



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

CIVIL APPLI 203 OF 2009 (UR 140/2009)

WALKER KONTOS ADVOCATES.....APPLICANT

AND

INDUSTRIAL PLANT (EA) LIMITED (IN RECEIVERSHIP).....1ST RESPONDENT

AIRDUCT ENGINEERING LIMITED.....2ND RESPONDENT

(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi (Khaminwa, J)

dated 22nd June, 2009

in

H. C. C. C. NO. 425 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 execution pending the hearing and determination of an intended appeal.

The background to this application is briefly as follows:

Between the years 1995 and 1999 the applicant law firm acted as advocates for the respondents as well as for Stanbic Bank Kenya Ltd (“Stanbic”), and in that capacity drew documents and legal instruments that included a lease agreement, legal charge and debenture for Kshs.50 million. At some point, a dispute arose between the 1st respondent and its bankers, Stanbic, and the applicants chose to act for Stanbic, and issued a notice of appointment of a Receiver/Manager on behalf of Stanbic against the 1st respondent. This infuriated the respondents who then filed an action in the superior court at Milimani alleging breach of confidentiality and their contract of retainer with the applicant. The prayers sought by the respondents in that suit included temporary and permanent injunctions preventing the applicant from acting for Stanbic now or in the future. Soon after filing the aforesaid suit, that is HCCC No. 425 of 2008, the respondents on 29th July, 2008 filed an application in the superior court seeking almost the same prayers as they had sought in the Plaintiff. These prayers are as follows:

“2. THAT the Defendant/Respondent be restrained by interlocutory injunction from representing in any Court or Tribunal in Kenya, Stanbic Bank Kenya Limited and/or the Receivers/Managers and any other associated companies assignees, successors and/or persons in HCCC No. 689 of 2002, HCCC No. 1855 of 2000 and HCCC No. 532 of 2006 and in any litigation and/or proceedings against the Plaintiffs/Applicants by Stanbic Bank Kenya Limited arising from the Advocate-Client relationship and fiduciary duty subsisting between the Plaintiffs/Applicants and Defendant/Respondent pending the hearing and determination of the Application herein.

3. THAT an injunction do issue to restrain the firm Walker Kontos Advocates, their partners or servants, and/or agents from acting or from passing over to Stanbic Bank Kenya Limited and/or its servants, agents, successors in title or

assignees, or any other parties any documents or information confidentially obtained from the Plaintiffs/Applicants whilst the said Walker Kontos Advocates were previously acting for them in the transactions the subject matter of the Suit herein.

4. THAT a mandatory injunction against the Defendant/Respondent, M/s Walker Kontos Advocates, their partners or servants, and/or agents be granted compelling them to cease from acting for Stanbic Bank Kenya Limited and/or its servants, agents, successors in title or assignees, in HCCC No. 532 of 2006, HCCC No. 689 of 2002 and HCCC No. 1855 of 2000 now pending before this Honourable Court or in any dispute between Industrial Plant (EA) Limited (In Receivership) and Airduct Engineering Limited and Stanbic Bank Kenya Limited now or in the future in howsoever manner.

5. THAT this Honourable Court do order a stay of representation by the firm of Walker Kontos Advocates and/or any other firm of Advocates for Stanbic Bank Kenya Limited and the Joint Receivers/Managers in HCCC No. 532 of 2006, HCCC No. 689 of 2002 and HCCC No. 1855 of 2000, pending the hearing and determination of the Suit herein."

Our reasons for reproducing those prayers *in extenso* will be evident shortly. The above application was heard by Khaminwa, J who agreed with the applicants and allowed **all** the prayers as sought. In her ruling, the learned Judge noted that the applicant (defendant in the superior court) was not acting for Stanbic in the suit before her, and yet went ahead to grant the orders sought. She said, in part:

"On the hearing date Mr. Oraro appeared for defendants and submitted that when the plaintiffs filed this suit the defendants chose to remove themselves from the conduct of the suits mentioned above and presented the same firm of Oraro & Co. Advocates as indicated in the affidavit of John Okello Ougo filed herein.

Therefore, the defendants are not handling the matters for Stanbic Bank Ltd and no orders can be made in the circumstances against the defendant. It is to be noted that the plaintiff prays for restraining orders, mandatory injunction, permanent injunction, declaration that the defendant should not now or in future continue to act for Stanbic Bank Ltd against the plaintiffs or use the documents obtained from the plaintiffs."

She then concluded that the passing over of the case to Messrs Oraro & Company Advocates was of itself without more an admission the defendants should not have acted for Stanbic Bank Limited. She then granted the orders sought as earlier on stated.

It is against that decision that the applicant intends to appeal, and in the meantime has filed this application dated 8th July, 2009 in which it seeks the following order:

"THAT the order of the High Court in Nairobi Milimani HCCC 425 of 2008 at Nairobi and dated 22nd June, 2009 ordering a stay of representation by the firm of Walker Kontos Advocates and/or any other firm of Advocates, as Advocates for Stanbic Bank Kenya Limited and the joint Receivers/Managers in HCCC No. 532 of 2006, HCCC No. 689 of 2002 and HCCC No. 1855 of 2000, be stayed until the Applicant's intended appeal is lodged, heard and determined."

The three important grounds on which the application is premised are as follows:

"(a) The Honourable Judge of the High Court acted without jurisdiction in making the order of 22nd June, 2009 as the said order has the effect of affecting Stanbic Bank Limited who was not a party to the proceedings upon which the order was made.

(b) The Honourable Judge in making the order of 22nd June, 2009 effectively denies Stanbic Bank Limited the right to Counsel in Nairobi HCCC 532 of 2006 Nairobi HCCC 689 of 2002 and Nairobi HCCC 1855 of 2000 in which the said Bank is a party.

(d) It was not open to the Judge to make the order of 22nd June, 2009 whose effect was to deny Stanbic Bank Limited the right to use documentary evidence which is in the public domain and which is not confidential."

In his submissions before us, Mr. George O. Oraro, learned counsel for the applicant, argued that the superior court erred in making a final decision at an interlocutory stage – a decision that affected the rights to counsel of Stanbic which was not a party to the suit before the superior court, and who had not been heard before such a drastic decision was made; that the superior court erred in granting an injunction affecting a client over a retainer, denying Stanbic the right to engage a counsel of its choice; that the orders of the superior court deny the applicant its right to deal with the documents affecting Stanbic, and even to proceed to taxation of its bill of costs. All these, Mr. Oraro submitted, are arguable points, and unless the orders sought are granted, the intended appeal would be rendered nugatory as the constitutional right of Stanbic to seek legal counsel is at stake.

Mr. Fred N. Ojiambo, learned senior counsel for the interested party, associated himself with the submissions made by Mr. Oraro.

Mr. Moses Kurgat, learned counsel for the respondents, on the other hand, relied on the replying affidavit of Harmel Singh Sagoo, sworn on 27th July, 2009, arguing essentially that the applicant had breached provisions of the Advocate's Act in acting for one client to the prejudice of another, and had to be stopped. He submitted that the applicant having withdrawn itself from

acting for Stanbic in the superior court no longer had locus standii to present this application, and that there are instances where the court can and has made similar orders. He referred us to the cases of King Woolen Mills vs Kaplan Stratton Advocates (1993) KLR 2170 and Consolidated Bank of Kenya vs Usafi Ltd (2006) e KLR.

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 the case of Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd Civil Application No. Nai. 157 of 2006 (unreported):

“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? Although, only one arguable point is sufficient for this court to exercise its discretion to grant the orders sought, we are able to discern several arguable points: could the superior court make “final” orders at an interlocutory stage considering that the prayers sought in the Plaint are the same as those granted in the application which is the subject of this appeal?; did those orders affect the constitutional rights of a party not before the court?; did those orders unfairly bar the applicant “forever” not to act for Stanbic?; can an injunction order be made against an advocate’s client, as opposed to the advocate himself?

As for the nugatory aspect, we are also of the view that because the constitutional rights of a party are at stake here, and because the orders granted by the superior court are fairly drastic, this appeal will be rendered nugatory in the event the orders sought here are not granted.

In the result, we allow this application as prayed, and order that the orders issued by the superior court (Khaminwa, J) dated 22nd June, 2009 be and are hereby stayed pending the hearing and determination of the intended appeal herein.

Dated and delivered at Nairobi this 23rd day of October, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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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