



IN THE COURT OF APPEAL

AT NAIROBI
CIVIL APPLICATION NO. 108 OF 2010

NEVILLE PATRICK GIBSON WARREN..... 1ST APPLICANT
DANIEL JAMES CORRY McVICKER 2ND APPLICANT
HAMISHI WOOLER KEITH 3RD APPLICANT
ZULFIKAR H. ALIBHAI 4TH APPLICANT

(All Practising as Advocates under the firm name

Of Daly & Figgs Advocates)

AND

LINDA WATIRI MURIUKI..... RESPONDENT

(An application for a stay of order pending appeal from the ruling of the

High Court of Kenya at Nairobi (Aroni J.) 23rd March, 2010

in

H.C.C.C. NO. 611 OF 2003)

RULING OF THE COURT

Naville Patrick Gibson Warren, Daniel James Corry McVicker, Hamishi Wooler Keith and Zulfikar H. Alibhai, as partners of the firm of advocates known as Daly & Figgs Advocates, have moved this Court under rule 5(2)(b) of the Court of Appeal Rules, seeking on the main an order staying the execution of the order of the superior court made on 23rd March 2010 in its Civil Case No.611 of 2003. By that order the superior court appointed one Melvin Smith, an accountant, as a Valuer for purposes of determining the shares in the aforesaid firm of one Linda Watiri Muriuki, the respondent herein as the Plaintiff in that suit. The court in addition specified the period within which the aforesaid Valuer would publish his valuation report.

The aforesaid order was made pursuant to an application by the respondent following a judgment in the aforesaid suit in which the superior court, in the said judgment delivered on 17th December, 2007, decreed that the respondent was not affected by the partnership deed creating the partnership. In addition the respondent by bringing that motion was following the terms of a consent order between her and the applicants herein which was entered in the suit on or about 18th December, 2003, particulars of which are contained in a letter to the Deputy Registrar of the High Court of Kenya of the same date, which as material reads as follows:-

RE: HCCC NO.611 of 2003

LINDA N. MURIUKI VS. NEVILLE PATRICK GIBSON WARREN & 3
OTHERS

Kindly enter the following order by consent of the parties:-

- (a) That this Honourable court be pleased to determine as a single issue, whether the terms of the Partnership Deed dated 31st October 1990 applies to the partnership between the plaintiff and the defendants.
- (b) That the Plaintiff retire from the Partnership with effect from 31st December and shall be entitled to participate in the profits of the partnership for the year ending 31st December, 2003.
- (c) ...
- (d) ...
- (e) That upon determination of issue (a) above (i) In the event that the Partnership Deed is applicable then the Plaintiff shall be entitled to all payments prescribed under clause 17 of the Partnership Deed aforesaid ...
- (ii)...
- (f) In the event that the Partnership Deed is not applicable the parties agree to nominate a Senior Accountant/Auditor acceptable to both parties to act as a Valuer for the purposes of determining the value of the Plaintiff's share in the partnership on a fair market value basis. For the purposes of the said valuation, the Plaintiff and/or her representative shall be entitled to full and free access, to all the accounts maintained by the Firm and all the accounting records and statements. The Valuer shall publish his valuation within (60) days and upon publication the amount due to the Plaintiff shall be paid within fourteen (14) days of such publication ...”

The consent was signed by a representative from the firm of Oraro & Company Advocates who appear for the respondent, and a representative from the firm of Ngatia & Associates, advocates on record for the applicants.

In her affidavit in support of her motion before the superior court, the respondent, among other things, deponed that the applicants refused to co-operate in the appointment of a Valuer pursuant to the consent order, and that refusal made her seek the court's assistance.

In an application under rule 5(2)(b) of this Court's Rules, the applicant is obligated, to show firstly, that his appeal or intended appeal is arguable or put differently, that it is not a frivolous one. Secondly, and in addition, that unless he is granted a stay or injunction as the case may be, his appeal, if it were to eventually succeed, such success will be rendered nugatory. It was not in dispute that a judgment has already been pronounced by the superior court decreeing that the respondent was not affected by the deed of partnership dated 31st October 1990. By the terms of the consent order between the parties herein the superior court set out how the case between the parties would proceed. Upon judgment being entered to

the effect that the deed of partnership above, did not include the respondent, what was to follow was that a Valuer would be appointed acceptable to both sides to assess the respondent's share in her partnership with the applicants. Both sides were to be involved in his appointment. From the available material it is clear that the applicants declined to participate in the appointment citing the reason that the Partnership has fundamentally altered, and that only the 3rd applicant of the then partners of the firm is present. That aspect was not in the contemplation of the parties as there is no clause in the consent, order, part of which we reproduced earlier, to deal with the issue. The applicants raised the issue both before the superior court and before us. The terms of the consent order have not been altered and it is trite law that such terms can only be altered or set aside by consent of the parties except in certain well known exceptions which are not present here.

Faced with the negative attitude of the applicants, the respondent was forced to seek the assistance of the superior court, which then made the order against which an appeal is intended.

Have the applicants shown their intended appeal is arguable? To the extent that the respondent followed the terms of the consent order between the parties by seeking assistance of the court in appointing a Valuer it is not prima facie, apparent what argument the applicants will raise against the appointment of a Valuer. They are not complaining that the person who was appointed is not qualified. Nor are they saying the appointment goes contrary to the terms of the consent order. As that order is still in place we are unable to discern what issue the applicants will raise in support of their intended appeal. The valuation ordered by the court is unlikely to affect the partnership as presently constituted as the period of the valuation is discernible, namely the period when the respondent and the applicants were partners by which time some of the present partners had not joined the firm.

Besides, it is quite clear that what the applicants want stayed are proceedings in the superior court. A Valuer has been appointed and what is awaited is his report. It is not obvious to us how preparations of the report will render the success of the applicants intended appeal nugatory. The applicants were party to the consent order the superior court relied upon to appoint a Valuer. That court has not been shown to have exceeded the terms of the consent order. We do not lose sight of the fact that the partners in the firm at present are not the same as when the respondent was a partner. However the partners against whom the suit was filed are named. They are known. It has not been alleged that any of them is either dead or out of jurisdiction. Besides, the valuation, we think, will be based on books of account. The consent order is clear on this.

The case of Reliance Bank (In Liquidation) v. Norlake Investments (2002) 1 EA 227, was cited to us by Ms. Shaw for the applicants as providing appropriate guidance in determining this matter. Considering the peculiar facts and circumstances of this case the authority is of little, if any, assistance to the applicant.

In the result as the applicants have not satisfied the two tests in applications of this nature, we are constrained to and hereby dismiss the application dated 10th May, 2010, with costs.

Dated and delivered at Nairobi this 1st Day of October 2010

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR