REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

Civil Appli 77 of 2008 (UR 46/09)

HARRIS HORN JUNIOR

HARRIS HORN SENIOR.....APPLICANTS

AND

VIJAY MORJARIA.....RESPONDENT

(Application for stay of execution of the decree and stay of any further proceedings

in H.C.C.C. No 285 of 2004 in an appeal from the order of the High Court of Kenya

at Nakuru (Martha Koome, J.) dated 29th June, 2007

in

HCCCC NO 285 OF 2004)

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RULING OF THE COURT

HARRIS HORN JUNIOR and HARRIS HORN SENIOR, the applicants, invite us to exercise our discretionary jurisdiction under rule 5(2) (b) of our Rules to firstly, order a stay of execution of the decree made on 16th June 2006 and all consequential orders thereto pursuant to the judgment of the superior court at Nakuru (Muga Apondi, J) pending the hearing and determination of the applicants' appeal being Nakuru Civil Appeal No. 223 of 2007, and secondly; to stay any further proceedings in Nakuru HCCC No. 285 of 2004 pending disposal of the aforesaid appeal.

The primary facts giving rise to this application are briefly as follows. The applicants are father and son of Greek origin but resident in Kenya and both of them are directors of some companies one of them being Majani Mingi Sisal Estates Limited doing farming in Nakuru District. VIJAY MORJARIA, the respondent herein and the successful party in the suit in the superior court is a businessman based in Nakuru. According to the evidence he tendered before the learned trial Judge he is an estate agent and also deals in petroleum products. By a plaint dated 12th October 2004 the respondent claimed against the applicants the sum of Shs. 35,100,000/- together with accrued penalty of Shs. 750,000/- per month with effect from 15th May, 2004. The respondent told the trial Judge that the applicants approached him so that he could supply them with petrol, spares and lubricants for the manufacture of sisal twines. Whereas

the applicants used to pay the respondent promptly, the latter thereafter started supplying them on credit.

The respondent stated, *inter alia*, that on 1st February, 2003, the applicants approached him with a request that they needed Kshs. 22.5M which he gave them on the said date and entered into a formal agreement the parties agreeing that from 15th March, 2003 the applicants would pay the loan at the rate of shs. 1M per month till payment in full. In default, it was also agreed, that the applicants would pay the respondent Kshs. 250,000 per month till every instalment was cleared. That apart, the applicants gave security thereof as Land parcel No. LR No. 12502 Kwale (Title No. 16310). In addition to the above, the respondent explained how the applicants had given him 22 cheques and despite their issuance the applicants requested him not to bank the said cheques till they gave him the nod. The applicants also gave the respondent undated cheques as security for default but when the respondent banked them three of them were dishonoured. As for the rest the bank indicated that the account was closed.

Though the applicants filed a defence by which they denied the claim asserting that the suit was bad in law none of them appeared in court during the trial of the suit. Their then counsel Mr. Mbugua was consigned to "leaving the matter to court". In finding for the respondent the learned Judge held:-

"**This Court has carefully perused the evidence on record. I have also had the advantage of perusing the documents that have been presented to the Court. At the outset, it is explicit that the defendants denied the Court an opportunity to hear their side of the story. That means that the evidence of the plaintiff and his sole witness has not been challenged."**

And also that:

"**.....it is not in dispute that the amount lent out to the defendants was Shs.22,500,000 as shown by the Agreement and Acknowledgement"**

And finally that:

"**The upshot is that I hereby find that the plaintiff has proved his case on a balance of probabilities that he had lent the two defendants Kshs. 22,500, 000. On their part, the defendants have to repay the above amount of money but at Court rates and not at any commercial rates."**

The learned Judge then entered judgment for the respondent. This was on 16th June, 2006.

The records laid before us show that after the said decree was issued the applicants sought orders of review of the judgment, stay of execution and leave to adduce evidence in support of their defence, but, the application was dismissed on 29th June, 2007 by Koome, J. Being aggrieved by the refusal for review, the applicants duly filed notice of appeal; and, it is common ground that that has given rise to Nakuru Civil Appeal No. 223 of 2007. To avert execution the applicants sought and obtained stay of execution which was granted by consent on condition that the applicants would deposit a sum of **Kshs.2,250,000/=** in a joint interest earning account in the names of the counsel for the parties within a period of **Thirty (30) days** from the said **12th July, 2007**. However, it is indisputable that the applicants were unable to raise the said sum of **Kshs.2,250,000/=** within the said deadline but they were eventually able to raise a sum of Kshs.1 million on 12th August, 2007 and another sum of **Kshs.1,250,000/=** on 18th August, 2007 and the two cheques were subsequently drawn in favour of the respective counsel for the parties. Though the applicants were late to raise the said sum of **Kshs.2,250,000/- by about 38 days**, nevertheless, the said cheques were deposited in the joint account and the same were duly cleared and paid. It would appear that after that somewhat difficult attempt the applicants thought that all was well until May, 2008 when the respondent revived execution process and hence more frantic efforts before this Court to forestall that process.

It is now well established that for an application under **Rule 5(2)(b)** of the Court's Rules to succeed the applicant must satisfy the Court that:-

(i) The appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal;

And that

(ii) Unless the order of stay of execution is granted, the intended appeal or appeal, if it eventually success, will be rendered nugatory.

As regards the first requirement, Mr. Shah, for the applicants, in a forceful submission contended that the plaint disclosed no cause of action, that it was bad in law, inept, ambiguous and that the entire suit was a nullity. Further, he submitted that the transaction between the parties was illegal and that the court below ought not to have sanctioned it. He led us through the grounds of appeal contained in the Memorandum of Appeal and submitted that all of them were arguable. He placed reliance on eighteen authorities the main ones being **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach** [2003] KLR 249; **International Laboratory for Research on Animal Diseases vs. Kinyua** [1990] KLR 403; **Halai & Another vs. Thornton & Turpin Ltd.** [1990] KLR 365; **Sargent vs. Tisdale – Jones** [1957] E.A. 226; **Patel vs. Singh** [1987] KLR 585; **Mapis Investment (K) Ltd. vs. Kenya Railways Corporation** [2006] e KLR.

Mr. Githui, for the respondent, countered Mr Shah's submissions by contending that the appeal was not arguable in that what was being challenged was an exercise of discretion by a learned Judge and yet it had not been shown at all that she exercised it wrongly.

Upon our consideration of the grounds of appeal, the ruling and submissions of counsel together with all the authorities cited before us we are satisfied that the appeal raises arguable grounds of appeal on both law and fact.

Again, we would point out to both counsel, that it is an arguable point as to whether we could stay a dismissal order by the superior court. However, as the matter was not raised before us we will not deal with it at this stage.

Would the intended appeal if it eventually succeeds be rendered nugatory? We do not think so. The orders granted to the respondent against the applicants relate, in essence, to payment of money. The applicants are wealthy land owners with huge chunks of land. Equally so, the respondent has demonstrated that he is wealthy by the large sums of money he transacts in. Obviously, he is not a man of straw and we believe, no doubt, that he would be able to repay whatever sums of money may be paid to him if the appeal succeeds.

Accordingly in the exercise of our discretion and for the aforegoing reasons this application fails and is ordered dismissed with costs.

Dated and delivered at Nairobi this 29TH day of May, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR