeal nugatory."

A brief background to this application is that the respondent herein, ***TRADEWINDS AVIATION SERVICE LIMITED*** (as the plaintiff) filed a suit against the applicant (as the defendant) in the superior court seeking judgment for **USD 275,264.77** being monies due and owing on account of handling services rendered by the respondent to the applicant. Upon being served by the plaint the applicant, through its lawyers, filed a Defence and Counter-claim in which the claim was denied. Paragraph 3 of the Defence and Counter-claim was as follows:-

"In reply to paragraph 3(b) of the plaint the Defendant denies enjoying services from the plaintiff up to and including the 7th July, 2009 or at all and further states that services provided were unsatisfactory and charges levied were exorbitant erroneous not agreed upon and therefore fraudulent."

The applicant then set out the particulars of fraud in the said defence and counter-claim. Having considered the contents of the defence and counter-claim, the respondent through its counsel decided to file a notice of motion pursuant to ***"Order XXXV Rules 1(1)(a) & (2), 9 and O.VI Rules 3(1) (b), (c) and (d) of the Civil Procedure Rules"*** seeking the following orders:-

"(1) THAT judgment be entered against the defendant in the sum of USD 275,264/77 together with interest at court rates from the date of filing suit as prayed.

(2) (a) <u>THAT in the alternative</u> the defendant's statement of defence and counterclaim dated 28th August, 2009 be struck out for being:-

i. *Scandalous, frivolous and vexations.*

ii. *Meant to embarrass, prejudice or delay the fair trial of transaction.*

iii. *Otherwise an abuse of the process of court.*

(b) THAT once struck out, judgment be entered for the plaintiff as prayed.

(3) THAT the costs of this application the main suit and the counter claim be awarded to the plaintiff."

It is that application that was placed before Muga Apondi, J. for consideration. After considering the rival submissions made before him, the learned judge granted the prayers sought in his ruling delivered on *28th January, 2010*. In concluding his ruling the learned judge stated:-

"In this case I am satisfied that there are no triable issues and that the counterclaim does not disclose any bona fide triable issue.

In view of the above analysis, I hereby concede to the application in terms of prayer No. 1. In pursuance of the above, I hereby enter judgment in favour of the plaintiff/applicant in the sum of USD 275,264/77 together with interest at court rates from the date of filing suit up to the date of payment. Those are the orders of the court."

The applicant was aggrieved by the foregoing and has already filed an appeal as set out in the grounds in support of this application. The applicant seeks stay of the foregoing order of the superior court. That is the application that came up for hearing before us on *21st April, 2010* when Mr. G.J. Mungu, appeared for the applicant, while Mr. P.O. Mungla, appeared for the respondent. In his submission, Mr. Mungu pointed out that ***Order XXXV*** of the *Civil Procedure Rules* would be invoked where a defendant had not filed a defence but in this case the defendant (*the applicant herein*) had already filed a defence when the plaintiff (*the respondent herein*) filed application for summary judgment. In his view that was an arguable point in the intended appeal. His second point was that the learned judge made reference to bulky charge notes and yet there was no production of those documents. He argued that the ruling was based on documentary evidence which was not produced.

On the nugatory aspect of the application, Mr. Mungu submitted that the decretal amount was in the region of ***Kshs.20 million*** and if the applicant were to be forced to pay out this amount, its operations would be adversely affected. To buttress his submissions Mr. Mungu relied on the authorities of ***RAGHBIR SINGH CHATTE V. NATIONAL BANK OF KENYA*** *– Civil Appeal No. 50 of 1996* and ***ORARO & RACHIER ADVOCATES V. CO-OPERATIVE BANK OF KENYA*** *– Civil Application No. NAI. 358 of 1999.*

In response to the foregoing, Mr. Mungla submitted that the applicant had no arguable appeal. As regards ***Order XXXV*** of the Civil Procedure Rules, Mr. Mungla argued that the superior court had to look at the defence filed and also the fact that the respondent sought an alternative order of striking out the defence. Mr. Mungla further submitted that there was no need to exhibit invoices since services had been rendered. It was Mr. Mungla's submissions that the defence filed by the applicant could not stand the court's scrutiny.

On the nugatory aspect of the application, Mr. Mungla pointed out that the amount outstanding was about **20 million** and hence he would ask for a bank guarantee otherwise the application ought to be dismissed.

This being an application under ***rule 5(2)(b)*** of this Court's Rules, it is upon the applicant to satisfy us not only that the intended appeal is arguable, and is not frivolous but also that the same intended appeal, if successful, will be rendered nugatory if stay orders are not granted at this stage. This is a settled law and if any authority is required, it is readily available in ***RUBEN & 9 OTHERS V. NDERITO & ANOTHER [1989] KLR 459*** where this Court said:-

"In dealing with rule 5(2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory. See *Stanley Munga Githunguri v. Jimba Credit Corporation Ltd****. Civil Application NAI. 161 of 1988."***

And in its recent decision on ***BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES [2004] 1 KLR 194*** at p. 196 this Court stated:-

"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."

Both Mr. Mungu and Mr. Mungla appreciated the foregoing principles and their submissions were made on that understanding.

We have given a brief history of the dispute between the parties and how the respondent made an application before the superior court for summary judgment. It has been noted that when the application for summary judgment and/or striking out of the defence was made, the applicant had already filed its defence and counter-claim. The applicant's counsel raised two issues in his submission which issues would form part the arguments during the intended appeal. There was the issue of ***Order XXXV*** of the Civil Procedure Rules being invoked when there was already a defence on record. Then there was the issue of the learned judge relying on documents (charge notes) which had not been produced in court.

We have carefully considered the background to this application, the submissions by counsel appearing for the parties and have come to the conclusion that while we are not dealing with the merits of the intended appeal (which is already filed as Civil Appeal No. 52 of 2010), it can be fairly stated that it may be arguable whether the respondent was entitled to invoke the provisions of ***Order XXXV*** of the *Civil Procedure Rules* in the face of a filed defence and counter-claim. It will also be arguable whether the learned judge was right in relying on documents which had not been attached to the supporting affidavits. It has been stated again and again that even one single arguable point would suffice the test of an appeal being arguable. In ***JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS V. KILACH*** [2003] KLR 249 at p. 264 this Court said:-

"We think this, even if it were the only point, is an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating on appeal and is not a frivolous one.

There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5(2); there need not be a chain of arguable points to sustain an application."

We reiterate that we are not hearing the intended appeal but in view of our observations above, can it be seriously argued that the intended appeal is frivolous and that the applicant would suffer no loss if we refused to grant the orders sought? We do not think so.

As required apart from ascertaining the existence of the two requirements, we have also given effect to the overriding objective and we consider that in the circumstances the granting of the order of stay is just and fair.

For the foregoing reasons, we allow this application and grant the orders sought in the notice of motion dated *1st March, 2010.*

Costs of this motion shall abide the outcome of the appeal.

Dated and delivered at NAIROBI this 28th day of May, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

J.G. NYAMU

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR