



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 153 of 2009 (UR 105/09)

KENYA COMMERCIAL BANK LIMITEDAPPLICANT

AND

HON. NICHOLAS OMBIJARESPONDENT

(Application for stay of proceedings pending the lodging, hearing and determination of an intended appeal from the ruling and orders made by the superior court at Nairobi (Khaminwa, J) dated 5th March, 2009

in

H.C.C.C. NO. 547 OF 2008)

RULING OF THE COURT

This is an application under **Rule 5(2) (b)** of the Court of Appeal Rules (“*the Rules*”) for stay of proceedings in HCCC No. 547 of 2008 pending the hearing and determination of an intended appeal.

The appeal intended herein arises from the decision of the superior court (Khaminwa, J) dated 5th March 2009 whereby the superior court struck out the applicant’s (defendant in the superior court) statement of defence; entered judgment for the respondent and proceeded to assess the damages by way of formal proof. The final judgment on quantum is pending, and is slated for delivery on 27th July 2009.

The facts that gave rise to the suit in the superior court are briefly as follows: the respondent, the Hon. Justice Nicholas R.O. Ombija, was, at the material time, a holder of the applicant bank’s credit card. He had a credit limit of Shs.50,000/=. On three different occasions, namely on 19th April, 2008, 3rd May, 2008 and 4th May, 2008, the applicant declined to accept transactions for purchases made by the respondent at Hotel Intercontinental and Nakumatt supermarket. In a suit filed in the superior court on 19th September 2008, the respondent claimed that the applicant’s refusal to accept those transactions, even when he had adequate funds to his credit, was in breach of his contract with the applicant, and further that it disparaged his reputation, for which he claimed damages.

In a statement of defence filed on 7th November, 2008 in the superior court, the applicant averred, among other things, that the respondent exceeded his authorized credit limit of Shs.50,000/=; that as a

result his credit card got suspended; and that the suspension had not been lifted when the respondent attempted to re-use his said card.

On 1st December, 2008 the respondent filed an application under **Order 6 rule 13(1) (b), (c) and (d)** of the Civil Procedure Rules (“CPR”) for an order that the applicant’s defence be struck out on the following grounds:-

“(a) That the defendant’s defence is a sham and does not raise any issues that warrants a trial.

(4) (sic) That the defence filed herein is hollow, bereft of merit, incompetent and is only for striking out as the same is scandalous, frivolous and vexatious, may prejudice embarrass or delay the fair trial of the action herein and is otherwise an abuse of the court process.

(b) (sic) That the defendant has admitted the plaintiff’s claim in writing and the purported defence is nothing but an afterthought.

(c) (sic) That the defendant has made an unqualified admission of the plaintiff’s claim.”

In a brief and completely unreasoned one-page ruling, the learned Judge of the superior court struck out the defence, and ordered that the suit be set down for formal proof. Here is how the learned Judge delivered herself:-

“Chamber summons dated 01.12.08 brought by Plaintiff Hon. Judge under Order VI Rule 13 (1) (b) and (c) and (d) seeking order that the defendant’s statement of defence be struck of and judgment be entered against the defendant and the suit to proceed to formal proof on the grounds that statement of defence is a mere sham and does not raise any issues that warrant a trail. (sic)

It is hollow, benefit (sic) of merit, incompetent and is only for striking out. The same is scandalous, frivolous and vexatious and may prejudice, embarrass or delay the fair trial of an action herein and it is otherwise an abuse of court process.

Furthermore, the defendant has admitted in writing the plaintiff’s claim and the defence is nothing but an after thought.

I have examined the pleading and statement of defence. I am satisfied that the defendants admitted the claim and even went to the extent of offering apology in the manner they mishandled the plaintiff. (Judge of High Court) under contract with them. The defence now filed is just an afterthought. Application is allowed. The defendants (sic) defence is struck of (sic) and judgment is entered for plaintiff and as it is in claim of damages. (sic) The plaintiff shall set the suit down for formal proof. Costs to the plaintiff for this application. Stay of period of thirty (30) days pending consideration of appeal.”

It is against that ruling that an appeal is intended, and for now the applicant seeks a stay of proceedings. As we noted before, the superior court is expected to render its judgment on 27th July, 2009.

In his submissions before us, Mr. Achach, learned counsel for the applicant, argued essentially that the applicant’s letter of apology to the respondent dated 20th May, 2008 did not constitute admission of claim; that although the application before the superior court was to strike out the defence under **Order 6 rule 13** of **CPR**, the superior court wrongly struck out the defence based on “admission” when no such admission had been made; and that the applicant’s refusal to honour further credit card transactions arose from the suspension of the card in accordance with the contract between the parties. The applicant argued that if the order sought was not granted, the appeal would be rendered nugatory, as the judgment of the superior court is expected to be delivered on 27th July 2009. Mr. Achach cited the case of **Delphis Bank Ltd v. Channan Singh Chatthe** (2006)e KLR 1 where this Court stated as follows:-

“If no stay is granted and the appeal is allowed when it comes for hearing resulting in the setting aside of the order that Delphis must call its evidence first, it is very probable that judgment (hereinafter “the second judgment”) will already have been given in favour of the plaintiff against Delphis in the absence of any evidence having been adduced by Delphis. The successful appeal against the order of the judge will have been overtaken by events and rendered nugatory. It is true that in these circumstances Delphis may be able to mount a separate appeal against the second judgment but this possibility does not undo the fact that the present intended appeal will have been rendered nugatory.”

Mr. Miller, learned counsel for the respondent, argued that the application had been overtaken by events, in that the proceedings before the superior court had been concluded, and what remained was the judgment, so that in his view *“there was nothing to stay.”* He relied on the case of ***Owino v. Madowo*** (1987) KLR 450 for that proposition. He submitted that the applicant had no arguable appeal; that the claim had been *“admitted”*; and that the application had been delayed inordinately.

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 is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

Clearly, whether the applicant’s letter of apology dated 20th May, 2008 constituted *“admission”* which entitled the superior court to strike out the defence is an arguable point. It is also arguable whether the respondent was in breach of the terms of the credit card agreement when the transactions were dishonoured and whether such breach entitled the applicant to *“suspend”* the respondent’s account. We are satisfied that this appeal is arguable. An *“arguable”* appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.

On the second point whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that it will be rendered nugatory. We recognise, as the Court did in the ***Delphis Bank*** case (supra), that once the judgment is delivered herein by the superior court although the applicant will be able to mount a separate appeal, this does not undo the fact that the present intended appeal will have been rendered nugatory.

Finally, we are unable to accept Mr. Miller’s argument that the *“proceedings”* having been concluded in the superior court, there is nothing to stay. That is an untenable proposition, and the ***Owino*** case (supra) that he cited says nothing of the sort. Until judgment is finally delivered, the proceedings are very much alive, entitling any party to even apply for amendment of pleadings before judgment. We are also of the view that there has been no inordinate delay in bringing this application before the Court, at least none that has, or could have, caused prejudice to the respondent.

Accordingly, and for reasons cited, we allow this application and order that further proceedings in HCCC No. 547 of 2008 be stayed pending the final determination of the intended appeal herein. Costs shall be in the appeal.

Dated and delivered at Nairobi this 24th day of July, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR