REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 83 of 2009 (UR 52/2009)

EGYPTIAN ART GALLERY LIMITED ……….……..…. APPLICANT

AND

MODWAYS INVESTMENTS LIMITED ………..….. RESPONDENT

(An application for an injunction and stay of proceedings pending the filing, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Hatari Waweru, J.) dated 20th March, 2009

in

H.C.C.C. NO. 23 OF 2009)

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RULING OF THE COURT

This is an application under ***rule 5 (2) (b)*** of the Court of Appeal Rules ("the Rules") for an injunction and stay of proceedings pending the hearing and determination of an intended appeal.

The applicant, Egyptian Art Gallery Limited, is a limited liability company. It entered into an agreement with the respondent, Modways Investments Ltd, to lease a portion of the respondent's business premises known as L. R. No. 209/11616 (commonly known as "the Capital Centre") on Mombasa Road, in the city of Nairobi. The term of the lease was for a period of six (6) years from 1st February, 2003 to 31st January, 2009.

Some eleven days before the expiration of the lease, the applicant filed a suit in the High Court of Kenya claiming essentially that the lease was unconscionable and amounted to unjust enrichment of the respondent. It sought "**a declaration that the lease dated the 10th March, 2004 in respect of the suit premises constitute a harsh and unconscionable bargain and is consequently null and void".** That is the only prayer in the plaint (in addition to the prayer for "costs"). There is no prayer for an injunction. However, by an application dated 27th January, 2009, the applicant applied for, and obtained from the superior court, an ex parte interim order for an injunction. Based on that order, the applicant continued in occupation of the suit premises pending the hearing and determination of the matter inter-partes. The matter was heard inter-partes by Waweru, J. who not only dismissed the application but proceeded to order the suit struck out on the ground that it disclosed no reasonable cause of action.

It is against that decision that the applicant intends to appeal, and in the meantime filed this application dated 30th March, 2009, in which it seeks the following orders:

"***1. <u>THAT</u> pending the hearing and determination of the intended appeal against the ruling and decree of the Honourable Court in <u>High Court Civil Suit No. 23 of 2009 Egyptian Art Gallery Ltd vs Modways Investment Ltd</u> delivered on the 20th March, 2009 (Hon. Justice Hatari Waweru), this Honourable Court be pleased to make an order restraining the Respondent from, whether by itself servant and or agents or in any manner whatsoever,***

howsoever, interfering with the Applicant's peaceful and quiet possession of the suit premises, that is to say, the area of floor space comprising four hundred and twenty five square feet (425 sq.ft) or thereabouts forming part of the upper floor of the Capital Centre, being unit No. 10.

2. THAT this Honourable Court be pleased to stay all proceedings in High Court Civil Suit No. 23 of 2009 Egyptian Art Gallery Ltd vs Modways Investment Ltd pending the filing, hearing and determination of the intended appeal from the ruling and decree of the Honourable Court delivered on the 20th March, 2009 (Hon. Justice Hatari Waweru).

3. THAT costs herein is provided for."

In his submissions before us, Mr R. Oyiembo, learned counsel for the applicant, argued that the superior court acted without jurisdiction in purporting to strike out the suit, a relief that was neither specifically sought, nor could be issued except by way of a substantive motion to that effect. He argued that the applicant was not heard on that issue, and had no opportunity to respond to the superior court's finding that the plaint disclosed no reasonable cause of action. He submitted that the appeal would be rendered nugatory should the respondent carry out its threat of evicting the applicant from the suit premises, and urged this Court to grant the injunction pending the hearing and determination of the intended appeal.

Mr Amoko, learned counsel for the respondent, on the other hand, relied on the replying affidavit of Edna Fernandes, sworn the 8th April, 2009, and submitted that the intended appeal was wholly unarguable because (i) the plaint did not disclose a cause of action, (ii) injunction could not be granted because there was no such prayer in the plaint and (iii) the lease which does not provide for a renewal clause, and which was negotiated freely between the parties, came to an end on 31st January, 2009.

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)}."***

So, then, is this appeal arguable? We think not. We cannot help but observe that the superior court held that the contract (lease) between the parties was clear; that the parties freely agreed to a six year lease **without** the renewal clause; that there was nothing unconscionable about the same; that the court's function is to uphold contracts, not re-write them; and finally that the plaint did not seek any prayer for an injunction and none could be given.

We again observe here, that the applicant enjoyed the full benefit of the six year term of the lease before alleging that the same was "unconscionable". The applicant had every opportunity to apply to the court for appropriate remedies the moment the lease was presented to it for execution. It did not. There is evidence in depositions filed before this court that the applicant was indeed represented by advocates and had had the benefit of legal counsel before executing the lease, and that it took its time in executing the same. In view of all these matters, we are of the tentative view that the appeal is not arguable.

Having found that the intended appeal is **not** arguable, 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 is not granted.

As we indicated before, the application before us seeks **two** prayers – an injunction, **and** "**stay of all proceedings"** in the superior court. With regard to the second prayer, we observe that the suit was struck out by the superior court. It may well be arguable that the superior court was wrong in striking out the whole suit at the stage it did, but the suit having been struck out, there are really no proceedings to stay, and accordingly, we decline to grant the said prayer.

In the result, we dismiss the motion dated 30th March, 2009 with costs to the respondent, Modways Investment Limited.

Dated and delivered at Nairobi this 8th day of May, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

…………………….

JUDGE OF APPEAL

ALNASHIR VISRAM

……………………..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR