



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 59 OF 2007 (UR 42/2007)

ESTUARINE ESTATES LIMITED.....APPLICANT

AND

LEO INVESTMENTS LIMITED.....RESPONDENT

(Application for stay and injunction pending the determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Aganyanya, J) dated 22nd February, 2007

in

H.C.C.C. NO. 1162 OF 2006)

RULING OF THE COURT

ESTUARINE ESTATES LIMITED, the applicant herein, asks us under *Rule 5(2)(b)* of the Court's Rules to exercise our discretion in its favour and grant it an order that *LEO INVESTMENTS LIMITED*, the respondent herein, be directed by an order of mandatory injunction to withdraw the caveat lodged against the applicant's property known as L.R. NO. 214/253, Muthaiga, Nairobi, hereinafter referred to as the suit property, on 1st February, 2006 and that the notice of withdrawal thereof be lodged and registered with the Registrar of Government Lands. The applicant at the commencement of the hearing of the application withdrew prayers (a) and (b) of the Notice of Motion which had sought, *inter alia*, a stay of the proceedings of the suit in the superior court.

There was no representation for the respondent during the prosecution of the application because its counsel was absent though the hearing date was taken by consent. The respondent, too, was absent when we heard the application.

The brief facts as can be deduced from the pleadings are as follows. In or about February, 2005 the parties hereto agreed to execute a Sale Agreement whereby the applicant was to sell to the respondent the suit property at a consideration of Shs.12,500,000/=. It was an express term of the intended Agreement that the completion date was within 30 days of the date of the execution of the intended agreement and that the respondent was to pay to the applicant Shs.1,250,000/= being the 10% deposit of the consideration pursuant to the said Agreement.

It is common ground that the respondent duly signed its part of the Agreement and effected payment of the deposit. But, when these were dispatched to the applicant, the applicant kept the agreement beyond the one month period and later returned it unsigned. It also returned the deposit cheque. The reason given for this unexpected move was that the applicant was no longer interested in selling the property to the respondent.

It transpired that attempted negotiations to sustain the intended transaction did not materialize and the respondent lodged a caveat against the title to the property and later sued seeking specific performance and/or general damages. Soon thereafter the applicant by its Chamber Summons grounded on *Order VI rule 13* of the Civil Procedure Rules moved the superior court to strike out the suit on the ground that it discloses no reasonable cause of action and is frivolous and vexatious.

Aganyanya, J (as he then was) in dismissing the application held:-

“Given those set of circumstances, can the suit be struck out on any of the grounds set out in the application! I feel not. The defendant cannot be allowed to have his (sic) cake and eat it at same time. It was the author of this whole problem and the suit must be allowed to go to full trial so that all the issues therein including that on general damages can be determined.

And while this suit is still pending an order cannot be made for the withdrawal of the caveat lodged thereon.

The application is dismissed with costs.”

The applicant has incorporated in the record a draft memorandum of appeal. We have perused the grounds enumerated thereon and we would assume in favour of the applicant that it has an arguable appeal. However, it must always be remembered that an arguable appeal does not necessarily and cannot mean an appeal that is bound to succeed. Also, the fact that an appeal or intended appeal is arguable does not, by itself, entitle a party to an order of stay or a mandatory injunction as the case may be, such as is sought herein. Such a party must go further and show that apart from its appeal being an arguable one, unless an order of stay, or a mandatory injunction is granted pending the determination of the appeal, if the appeal were to succeed, that success would have been rendered nugatory by the earlier refusal to grant the stay.

The applicant is seeking the removal of a caveat lodged against its property because “if ordered to remain until the determination of the suit it will further restrain the applicant from exercising its proprietary rights over the property.” But the applicant has not shown that any ensuing damage would be incomensurable if the intended appeal was successful or that the respondent is likely to be rendered impecunious in the foreseeable future and would not be a viable entity capable of meeting any damages that may be decreed against it.

In all the circumstances of this case, we are not persuaded that the intended appeal would be rendered nugatory if the appeal succeeds and accordingly there are no grounds for us to grant any of the orders sought in the Notice of Motion dated 22nd March, 2007. In the result, we order that the application be and is hereby dismissed. We make no order as to costs.

DATED and DELIVERED at NAIROBI this 6th day of JUNE, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR