



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 79 OF 2010

BETWEEN

SUPERIORFONES COMMUNICATIONS LIMITED APPLICANT

AND

PIEDMONT INVESTMENTS LIMITED 1ST RESPONDENT

STANDARD ASSURANCE KENYA LIMITED

(Under Statutory Management) 2ND RESPONDENT

UFANISI CAPITAL AND CREDIT LIMITED 3RD RESPONDENT

(An application for stay of ruling pending the hearing and determination of an intended appeal from the Ruling and Orders of the High Court of Kenya at Milimani Commercial Courts in Nairobi (Kimaru, J.) dated 25th March, 2010

in

H. C. C. C. No. 806 of 2003)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules presumably for stay of execution pending the hearing and determination of an intended appeal. The order sought is for “stay of the Ruling”. Clearly a Ruling cannot be stayed; and we can only assume that the applicant seeks to stop its execution.

The material facts giving rise to this intended appeal are not in dispute. At the centre of the dispute is a prime property located in Nairobi known as LR No. 209/2582 (hereinafter “the suit property”). The property was originally owned by the 1st respondent (Piedmont) and charged to the 2nd respondent (Standard Assurance). At some point Standard Assurance purported to dispose or transfer the suit property in the exercise of its statutory power of sale. However, on 1st July, 2008 the superior court

(Kimaru, J) ordered status quo in respect of the ownership of the suit property as at 2nd June, 2004 pending the hearing and determination of the suit before the superior court. Being aggrieved by that decision, Standard Assurance filed an appeal before the Court of Appeal. At the same time it filed an application before this Court under **rule 5 (2) (b)** of the Court of Appeal Rules seeking an order for stay of the proceedings before the superior court. Now, on 11th March, 2009, while this application for stay of proceedings was pending before this Court, Standard Assurance was placed under statutory management by the Insurance Regulatory Authority in accordance with **section 67 (c) (2) (1)** of the Insurance Act, and M/s HCB Ashvir Consulting Limited were appointed its Statutory Manager. The effect of this clearly was to place all the assets of Standard Assurance under the control and management of the statutory manager. However, despite the order placing Standard Assurance under statutory management, and without the knowledge and/or approval of the statutory manager, the former advocate of Standard Assurance, Mr. Milton Mugambi Imanyara, proceeded to prosecute the application for stay of proceedings pending before this Court, and in effect obtained an order of interim stay “to last until determination of this application or further orders of this court.”

On 23rd February, 2010 the suit property was purportedly sold to the 3rd respondent (Ufanisi) for a price of Kshs.20.5 million, and on the same day, re-sold to the applicant for a whopping Kshs.145 million.

On 11th March, 2010 Piedmont filed an application before the superior court seeking various orders including the reversal of entries made in the title to the suit property. In a detailed ruling delivered on 25th March, 2010 the superior court (Kimaru, J) allowed Piedmont’s application, cancelled all the transactions and ordered that the ownership of the suit property revert to Standard Assurance.

It is the above ruling that is the subject of the intended appeal, and in the meantime the applicant has filed this application dated 13th April, 2010 seeking in the main the following orders:

“(a) THAT this Honourable Court be pleased to stay the Ruling and Orders of Mr. Justice L. Kimaru, J. delivered at Milimani Commercial Courts in Nairobi on 25th March, 2010 Milimani H. C. C. No. 806 of 2003, pending the hearing and determination of the Applicant’s intended Appeal.

(b) SUCH further or other relief as this Honourable Court may deem fit and just to grant.

(c) THAT the costs of and incidental to this Application be costs in the intended appeal.”

In his submissions before us, Mr. Peter Simani, learned counsel for the appellant, argued that the Court of Appeal having stayed all further proceedings by its order given on 14th October, 2009, the superior court had no jurisdiction to proceed with the hearing of the application by Piedmont; that the ruling of the superior court was accordingly given without jurisdiction; that the superior court made drastic orders at the interim stage without giving all parties the opportunity to be fully heard; that the applicant was a bone fide purchaser for value and stood to lose Kshs.145 million in purchase price that it had paid to Ufanisi, thus rendering this appeal nugatory if the orders sought are not given.

Mr. C. O. Rachuonyo, learned counsel for Piedmont, relied on the replying affidavit of Maxwell Otieno Odongo, sworn the 10th May, 2010, and submitted that the transfer of the suit property to Ufanisi, and subsequently to the applicant on the same day, at a whopping profit of Kshs.125 million was fraudulent, as it was done in violation of the superior court’s order of stay dated 1st July, 2008; that in any event there is no evidence that the applicant actually paid Kshs.145 million to Ufanisi, and accordingly the applicant has not shown what it stands to lose if the orders sought are not given.

Mr. J. L. Onguto, learned counsel for the statutory manager of Standard Assurance submitted that the purported sale of the suit property was fraudulent, unlawful and in breach of the orders of the superior court; that in any event Standard Assurance had received no moneys or consideration for the purported

sale of the suit property; that the order of “stay of proceedings” issued by the Court of Appeal on 14th October, 2009 did not in any way authorize the “sale” of the suit property; and that in any event the aforesaid order of 14th October, 2009 was obtained by counsel fraudulently, and without disclosing to the Court of Appeal that Standard Assurance had been placed under statutory management. According to Mr. Onguto, the order given by this Court on 14th October, 2009, having been obtained unlawfully the same was null and void and of no effect, and that accordingly the intended appeal was not arguable. Finally, he submitted that the intended appeal would not be rendered nugatory should the orders sought are not granted because the property would be safely in the custody of the statutory manager, and in any event the applicant would be entitled to a refund of the purchase funds it allegedly paid to Ufanisi.

Mr. S. O. Oyugi, learned counsel, appearing with Mr. T. K. Ruto and Mr. J. Bosek, for Ufanisi, relied on the affidavit of Vitalis Langat, sworn the 6th May, 2010, and argued that the suit property was purchased by Ufanisi on 26th May, 2004, pursuant to an order of the superior court made on 26th February, 2004 which order “allowed” the sale of the suit property. However, counsel could not explain to this Court, why the transfer documents were not lodged at the lands office until 23rd February, 2010 – a lapse of some six years after the purported sale of the suit property.

Mr. P. L. Mutuli, learned counsel for Mugambi Imanyara, the Interested Party, argued that his client had been retained as Advocate to represent Standard Assurance and that when he so appeared before the Court of Appeal on 14th October, 2009, his instructions had not been withdrawn by the statutory manager and that he believed he had ostensible authority to continue acting for Standard Assurance.

Now, the principles applicable to the determination of applications under **rule 5 (2) (b)** of the Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006** in ***Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd*** (unreported) in these terms:

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” {See *Githunguri vs Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-88)*}.”

Is this appeal arguable? Although it would not be appropriate for us at this interim stage to make any definitive statements as to the merits of this appeal, we are highly skeptical about its success. First, with regard to the jurisdictional argument, we note that the suit property was purportedly sold in defiance of the order issued by the superior court on 1st July, 2008, presumably on the strength of the order dated 14th October, 2009 issued by this Court (differently constituted) staying the proceedings of the matter before the superior court. That alone gave the superior court the jurisdiction to deal with the matter to protect the integrity of its own order, and of the process of the court. Second, this Court’s order did not, and could not have, authorized the sale of the suit property in defiance of the orders issued by the superior court. Third, the order of 14th October, 2009 was obtained by counsel who had absolutely no authority to do so. Mr. Imanyara’s assumption that he had the authority to continue acting for the statutory manager simply because the same had not been revoked is, in our view, not an arguable point. Finally, Mr. Imanyara had the duty to disclose to this Court that his client had been placed under statutory management. He did not, and he has not explained why he failed to make the disclosure when he obtained the order on 14th October, 2009.

For those reasons, we are of the view that the intended appeal may not be arguable. Having come to that conclusion we do not find it necessary to go into the second limb of the principles set out for determining this application, namely, that the appeal will be rendered nugatory in the event an injunction or stay is not granted.

In the result, we dismiss the motion dated 13th April, 2010 with costs to the 1st and 2nd respondents. As this application has been consolidated with Civil Application No. 231 of 2008, this decision shall apply to both applications before this Court.

Dated and delivered at Nairobi this 24th day of September, 2010.

E. O. O’KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR