



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

Civil Appli 147 of 2008 (UR 94/2008)

NDIMA TEA FACTORY LIMITED.....APPLICANT

AND

JOSEPH MWANIKI MUCHIRA T/A CENTRAL ASSOCIATES....RESPONDENT

(An application for stay of execution orders of the judgment and decree of the High Court of Kenya

at Embu (Hon. Lady Justice Khaminwa) dated 17th January, 2008

in

H.C.C.C. NO.102 OF 2007)

RULING OF THE COURT

In the plaint dated and filed in the superior court at Nyeri on 6th September, 2004, the respondent in this notice of motion, *Joseph Mwaniki Muchira t/a Central Associates* sued the applicant *Ndima Tea Factory Limited* and *Kirinyaga County Council* seeking judgment for Kshs.13,098,000/= to be paid to him by the applicant; general damages against both defendants and an order for permanent injunction restraining the second defendant, *Kirinyaga County Council* from claiming and/or otherwise interfering with his parcel of land *Kirinyaga/Gathigiriri/259* and *581* in any manner. That claim was brought against the applicant on allegations that the applicant had breached contracts of sale of two parcels of land *Kirinyaga/Gathigiriri/259* and *581* measuring 20 acres and 54 acres respectively which was allegedly entered into between them on 23rd June 2004, in respect of which the total price agreed was Ksh.13,098,000/= and which parcels had pursuant to the agreements been transferred to the applicant. The applicant, in a statement of defence and counter-claim dated 21st March 2005 denied the claim stating that the alleged sale agreements were invalid, voidable and incapable of creating any legal obligations on the part of either party and set out the various particulars of the matters it alleged made the agreements invalid and incapable of creating any legal obligation. The applicant also alleged in its defence that there were cautions on the suit lands lodged by *Kirinyaga County Council*, and that the applicant was not a party to the transactions leading to the transfers into its name and several other allegations which we find unnecessary to cite in this ruling save to state that the applicant sought in its counter-claim a declaration that the sale transactions subject matter of the suit were illegal, null and void; that the title deeds Numbers *Kirinyaga/Gathigiriri/581* and *Kirinyaga/Gathigiriri/259*, were illegally issued and that costs of the counter-claim be paid to it. The respondent filed defence to the counter-claim

on 29th March, 2005. After the close of the pleadings, the suit was set down for hearing. The record shows that the case against Kirinyaga Court Council was withdrawn and the matter was set down for hearing as between the respondent and the applicant before the superior court (Khaminwa J.) on 10th December, 2007. On that date, the applicant was not present in court but, the learned Judge accepted the respondent's counsel's application to proceed ex-parte as in her view, the hearing notice for that date was properly served. After hearing the respondent, the learned Judge of the superior court delivered judgment on 17th January, 2008 in which she concluded as follows:-

“It is my finding then that the sale agreements are valid and the defendant ought to pay the price claimed. It is the registered owner of property under Chapter 300. I therefore enter judgment for the plaintiff against the first defendant in sum of Kshs.13,098,000/= plus interest at the rated of 24% p.a. from the date for (sic) plaint until full payment.”

She dismissed the counter-claim and made no order on prayer for injunction as the suit had been withdrawn against the second defendant but ordered the applicant to pay costs of the suit to the respondent. On 28th January 2008, the applicant moved to the superior court seeking, inter alia, an order that the ex-parte judgment entered against it on 17th January, 2008 be set aside. That application was premised on two main grounds which were that the hearing notice was not served upon the applicant and that the applicant had a good defence and counter-claim. It was supported by an affidavit sworn by one Rebecca Mbithi, the head of the Legal and Regulatory affairs of Kenya Tea Development Authority Limited which was the Managing Agent of the applicant. In that affidavit, the deponent stated, *inter alia*, that the applicant was not aware of the hearing date of 10th December, 2007 as it had not been served with the hearing notice and that the applicant had a good defence to the suit and a counter-claim against the respondent. That application was opposed and the respondent in a replying affidavit sworn by his counsel Mwikali Rika maintained that the applicant was properly served with the hearing notice. The respondent annexed to his replying affidavit copies of the alleged hearing notices but which we note were in respect of hearing on 23rd November, 2006 and not 10th December, 2007. Affidavit of service sworn by a process server was also annexed. It stated that the advocates for the applicant accepted service by signing and stamping on copies of the notice retained by the process server but the signed and stamped copies were not annexed to the record before us. That application came up for hearing before the Judge on 7th April, 2008. The process server was availed for cross-examination on his affidavit. After full hearing of that application, the learned Judge, in her Ruling dated 3rd June 2008, dismissed the application to set aside the judgment delivered on 17th January 2008.

The applicant felt aggrieved by that dismissal. It filed a notice of appeal on the date 4th June 2008. On 26th June 2008, it brought this notice of motion dated 25th June 2008 pursuant to **rule 5(2)(b)** of the Court of Appeal Rules in which it is seeking orders as follows:-

“(a) That due to the urgency of this motion, the same be certified urgent and admitted for hearing before the full court on priority basis.

(b) That upon hearing interpartes, an order be issued staying the execution of the ex-parte judgment and decree or orders of the superior court made on 17th January, 2008 in the above named suit by Hon. Lady Justice Khaminwa until the hearing and determination of the intended appeal.

(c) That the costs of this application be provided for.”

The grounds in support of the application are, in a summary, that the intended appeal is arguable and not frivolous in that there was no service of the hearing notice on the applicant for the hearing of 10th December, 2007 and judgment delivered on 17th January 2008; that on merits the sale agreements, the subject matter of the proceedings of 10th December, 2007 were void *ab initio* for want of capacity and lack of consideration; that the defence and counter-claim raised fundamental triable issues of law and facts which merited full trial; that the ruling of the learned Judge of the superior court was plainly wrong. It also contended that the success of the appeal which we understand has since been filed and is Civil

Appeal Number 185 of 2008 in Court of Appeal at Nyeri, if it succeeds, will be rendered nugatory as the decretal amount is colossal and the respondent will not be in a position to refund it once it is paid to him. There is an affidavit in support of the application, again sworn by Rebecca Mbithi. The application is opposed and in a replying affidavit sworn by the respondent, he insists that the applicant was properly served; that the application is frivolous as the agreements giving rise to the suit before the superior court were valid, as there was consideration on the respondent's part; that the applicant was a party to the contract; and that the respondent is in a position to refund the subject decretal amount if the appeal succeeds.

We have heard submissions by Mr. Njuguna, the learned counsel for the applicant and submissions by Mr. Gitau, the learned counsel for the respondent. We have considered the same, together with the record, the judgment delivered on 17th January 2008, the pleadings and the law.

The notice of motion is brought under **rule 5(2) (b)** of this Court's Rules. The principles that guide the Court in deciding an application brought under that rule are now well settled. For the applicant to benefit in such an application, he must satisfy the Court first that the appeal or intended appeal as the case may be is arguable and not frivolous. Secondly, he must satisfy the Court that if the Court refuses the application, the success of the appeal or intended appeal were it to succeed, would be rendered nugatory - See case of ***J. K. Industries vs. Kenya Commercial Bank Ltd & Another*** [1987] KLR 506. Those two principles must both be demonstrated before the order is given in favour of the applicant and proof of only one of the two will not suffice.

It is with the above principles in mind that we now proceed to consider this notice of motion. On 10th December, 2007, the learned Judge of the superior court heard the entire suit ex-parte. The applicant had filed defence and counter-claim and all pleadings were before the Court. It was heard ex-parte on account that the applicant though served with the hearing notice for that day did not attend court to defend itself. The learned Judge apparently found that the service of the hearing notice for that day was proper. After hearing the case ex-parte, she reserved the judgment which she delivered on 17th January, 2008. On that day she ordered the applicant to pay to the respondent Ksh.13,098,000/=, together with interest at 24% which was ordered at commercial rates. She dismissed the applicant's counter-claim as, in any case, the applicant was not in court to prosecute it. Later by the application we have referred to hereinabove, the applicant sought orders to set aside the judgment delivered on 17th January, 2008, on grounds that the applicant was not served with the hearing notice for that date and on further grounds that in any case, the applicant had raised in his defence and counter-claim triable issues that required to be ventilated by the court. When the court was hearing this application for setting aside the earlier ex-parte judgment, it was to an extent exercising its discretionary powers and to that extent this Court on hearing the appeal will proceed on certain well set out principles to ascertain whether it did exercise those powers properly or not. That is not for us to deal with in this ruling as to do so may very well prejudice the entire appeal. We note that the main issue that was raised before the superior court was that the applicant was not served with the hearing notice for hearing that proceeded ex-parte on 10th December, 2007, which resulted into the judgment delivered on 17th January, 2008. The respondent says the applicant was properly served through its advocate's firm which signed and stamped a copy of that hearing notice. No such copy was annexed to the record. We have on our own perused the affidavit of service and we have also perused and considered the process server's reply in cross-examination by the applicant's counsel when he appeared before the superior court. In our view, we have no hesitation in arriving at the conclusion that the issue as to whether the applicant was served with the hearing notice or not is an arguable point. We need to add here that in law, if the applicant is found not to have been served then the court had no discretion on the matter but to set aside the ex-parte order. See case of ***Maina v. Mugiria*** Civil Appeal No. 27 of 1982 (unreported). We make this observation only to emphasize that the issue of service or non service of the hearing notice cannot be treated lightly. It is in our view an arguable point.

Only one arguable point is needed in law, but here, we also think that whether the agreements relied on by the respondent in this case were valid or not, noting that they were between people, some of whom are not parties to the suit and that they had no Seal of the applicant is also another arguable point. The third point is the basis on which interest at 24% p.a. was awarded.

That leaves us with the second principle, which is whether if the appeal already filed succeeds, the success of it would be rendered nugatory by our refusing to grant the orders sought in this notice of motion. The amount that was awarded was Ksh.13,098,000/=. We understand, it has now increased to an amount over Ksh.25,148,160/=. That is not a small amount by any standards. The applicant states at paragraph 17 of its affidavit:-

“That the applicant is a body corporate serving the interests of public who are mainly small scale tea farmers and a sum of Ksh.13,098,000/= is quite high and its payment may render it insolvent and the eventual success of the intended appeal rendered phyric.”

That allegation has not been rebutted by the respondent. The amount as we have stated has increased to almost twice the amount that was awarded. We are of the view that payment of the amount in excess of Ksh.25,000,000/= by the applicant may well render it insolvent. See the case of ***Oraro Rachier Advocates vs. Co-operative Bank of Kenya Ltd***, Civil Application No. NAI. 358 of 1999. Further, although the respondent says in his affidavit that he has properties valued at approximately Ksh. 40,000,000, there is no evidence to demonstrate that allegation as he has not cited the alleged properties and has not annexed any valuation report in an attempt to show that indeed he is not a man of straw from whom the money would be recovered once paid to him. We are satisfied that in this case the results of the appeal, were it to succeed, would be rendered nugatory if this notice of motion is refused.

In the result, we are satisfied that the appeal already filed is arguable and that the results of the same would be rendered nugatory were it to succeed. The application succeeds. The execution of the judgment and decree of the superior court made on 17th January, 2008 is hereby stayed till the appeal already filed at the Court of Appeal Registry at Nyeri is heard and determined. The costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 13th day of March, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR