IN THE COURT OF APPEAL OF KENYA AT NYERI

Civil Appli. Nai 17 of 2008 (UR. 11/2008)

TROPICAL QUARRIES (KENYA) LTD.

INDERJIT SINGH SAIMBHI

SUKHWIDNER KAUR SIMBHI ……...……. APPLICANTS

AND

TROPICAL TRADING CO. LTD.

HARDEV SINGH SAIMBHI …….……. RESPONDENTS

(Application for stay of execution pending the filing, hearing and determination of the intended appeal from the ruling and order of the High Court of Kenya at Nyeri (Justice Kasango) dated 4th February, 2008

in

H.C.C.C. NO. 40 OF 2007)

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RULING OF THE COURT

By this application under ***Rule 5 (2) (b)*** of the Court of Appeal Rules (Rules), the applicants ask the Court:

"…… ***to order stay of execution of the ruling and orders of the superior court delivered and issued on 4th February, 2008 and the respondents as well as their agents M/s. Hippo General Merchants to deliver back the applicants and/or return any equipment, machinery and/or motor vehicles attached if any pending the filing, hearing and determination of the intended appeal".***

The orders to which this application relates are interlocutory orders made by the superior court in *Nyeri H.C.C.C. No. 4 of 2007* filed by the two respondents (plaintiffs) against the three applicants herein (defendants). The dispute in the superior court is essentially between two brothers ***Inderjit Singh Saimbhi*** (2nd applicant) (Inderjit) and ***Hardev Singh Saimbhi*** (3rd respondent) (Hardev) over the management of and the assets of a family company ***Tropical Trading Co. Ltd.*** (Company).

The company was incorporated on 7th July, 1988. It had four shareholders including Inderjit and Hardev. After the incorporation, the Commissioner of Lands gave a licence to the company to occupy L.R. No. 7387/32, Kiganjo, Nyeri comprising of 50.2 HA for purposes of establishing a stone crushing plant.

The plaintiffs averred in the plaint, *inter alia*, that the company is the beneficial or registered owner of eight motor vehicles Registration Nos. KAA 135S, KAB 566N, KAC 945D, KAA 282T, KZF 011, KTZ 225 KAC 246, KAA 282T and heavy machinery to wit, three wheel loaders Reg. Nos. KYD 106 CAT 926, KAB 460T Volvo 420 and KTS 264 Michigan 75111; Holman compressing machine and two stone crushing plants; that Inderjit fraudulently and unlawfully changed the directorship of the company by removing Hardev as director and instead appointing his wife ***Sukhwinder Kaur Saimbhi*** (3rd applicant) as a director and that after changing the directorship of the company, Inderjit illegally transferred the eight motor vehicles, the three wheel loaders, compressing machine and the crushing plant to the ***Tropical Quaries (Kenya) Ltd***, the 3rd applicant.

The plaintiffs sought three reliefs, viz – a permanent injunction restraining the defendants from alienating, wasting using or appropriating the company's assets; a declaration that the purported transfer of all assets of the company was unlawful, illegal and void and a cancellation of such transfer, and, lastly, an order that defendants do account for all proceeds and profits for the use of the company's assets.

The respondents filed a Chamber Summons dated 6th June, 2007 together with the plaint seeking two orders, firstly, an order for injunction to restrain the defendants from alienating, using, appropriating to their use wasting or otherwise dealing in all the specified assets of the company until the hearing and determination of the suit and, secondly, an order that the defendants "*be barred from continued use of Parker R.L. 1061 – 1131 crushing plant*".

It appears from the record that when the application came for hearing on 26th July, 2007, the defendant's advocates applied for adjournment which the court allowed, but granted the interlocutory orders sought in the application until the next hearing date. Sometime in September, 2007, the defendants filed both a Defence and an application seeking an urgent hearing of the plaintiff's application dated 6th June, 2007 on the ground that the interlocutory orders granted on 26th July, 2007 had the effect of shutting down the operations of Tropical Quarries (Kenya) Ltd (1st defendant). On 22nd November, 2007, the plaintiffs filed a second Chamber Summons under ***Order XXXIX Rules 2, 2A, (2)*** and ***(3)*** *Civil Procedure Rules* seeking two orders, that:

(a) …… ***all the assets listed at paragraph 6*** *(of the Plaint)* …… ***as may be reasonably practicable be attached and detained at the premises of the 1st plaintiff by M/s. Hippo General Merchants Auctioneers, and to remain until the full determination of this suit or otherwise ordered ……***

(b) That the 2nd and 3rd defendants be committed to civil jail for a term not exceeding six months for wilful disobedience of court orders.

The 2nd application was brought on the main ground that the defendants had disobeyed the orders of 26th July, 2007 by continuing to use the assets of the company.

The Chamber Summons application dated 6th June, 2007 was supported by the affidavit of Hardev. He annexed documents to the affidavit to show, among other things, that the motor vehicles in issue were registered in the name of the company and that in 2002 Inderjit filed a notification of change of directors of the Company replacing Hardev with Sukhwinder Kaur Saimbhi (3rd defendant). On his part, Inderjit filed a long replying affidavit deposing, *inter alia*, that, he was a director of the company, that the suit and the application were incompetent as the company did not sanction the filing of the suit and the application; that sometime in 2001, Hardev – a co-director of the company deserted the company and the country and moved to the United Kingdom and thus retired as a director by desertion; that Hardev purported to appoint one Benson M. Kiambu as a director to represent him without authority of the board of directors which purported appointment was rejected; that as the company could not run without a director, the 3rd respondent was appointed as a director following advise from his lawyers; that the 1st applicant – Tropical Quaries was incorporated because the operations of the company had become near to impossible because of continuous interference by outside forces and due to the fact that the company owed a lot of money; that sometime in 2004, Hardev caused a notification of change of directors of the

company to be filed, replacing Inderjit with Mohinder Singh Saimbhi as director; that subsequently and whilst Inderjit was abroad, Hardev and Mohinder instructed an auctioneer to attach and sell the motor vehicles belonging to the company which vehicles were sold to Samson Mudongoi N. Mulama, (Samson Mulama); that Inderjit re-purchased the vehicles from Samson Mulama and that the vehicles no longer belong to the company.

A supplementary affidavit sworn by Hardev on 4th December, 2007 was filed.

In that affidavit, Hardev denied that Inderjit is a director of the company and deposed that he had full authority of the company to institute the suit which he would produce at the hearing of the suit.

The superior court considered the application and concluded that the plaintiffs had proved a case for grant of the injunction and proceed to grant orders in terms of the two Chamber Summons dated 6th June, 2007 and 20th November, 2007 respectively.

We quote below some of the findings made by the superior court on the contentious issues raised. On the question whether Hardev could appoint Benson. M. Kiambu to represent him, the court said:

"***The defendants argument therefore that the second plaintiff could not appoint a third party to act for him*** *(as a director)* ***as it is alleged he did, is upheld and is the correct position".***

On the issue of the retirement of Hardev as a director the court said:

"***In as much as the second defendant argued the circumstances under which he did so, the provisions of the Articles of Association of the first plaintiff provide that the quorum for transaction of business of the directors may only be fixed not less that two directors. The retirement of the 2nd plaintiff was carried out by the 2nd defendant unilaterally. The appointment of the 3rd defendant as a director was also carried out unilaterally".***

On the issue whether the suit and the application were incompetent for lack of the resolution of the company authorizing the institution of the suit, the court said:

"***It is argued by the defendant that the plaintiff's suit was filed without authority from the Board of Directors of the first plaintiff. It ought to be however, be (sic) noted that according to the latest information provided by the Department of Registrar General dated 15th December, 2004 that the directors of the first plaintiff are the second defendant and another person not a party to this claim. The second defendant is shown not as a director but as a shareholder. That being the case, the second defendant has no locus standi to require that an authority be shown. Such an authority can only be questioned by a co-director who would participate in a board meeting. That being the case, that argument of the defendant is defeated".***

On the explanation by Inderjit why Tropical Quarries (Kenya) Ltd. was incorporated, the court said:

"***The second defendant in incorporating the first defendant stated that it was because the first plaintiff's operations*** *"became near impossible"*. ***What one gets from that statement is that the defendant decided to incorporate first defendant's company in order to probably continue in business that was being carried out by the first plaintiff. It does seem undoubtedly that the defendant did begin to use items of property owned by the first plaintiff in transacting the business of the first defendant. This on a*** *prima facie* ***basis gives credence to the plaintiff's claim that the defendant did use the first plaintiff's vehicles and machines. Whatever the circumstances that were prevalent when this action was taken it cannot justify the use of items of property by the first defendant that did not belong to it".***

Lastly, order No. 2 of the orders granted by the superior court, states:

"***That in particular, the defendant be barred from continued use of Parker R.L. 1061 – 1131 Crushing***

Plant <u>the property of the first plaintiff</u> until the determination of the suit". (Underlining ours).

The principles upon which the court exercises its original and unfettered discretion under ***Rule 5 (2) (b)*** of the Rules are settled. The applicants in this case are required to demonstrate not only that the intended appeal is arguable but also that unless a stay of execution is granted, the intended appeal would be rendered nugatory.

The applicants have enumerated the grounds of the intended appeal both in the draft memorandum of appeal and in the application. Generally speaking, the applicants will be contending that the findings of the superior court some of which we have set out above are in fact and in law erroneous. The applicants will be arguing, among other things, that the entire suit and the application were incompetent for lack of resolution by the company or the board of directors authorizing the respondents to institute the suit, that the superior court erred in making final pronouncement of ownership of the subject properties on an application for interlocutory injunction; that the superior court erred in granting mandatory injunction and attachment orders of goods and machinery when they were neither sought nor warranted, and that the orders granted were draconian as they had the effect of closing down the applicant's operations. It is apparent that there were several disputed issues of fact and law raised before the superior court. It is also apparent from excerpts of the ruling quoted above that the superior court finally pronounced on those issues. In our view, the appeal challenging the propriety and the correctness of those findings is not frivolous. Regarding the order for the attachment of the all assets of the company in particular, the order was made pursuant to the second application dated 20th November, 2007 which was made under ***Order XXXIX Rule 3*** Civil Procedure Rules which provides:

"***In cases of disobedience or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release".***

Thus, the attachment of goods under that rule is done as a punishment for disobedience or breach of order of injunction. Indeed, as we have pointed out above, the second application was based on the alleged breach of the interim injunction given on 26th July, 2007. The superior court made a finding in the impugned ruling that the allegations of breach of the injunction were not proved. It is arguable whether in view of that finding an order of attachment of the assets which was not based or ***Order XXXVIII*** Civil Procedure Rules (which rule authorizes attachment before judgment in the specified circumstances) was validly made.

We do not find it necessary to deal in detail with each of the proposed grounds of appeal. It is sufficient to say that the applicants have demonstrated that the intended appeal is not frivolous.

On the aspect of the intended appeal being rendered nugatory if stay is not granted, Inderjit deposes, *inter alia*, that, the equipment are used in the day to day operations of the company and the effect of depriving it of the use would be to grind its business to a halt; that in the event of execution, the company will have to close down rendering over 100 employees, some of who are highly skilled, redundant and causing cancellation of business contracts and dissipation of the goodwill, and that, if stay is not granted, the company will cease operations as a trading concern, incur heavy loss of profits, loss of credibility with its customers and bankers.

On his part, Hardev deposes in the replying affidavit, among other things, that, the application has been overtaken by events as the auctioneer has already executed the orders and that the appeal cannot be rendered nugatory as the orders issued are conservatory in nature. He has annexed a letter from the auctioneers dated 29th February, 2008 stating in part:

"***We executed the court order as directed by the court. Most of the assets listed were in poor condition, we managed to seize some vehicles and we delivered them to the plaintiffs' place to minimize the costs and security. The Parkers RL 1060 – 1131 crushing plant and the old parker crushing plant on L.R. No. 7387/32 are fixed and plaintiff advised that they should stay there. The work to be done was***

complicated and it required skills".

It is clear that the applicants' case is that unless stay of execution is granted, the applicants, particularly the 1st applicant, would suffer substantial loss, thus rendering the intended appeal nugatory. This court has on several occasions recognized that, if an intended appellant or appellant suffers substantial loss pending appeal that could render the appeal nugatory (see ***Kenya Shell Ltd vs. Kibiru & Another*** [1986] KLR 410, ***Mukuma vs. Abuoga*** [1988] KLR 645; ***G4S Security Services (K) Ltd vs. Group Four Security Limited*** – *Civil Application No. Nai. 19 of 2007* (unreported)).

In the ***Abuoga's*** case, (supra) this Court said at page 647 paragraph 5:

"***Granting a stay in the High Court is governed by Order XLI Rule 4 (2) the question to be decided being (a) whether substantial loss may result unless the stay is granted and the application is made without delay and (b) the applicant has given security. The discretion under Rule 5 (2) (b) is at large but as was pointed out in the*** *Kenya Shell* ***case, substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss could render the appeal nugatory. Therefore, it is necessary to preserve the status quo".***

In this case, the 1st applicant has been running a stone crushing plant on L.R. No. 7383/32 and selling ballast and dust for many years.

However, by the interlocutory orders of the superior court given on 4th February, 2008, the applicants were not only restrained from using the assets of the company including the stone crushing plant but also all the assets of the company were to be attached and retained by an auctioneer. Evidently, the effect of the interlocutory orders was to close down the plant and cause a total paralysis of the business of the company.

In ***Reliance Bank ltd vs. Norlake Investment Ltd.*** [2002] 1 EA 227 this Court said in part at page 231 paragraph f:

"***In the*** *Oraro and Rachier* ***case, the court took into account the fact that if the law firm was ordered forthwith to deposit the decretal sum, the firm itself might well be forced to go out of business and such an eventually may itself be sufficient to render the success of the appeal nugatory".***

In this case, we are satisfied that by the continued closure of the stone crushing plant and the attachment of the assets of the company, the 1st applicant would suffer substantial loss which would render the success of the appeal nugatory and that it is just in the circumstances that *status quo ante* should be restored.

In the result, the application is allowed and an order of stay in terms of prayer 1 in the application is granted. The costs of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 4th day of April, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR