



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

CIVIL APPLI 189 OF 2009 (UR 130/2009)

FREIGHT IN TIME LTD.....APPLICANT

AND

IMAGE APPARELS LIMITED.....RESPONDENT

(An application for stay of execution under rule 5 (2) (b) of the Court of Appeal rules from the ruling and order of the High Court of Kenya at Nairobi (Nambuye, J) dated 3rd October, 2008

In

H.C. Misc. Civil Appln. No. 1623 of 2005)

RULING OF THE COURT

Before us is a motion expressed to be brought under **Rule 5 (2) (b)** of the Court of Appeal Rules in which the applicant herein, FREIGHT IN TIME LTD. seeks essentially one main relief, viz,

“3) THAT there be stay of execution of the decision, Ruling or Order delivered on 3rd October, 2008 pending the hearing and determination of the applicant’s application and determination of the appeal from the ruling dated 3rd October, 2008.”

In addition to the foregoing the applicant is asking for the costs of the application. The application is supported by the affidavit of one AMIT SHAH a director of the applicant company. The applicant relies on the following grounds:-

“1) THAT the applicant shall suffer irreparable loss as execution is imminent unless the order for stay of execution is granted.

2) THAT the Applicants have an arguable appeal with a real chance of success and should be allowed to proceed.

3) THAT the Respondents shall not be prejudiced in anyway and on a balance convenience it is easier maintain (sic) to the status quo as it stands now, until the intended appeal is heard and determined.

4) THAT the Applicants are willing to deposit security in court.

5) THAT in the event that the order of the application granted are executed before the hearing of the hearing of the intended Appeal the Applicant and its operations will grind to a halt.

6) THAT the application has been made within reasonable time and without delay.”

The ruling which gave rise to this application before us was in respect of an application filed in the High Court in which the respondent herein took out a notice of motion pursuant to **section 5** of the Judicature Act, **section 3A** of the Civil Procedure Act and all enabling provisions of the law. In that application the respondent herein (as the applicant in the superior court) sought the following prayers:-

“1) That the Honourable Court do commit MR. KARIM SAYED an officer of the respondent to Civil Jail for a period of six (6) months together with SHANTILAL SHAH, LINAH BHARAT SHAH, HASIT SHANTILAL SHAH AND AMIT SHAH, the general manager of the respondent all to whom are members of he Board of Directors of the Respondent.

2) That the Honourable Court be pleased to order the attachment of the Respondents property to the tune of Kshs.eight (8) million.

3) That the respondent be condemned to pay the costs of this application.”

That is the application that was placed before the superior court (Nambuye, J) for determination . The application appears to have been hotly contested before the learned Judge who in a detailed ruling delivered on 3rd October, 2008 found in favour of the respondent herein. In concluding her judgment the learned Judge stated:-

“For the reasons given the final orders of this court on the applicants application dated 1st December, 2005 and filed the same date are as follows:-

(1) Prayer 3 whereof which prayed from (sic) an attachment of the respondents property to the tune of Kenya shillings 8 (eight) million scaled down to Kshs.1,351,430.00 as at the time of argument is disallowed for the reasons given.

(2) Prayer 2 thereof which seeks to commit:-

(i) Mr. Karimsayed,

(ii) Shantilala Barmai Shah,

(iii) Linha Bharat Shah,

(iv) Linah Bharat Shah,

(v) Hasit Shantilal Shah,

(vi) And Amit Shah to civil jail as officers and general managers and or directors of the respondent company is allowed to the extend that each of the persons named is fined Kshs.350,000.00 each in default each to serve 6 months imprisonment in jail.

3. The fines in number 2 above to be paid within 14 days from the date of the making of this order.

4. In default of number 3 above each of the persons named in number 2 above to be arrested immediately and then committed to jail to serve the 6 months jail ordered.

5. The applicant will have costs of the proceedings.”

Being aggrieved by the foregoing the applicant now comes before us seeking a stay of those orders pending an intended appeal. That is the application that came up for hearing before us on 29th September, 2009 when Mr. K.O. Arum appeared for the applicant while Mr. M.O. Odawa appeared for the respondent.

It was Mr. Arum's contention that the application for contempt was filed without leave of the superior court since the earlier application for leave had been withdrawn. It was further submitted that it was only one of the directors of the applicant company who was served with the order but even that order did not have a penal notice. For these reasons Mr. Arum argued that the superior court had no jurisdiction.

To counter the foregoing submissions, Mr. Odawa submitted that the learned Judge considered all that was before her and correctly came to the conclusion that she had jurisdiction. Mr. Odawa further reminded us that the contempt was not purged hence the intended appeal was frivolous. We were further reminded that there was no evidence to show that the directors of the applicant were not persons of means. Mr. Odawa therefore urged us to dismiss this application.

We have carefully considered the submissions of both parties. In an application under **rule 5 (2) (b)** of this Court's Rules it is upon the applicant to show that the intended appeal is not only arguable but that if stay was refused the appeal would be rendered nugatory. In the case of **TRUST BANK LIMITED AND ANOTHER V. INVESTECH BANK LIMITED AND 3 OTHERS** – Civil Application No. Nai. 258 of 1999 (unreported) this Court stated inter alia:-

“The jurisdiction of the court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly, that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case.”

As regards the first principle of the appeal being arguable we observe that submissions were made in respect of the procedure in the superior court in which one side was of the view that the superior court had no jurisdiction while the other side firmly believed that the superior court had jurisdiction. There was also the issue regarding service of the order not having been served on all the directors of the applicant. There was then the issue of penal notice. In our view these are questions of law to be decided on appeal – see **GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (NO. 2) [1988] KLR 838**. Indeed even one arguable point is sufficient for the purposes of **rule 5 (2) (1)** of this Court's Rules. In **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS V. KILACH [2003] KLR 249** at pp. 263 – 4 this Court said:-

“We think the applicants have shown to us some arguable points in their intended appeal. First they intend to show in their proposed appeal that even if it be true that the son of Mr. Justice Bosire is an employee of the Central Bank, or that Mr. Gatonye has previously acted for that bank, those are not such terribly important factors as to warrant the crippling of the operations of the Commission by an order of stay as Mbiti, J did. The respondent, on the other hand and relying on the decision of R V. Bow Street Stipendiary Magistrate ex part Urgate Pinochet quoted in his letter the contents of which we have already reproduced, contends that the relationship of son and father is such that the judge ought not to sit. We think this, even if it were the only point, is an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating on appeal and is not a frivolous one. There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5 (2); there need not be a chain of arguable points to sustain an application.

We are satisfied that the intended appeal is not frivolous. Will it be rendered nugatory if we refused to grant a stay? It is to be observed that the directors of the applicant stand a risk of being committed to civil jail. Each case must be considered on its own peculiar circumstances. In the present application we have considered the background leading to this application and taking into account conflicting claims of both parties we are of the view that this is a proper case in which to grant a conditional stay.

Accordingly we direct that there will be a stay on condition that each of the directors of the applicant deposit in court Shs.200,000/- each within fourteen (14) days of the date hereof. Failure to comply with that condition within the specified period the application will stand dismissed. Costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 16th day of October, 2009.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

D.K.S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.