IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 314 OF 2007 (UR. 215/07)

JARIBU HOLDINGS LTD ….……. APPLICANTS

AND

KENYA COMMERCIAL BANK LTD …..…...……..……. REPONDENTS

(An application for stay of execution pending the lodging and determination of an intended appeal from the judgment and decree of the High Court of Kenya (Warsame J.) delivered on 26th November, 2007

in

H.C.C.C. NO. 950 OF 2002)

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RULING OF THE COURT

In a reserved judgment which he delivered on 26th November, 2007 in a suit commenced by plaint for delivery of possession of premises of land known as LR. NO. 209/378/10, Warsame J. decreed thus:

"I direct the defendant to give vacant possession of the suit premises within the next 15 days failure of which the plaintiff shall be entitled to an order of eviction. The Plaintiff is also entitled to payment of all rents due and owing, plus costs of this suit."

The defendant, Jaribu Holdings Limited, wants to appeal to this Court against that decree, and has applied under rule 5 (2)(b) of the Court's Rules for an order of *"stay of execution of the judgment and decree of Hon. Justice Mohamed Warsame delivered on 26th November 2007 pending the lodging and hearing of an intended appeal against the said judgment and decree."*

It is trite law that for an applicant under rule 5(2)(b), above, to succeed, he has to satisfy the Court on two well settled principles.

First, that its appeal or intended appeal is arguable, or put another way that it is not frivolous. Second, that the success of that appeal will be rendered nugatory unless the Court grants either a stay or injunction as the case may be. The applicant is obliged to satisfy the Court on both the principles for it to succeed.

The background facts are not in dispute. Kenya Commercial Bank, the respondent herein, and the applicant entered into a lease agreement dated 30th July 1990 over premises on L.R. No. 209/378/10 for a

term of 6 years with effect from 1st January, 1990, but on the expiry of that lease, the applicant held over, and continued paying a monthly rent of Kshs.230,000/= which the respondent accepted. At some point in time the respondent served the applicant with a termination notice alleging that the applicant had sub-let the premises without its consent and that it was in arrears of rent. It thereafter sought possession which the applicant declined to give and hence the suit we referred to earlier.

While this motion was pending for hearing the respondent denied the applicant access to the suit premises, and took over tenants who occupied various parts of the premises.

At the hearing of the application Mr. King'ara for the applicant conceded that the applicant was no longer in possession, but urged us to grant the order of stay anyway contending that the respondent obtained possession irregularly. In his submissions before us he stated that the applicant was not seeking possession but an order of stay. He stated further that the applicant would seek possession elsewhere after obtaining the order of stay.

An issue arose whether any purpose will be served by us issuing an order of stay so to speak after the horse had bolted. Mr. King'ara's response was that the law must be followed and that it is the duty of the Court to ensure that litigants act within the law. In his view the respondent, instead of executing the decree in its favour through the court process took the law into its own hands when it took control over the management of the suit premises and the court should come to the aid of the party affected by such act.

The practice of the courts in this jurisdiction is that a party moves the court for whatever orders it wishes that court to make in its favour except where the law expressly empowers the court to act suo motu. The applicant has not included a prayer in its application before us seeking an order against the respondent for the alleged flouting of the law. The application before us is for an order of stay of execution of a specific decree. As the applicant concedes through its counsel on record that the decree sought to be stayed has infact been executed, regularly or otherwise, we see nothing to stay. If we were to proceed as suggested by Mr. King'ara certainly confusion and chaos might result. We are obliged to properly exercise our judicial discretion in this matter. Being judicial the discretion must be exercised, as Lord Halbury L.C. put in Sharp v. Wakefied [1891] AC.173, at P. 179:

"… according to rules of reason and justice not according to private opinion: (Rookes case 48 L.J. MC 38); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself:(Wilson v. Rastall Law Rep. 6Q.B.97)"

It will not be within reason for us to grant an order of stay of a decree which we know and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility. As we stated earlier if we were to order a stay, the applicant might use the order to seek possession. An order of stay is supposed to prevent execution from taking place. Execution does not imply only the formal execution of a decree or order through the court process. A successful litigant who is able to take over possession of suit property peaceably in pursuance of a decree or order of a court of competent jurisdiction is deemed to be executing the decree or order. Execution through the court process is normally resorted to where peaceable means fail. The respondent having obtained possession of the suit property we opine that an order of stay if made in this matter is likely to make the applicant seek forcible re-entry, which will be undesirable and possibly lead to violence, and breakdown of law and order.

With the foregoing in mind, we think that it will be an improper exercise of judicial discretion to grant the application before us even assuming the applicant's intended appeal is arguable.

Besides, the application before us is bound to fail because we do not see how the success of that appeal will be rendered nugatory. Mr. Kang'atta for the respondent told us that tenancy agreements have been executed between the respondent and sitting tenants. What we think, the applicant stands to lose, if at all, is the rent these tenants are paying to the respondent. The respondent is a bank and it cannot be

said that it will not be able to compensate the applicant in the event its intended appeal were to eventually succeed.

In the result we dismiss the applicant's application dated 14th December, 2007, with costs to the respondent.

Dated and delivered this 11th day of July, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR