



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

Civil Appli 47 of 2005 (UR 25/2005)

1. DR. KEA N. BARUA

2. AURELIA KWCZYNSKA APPLICANTS

AND

TOWN CONSTRUCTION COMPANY LIMITED RESPONDENT

(Application for stay of execution pending the lodging, hearing and determination

of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi

(Kuloba, J.) dated 13th October, 2003

in

H.C.C.C. NO. 2398 OF 1998)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for an order that the ruling and execution of the ruling of Kuloba J dated 13th October, 2003 in *H.C.C.C. No. 2389 of 1998* and delivered by Lenaola J. on 13th November, 2003 be stayed until the intended appeal against the ruling of Lenaola J. dated 18th February, 2005 is lodged and determined.

The application is supported by the affidavit of Dr. K. N. Barua, the first applicant which sets out the history of the dispute partly, thus:

By a plaint dated 30th October, 1998, **Town Construction Limited**, the respondent herein, filed a suit in the superior court, *H.C.C.C. No. 2389 of 1998* against the applicants herein who are husband and wife claiming Shs.15,681,027/= plus interest being the unpaid remuneration under a building contract. The respondent averred in the plaint, *inter alia*, that on 9th June, 1995, the respondent entered into a building contract with the respondents' whereby the respondent was to construct residential flats on the respondents' parcel of land L.R. No. 209/1870/3 along Westlands Road for a total of Shs.33,000,000/=; that additionally, the applicants were to pay extra costs of Shs.5,845,000/= the total contract sum being Shs.38,845,000/=; that the respondent duly completed the contract and handed over possession of the duly constructed flats to the applicants; that the applicants subsequently paid Shs.25,000,000/= to the respondent leaving a balance of Shs.15,681,027/= and that by an agreement dated 10th April, 1998, the respondents had purported to sell the property to Kabuito Contractors Limited or its nominee without paying the balance of the contract sum. Further documents filed in the suit show that the respondent constructed two blocks of flats on the plot comprising a total of twelve flats which the respondent handed over to the applicants on 7th July, 1997 and that the applicants sold the 12 flats to Kabuito Contractors Ltd. for Shs.51,000,000/= sometime in 1998.

As a first reaction to the suit, the applicants filed an application dated 17th November, 1998 under **Section 6 (1)** of the *Arbitration Act 1995*, for stay of the suit and reference of the suit to arbitration in accordance with an arbitration clause contained in the building contract. The application was however dismissed by Khamoni, J. on 11th December, 1999 upon his finding that the denial by the applicants 1½ years after final certificate that they owe the respondent the money did not constitute a dispute within the arbitration clause. The applicants filed a notice of appeal against the ruling of the superior court and thereafter filed *Civil Application No. Nai. 325 of 1995* in this Court for stay of execution of the decision of Khamoni, J. pending appeal which application was dismissed by majority on 29th January, 1999.

It seems that the appeal was never filed. Later on 12th February, 1999 the applicants filed a defence and counter-claim dated 11th February, 1999. By the defence, the applicants admitted that the total contract price was Shs.38,845,000/=; and that the respondent had been paid Shs.25,000,000/= which was borrowed from M/s. Investments & Mortgages Bank Ltd. By the counter-claim, the applicants averred, among other things, that they were induced by Hirji Karsan Patel, director of the respondent to enter into the contract on the premises that the respondent would be able to sell each flat at minimum price of six (6) million; that the respondent in breach of the agreement failed to procure buyers at that price and that the applicant ultimately sold the flats for Shs. 51 million. On that basis, the applicants counter-claimed, *inter alia*, for Shs. 21 million being the difference between what they would have fetched had the respondent sold the flats at Shs. 6 million each and the Shs. 51 million.

The respondent after filing a reply thereto, subsequently applied under **Order VI Rule 13 (d)** *Civil Procedure Rules* (CP Rules) for the striking out of the defence and counter-claim on the ground that the pleading was an abuse of the process of the court as the applicants were truly and justly indebted to the respondent in the sum claimed. The application was heard by Kuloba J. who ultimately prepared a lengthy ruling, allowing the application, caused it to be typed but apparently left the office before he could deliver it. He however signed and dated the ruling. The last paragraph of the ruling reads, thus:

“In the absence of precise allegations and particulars of undue influence, the defence and counter-claim is fatally in adequate.

Accordingly, it is struck out, and judgment is entered for the plaintiff as prayed in the plaint with costs also of this application. It is so ordered.

Signed and dated by me at Nairobi this 13th day of October, 2003.

(Signed)

R. KULOBA

JUDGE

13.10.2003”.

The ruling was delivered by Lenaola J. upon notice to the respective advocates for the parties on 13th November, 2003.

The record of 13th November, 2003 reads:

“13.11.2003

Before Lenaola Ag. Judge

Ruling read in the present of:

Mr. Joshi for the Plaintiff/Applicant.

Mr. Ireri for the Defendants/Respondents.

Signed Lenaola J.

13.11.2003”.

The learned Judge (Lenaola J) states in a subsequent ruling dated 18th February, 2005, thus:

“**The inscription above appears on the same page as the last page of the ruling of Kuloba J. and right below these words –**

‘signed and dated by me at Nairobi this 13th day of October, 2003

Signed Kuloba J.

13.10.2003”.

The applicants did not file a notice of appeal against the ruling of Kuloba J. They instead filed a review application dated 18th December, 2003 under **Section 3A and 80** of *Civil Procedure Act* and **Order XLIV Rule 1 and 4** CP. Rules seeking a review of the ruling of Kuloba J. on the ground that it was a nullity.

The application was supported by the affidavit of David W. Ireri, Advocate for the applicants which raised three grounds in support of the application, namely; that the ruling was not pronounced by Kuloba J. in open court; that the ruling was not counter signed and dated in open court by Lenaola J. and that Kuloba J. relied on observations of the Court of Appeal made in an interlocutory application which observations were not conclusive.

The application was heard by Lenaola J. It was submitted in support of the application, among other things, that the ruling was a nullity because by **Order XX Rule 3** CP Rules, a judgment ought to be signed and dated when it is being pronounced and not prior to the date as was done by Kuloba J.; that the ruling was also a nullity because Kuloba J. was not in service by 30th October, 2003 when he signed and dated it, and, lastly, that the ruling was a nullity because it was not counter-signed by Lenaola J. in breach of **Order XX Rule 3 (2)** CP Rules. The application for review was ultimately dismissed by Lenaola J. on 18th February, 2005. The applicants immediately filed a notice of appeal against the ruling and we were informed from the bar that the applicants have indeed lodged *Civil Appeal No. 6 of 2006*.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

The grounds of appeal are stated in the body of the application. They fault the findings of Lenaola J. on several grounds which were raised in support of the application for review. Mr. Chacha Odera, learned counsel for the applicants submitted, in particular, that, the appeal raises a novel point, viz, whether a ruling prepared and signed by a Judge who has retired from his office can validly be pronounced by his successor. It is apparent that the appeal is based on several technical legal grounds. Now that the appeal has been filed, we do not consider it appropriate to refer to the grounds of appeal in some detail, for doing so would not only be preemptory but also might in the end cause embarrassment to the judges who will ultimately deal with the appeal. Suffice to say at this stage that we are prepared to assume that the grounds of appeal are *ex facie* arguable.

The applicants gave three reasons why the appeal would be rendered nugatory if stay is not granted, firstly, that the respondent is not entitled to the decree pursuant to ruling of Kuloba J; secondly, that the decretal sum is colossal and if paid would adversely affect the applicants, and, thirdly, that the decretal sum is so colossal that the position of the applicants ought to be secured.

On the first ground, there is a judgment of Kuloba J. in favour of the respondent dated 13th October, 2003 but pronounced on 13th October, 2003. The respondent is entitled to fruits of its judgment unless there is a good reason to deny it that right. That judgment is valid until it is set aside by this Court. It is not with respect correct to say that the respondent is not entitled to the decree.

Furthermore, the applicants have admitted in the pleadings that they have only paid Shs. 25 million to the respondent out of the contract sum of Shs. 38,845,000/=.

It is true that the decretal sum is now colossal because of the element of interest. However, it is the applicants' conduct which has caused the decretal sum to escalate. The construction of flats was completed way back in 1997 and handed over to the applicants on 7th July, 1997. However, the applicants failed to pay the balance of the contract sum.

The applicants have already derived a benefit from the building contract as they received and sold the 12 flats at substantial sum of Shs. 51 million sometime in 1998 but failed to pay the balance of the contract sum. The applicants have not shown that the respondent has no financial capability to refund the decretal sum if the appeal ultimately succeeds. We cannot appreciate how the appeal would be rendered nugatory if the order of stay is not granted. Having regard to all the circumstances of the case, we are of the view that the interest of justice warrants the dismissal of the application.

For those reasons, we dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 5th day of June, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR