



IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI NO. 235 OF 2007 (UR 146/2007)

MOMBASA CASHEWNUTS PROCESSOR (K) LTD 1ST APPLICANT

AWADH SALEH SAID 2ND APPLICANT

AND

NYARI INVESTMENTS (1988) LIMITED 1ST RESPONDENT

DELPHIS BANK LIMITED 2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and the Order of the High Court of Kenya

Nairobi (Rawal, J) dated 30th July, 2007

In

H.C. C. C. No. 1987 of 2001)

RULING OF THE COURT

Both Mr. Nyaoga and Mr. Nowrojee, the learned counsel for the applicants, Mombasa Cashewnuts Processor (K) Ltd (1st applicant) and Awadh Saleh Salim (2nd applicant) and the 1st Respondent, Nyari Investments (1988) Ltd., respectively, argued the motion before us as though the motion itself was the very appeal. The motion dated and lodged in the Court on 20th September, 2007 is one under *Rule 5(2) (b)* of the Court's Rules, and it simply asks the Court:-

“---- to grant a stay of execution of the ruling and order of the Superior Court made on 30th July, 2007, pending the lodging, hearing and determination of an intended appeal against the said decision.”

We know, and its trite learning that in such an application, an applicant has to show to the Court two things before an order for stay can be granted and the two things an applicant is required to satisfy the Court on are:-

- (i) that the appeal, or the intended appeal if one has not been lodged, is an arguable and not a frivolous one;
- (ii) that unless the order of stay sought is granted the appeal or the intended appeal were it to eventually succeed would have been rendered nugatory by the initial failure to grant the order of stay.

Authorities on these points are too numerous and too well known to the Court and to the practising bar and there is no occasion for us to cite them.

Mr. Nyaoga strenuously pressed upon us that the appeal which they have already filed, i.e. Civil Appeal No. 229 of 2007, is an arguable one and cannot by any stretch of imagination be designated as frivolous. Mr. Nowrojee, even more strenuously than Mr. Nyaoga, argued to the contrary, namely that there is no arguable appeal, i.e. that the appeal which has been lodged is a frivolous one. Mr. Munyalo who represented the 2nd respondent, Delphis Bank Ltd. told us he was not opposing the application for stay.

For our part, we start from the stand – point that an arguable appeal does not and cannot mean an appeal which will or must succeed. As the principle itself indicates it simply means an appeal which can be argued. We have looked at the “*Draft Memorandum of Appeal*” annexed to the motion. With respect to Mr. Nowrojee, we are unable to agree with him that none of the nine grounds contained in the draft memorandum is arguable. Ground one, for example, deals with the issue of whether or not the application which was before Rawal, J. and which forms the basis of the appeal before the Court, was an application for review of the two earlier orders made by Ransley, J. The latter Judge had previously made two orders, one on 13th November, 2002 and the other one on 2nd April, 2003. The order of 2nd April, 2003 appears to have refused to review the earlier order of 13th November, 2002. The application before Rawal, J. was apparently made under **sections 3A** and **80** of the Civil Procedure Act. **Section 3A** of the Act, as everybody knows, simply confers on the High Court and subordinate courts exercising civil jurisdiction, the inherent jurisdiction or power to make such orders as will secure the ends of justice in a particular situation and to prevent an abuse of the process of the court. **Section 80** of the Civil Procedure Act confers on the High Court and the subordinate courts exercising civil jurisdiction, the power to review their previous orders where an appeal is not provided for or if provided for, where none has been filed. The application before Rawal, J. was partly under **section 80** and as we have already pointed out, the second order of Ransley J., appears to have refused to review the earlier order made on 13th November, 2002. Could a second application for review be brought before Rawal, J.? Mr. Nyaoga contends it could not. In this motion, we are not called upon to determine any issue and we cannot determine that point. But we think the point is arguable.

An applicant does not have to show the Court a chain of arguable points; one arguable point is sufficient for the purposes of an application under **Rule 5 (2) (b)**.

We move to the second requirement of whether the success of the pending appeal would have been rendered nugatory if we do not grant the order of stay. For that purpose, we have looked at the final four orders made by Rawal, J. Those orders appear to us to merely amplify the earlier orders made by Ransley, J. on 13th November, 2002. The applicants have apparently not complied with those orders. None of the orders purported to cancel their title to the disputed land and the applicants were merely required to appoint an independent agent to run the affairs of the disputed property and to provide accounts for their stewardship of the property. We equally cannot fail to note that the registration of the transfer to the 1st applicant took place barely a day before the ruling of Ransley, J. dated 13th November, 2002, as if it was meant to present the learned Judge with a fiat accompli. We agree with Mr. Nowrojee that the applicants’ intended appeal will not be rendered nugatory by our refusal to grant the order of stay sought.

The applicants were required to satisfy us on both limbs as to the presence of an arguable appeal and the appeal being rendered nugatory if an order of stay is not granted. While the applicants have satisfied us on the first limb, they have failed to satisfy us on the second limb. That being our view of the matter, we order that the applicants’ notice of motion dated and lodged in this Court on 20th September, 2007 be and

is hereby dismissed with the costs thereof to the 1st respondent. Those shall be our orders in the motion.

Dated and delivered at Nairobi this 15th day of February, 2008

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.