



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 24 of 2009 (UR 12/2009)

SONY HOLDINGS LIMITED

NAKUMATT HOLDINGS LIMITED

KNIGHT FRANK LIMITED.....APPLICANTS

AND

KEREN BUARON.....RESPONDENT

(Application for stay pending the hearing and determination of an intended appeal from the orders of the High Court of Kenya at Nairobi (Lady Justice Sitati) dated 2nd February, 2009

in

H.C.C.C. NO. 16 OF 2009)

RULING OF THE COURT

By an application brought under **Rule 5 (2) (b)** of the Court of Appeal Rules, the applicants ask this Court to “*stay the orders*” made by the superior court (Sitati J) on 2nd February, 2009 extending the *ex parte* interim orders of injunction issued on 19th January, 2007 restraining the applicants from evicting the respondent or interfering with the respondents enjoyment of L.R. No. 1879/1/557 unit G8 Westgate shopping Mall and any further extension of those orders pending the hearing and determination of the applicants’ intended appeal.

The application is supported by the affidavit of Alex Trachtenberg a director of the 1st applicant to which various documents are annexed including a sub-lease dated 12th January, 2007 by which the 2nd applicant sub-let unit G.8 on the ground floor of Westgate Shopping Mall to the respondent for a term of six years at monthly rentals shown in the sub-lease with effect from 1st June, 2007. The proceeding of the superior court in *High Court Civil Case No. 16 of 2009 Keren Buaron vs. Sony Holdings Ltd. and two others* are also provided. The proceedings show, *inter alia*, that an application for an *ex parte* injunction made by the respondent was heard on 19th January, 2009 and the court made orders, *inter alia*:

“1. Application dated 19.01.09 brought by way of Chamber Summons be and is hereby certified urgent.

2. There shall issue a temporary order of injunction in terms of prayer 2 of the said application.

3. Application is stood over to for inter partes hearing on 2/02/2009”.

The record shows that the applicants filed an application dated 26th January, 2009 for discharge of exparte orders given on 19th January, 2009 and that on 30th January, 2009 the respondent filed a notice of preliminary objection to the application. The proceedings further show that on 2nd February, 2009, the respondent’s preliminary objection was fixed for hearing for 17th February, 2009 and the interim exparte orders were extended to that date. The application for interlocutory injunction pending the determination of the suit is still pending for hearing in the superior court.

The applicants filed a notice of appeal on 5th February, 2009 indicating an intention to appeal against that part of the orders of 2nd February, 2009 extending the interim injunction granted on 19th January, 2009.

Before the Court can grant a stay of execution, an order of injunction or stay of proceedings under **Rule 5 (2) (b)** the applicant is required to demonstrate that the intended appeal or appeal is not frivolous and that unless the order sought is granted, the appeal, if it ultimately succeeds would be rendered nugatory.

In this case, the applicants have not provided the relevant material on the basis of which the Court can form a tentative opinion as to whether or not the intended appeal is frivolous. The applicants have failed to include in the record of the application, the plaint filed by the respondents in the superior court. The applicants have also failed to include in the record of the application, the application for interlocutory injunction, the supporting affidavit and the supporting documents on the basis of which an exparte injunction was given. The result is that the Court does not know the nature of the respondent’s cause of action or the grounds on which the application for interlocutory injunction (which is still pending for hearing) is based or the grounds on which the superior court granted an exparte interim injunction in the first instance or extended the exparte injunction.

Secondly, the intended appeal is against that part of the order made on 2nd February, 2009 extending the interim injunction to 17th February, 2009. This is clear from both the notice of appeal and from the present application. This application was heard on 24th February, 2009 and the applicant did not say that the interim injunction was on 17th February, 2009 extended to a future date or indefinitely. Indeed, it is common ground that the application was not listed before the superior court on 17th February, 2009. It is apparent that the validity of the order of 2nd February, 2009 extending interim orders to 17th February, 2009 was limited to 17th February, 2009 and became inefficacious when it was not extended. It follows that the present application for stay (of execution?) of the order of 2nd February, 2009 and the intended appeal against the order of 2nd February, 2009 are both futile.

For those reasons, the application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 20th day of March, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR