IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 84 OF 2008 (UR. 47/2008)

KILELESHWA SERVICE STATION LIMITED ……..…… APPLICANT

AND

KENYA SHELL LIMITED ……..…… RESPONDENT

(Application for stay of execution and injunction pending the filing and hearing of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Lesiit, J) dated 18th December, 2007

in

H.C.C.C. NO. 594 OF 2004

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RULING OF THE COURT

By a notice of motion dated 5th May, 2008, the applicant seeks two orders under ***Rule 5 (2) (b)*** of the Court of Appeal Rules, namely; an order for stay of execution of the Ruling/Order of the superior court delivered on 18th December, 2007 in *H.C.C.C. No. 594 of 2004* and secondly, an order of injunction to restrain the respondent, *inter alia*, from evicting the applicant from L.R. No. 4856/6 – a petrol station pending the filing, hearing and final determination of an appeal from the ruling and order delivered by the superior court on 18th December, 2007 in *H.C.C.C. No. 594 of 2004*.

The parties have had a long raging dispute over the operation of petrol station on L.R. No. 4858/6 situated in Kileleshwa, Nairobi. The plot and the petrol station constructed thereon are owned by the respondent (Company). The applicant has however been operating the petrol station since about 1971 under a commercial arrangement with the company. The exact nature of that arrangement has been in dispute between the parties. On 10th March, 2000 the company served a notice on the applicant terminating the relationship – *"Dealership"*. The applicant filed a suit *H.C.C.C. No. 462 of 2000* challenging the termination notice. In the suit, the applicant contended that its relationship with the company was that of landlord and tenant but the company contended that the relationship was that of a licensor/licensee. The superior court (Njagi J) on 8th April, 2004 made a finding that the applicant was a licensee but that the dealership (licence) had not been lawfully terminated. Thereafter, on 28th July, 2004 the company served the applicant with 3 months termination notice. The applicant after the expiry of the notice failed to vacate the petrol station. Sometime in October, 2004, the company filed a suit *H.C.C.C. No. 594 of 2004* against the applicant for the vacant possession as the main relief. The applicant again challenged the legality of the termination notice and claimed that its relation with the company was akin to a partnership as it had made improvements valued at Shs.13,088,000/= to the petrol station.

On 6th June, 2006 the superior court (Ochieng J) ruled that a 3 months notice was not reasonable and that the applicant should have been given a 6 months notice. The superior court made the following further findings and orders:

"Meanwhile, the defendant has poised an important question. It said that whereas it might be in a position to remove the equipment which it installed at the station, he (sic) would have nowhere to take them.

I find that that is a reasonable position to take. Therefore, I order that the defendant shall be compensated by the plaintiff to the tune of Kshs.13,088,000/=, whereupon the plaintiff would retain all the equipment which was purchased by the defendant, for use at the petrol station.

And whereas the defendant is entitled to six months notice as already held, I appreciate the fact that the parties herein no longer have cordial working relations. Therefore, in lieu of the notice, the plaintiff may obtain possession of the petrol station upon paying to the defendant the equivalent of profits which the defendant would have earned over the period of six months. The calculation of the profits shall be based on the difference between the wholesale and retail prices on the sale of motor fuel made by the defendant at the petrol station in issue, during the period of six months prior to 28th July, 2004".

The company being aggrieved by the orders requiring it to pay Shs.13,088,000/= and profits for six months in lieu of notice, filed a review application in the superior court on 10th July, 2006. In the review application which was made under *Section 80* of *Civil Procedure Act* and *Order 44* of the *Civil Procedure Rules*, the company contended that there was a mistake and error apparent on the record as both orders were made without being sought or being made an issue in the suit and without the company being heard.

The superior court (Lesiit J) partially allowed the application on 18th December, 2007 and set aside the order directing the company to pay Shs.13,088,000/=. The applicant being aggrieved by the order filed a notice of appeal in early January, 2008.

On 7th March, 2008 the company gave the applicant a six months notice to vacate the premises. The applicant in reply to the notice stated that it was ready and willing to vacate the premises on condition that the company paid over Shs.66,000,000/= being various kinds of losses that the applicant had suffered in addition to Shs.13,088,000/= being the compensation for improvements on the premises.The present application was filed on 6th May, 2008.

It is trite law that before the court can grant orders under *Rule 5 (2) (b)* of the Court of Appeal Rules, the applicant should satisfy the court that the appeal or intended appeal is arguable and that unless the order sought is granted the appeal or the intended appeal would be rendered nugatory. The applicant has filed a draft memorandum of appeal containing 14 proposed grounds of appeal against the order of the superior court. We have considered those grounds together with the submissions of Mr. Arwa, learned counsel for the applicant. We are satisfied that the intended appeal is indeed arguable.

The company however opposes the application on the grounds, *inter alia*, that there is nothing to stay as the order of 18th December, 2007 did not direct anything to be done. Regarding the order of injunction Mr. Kiragu, learned counsel for the company contended that an order of injunction cannot be granted in a vacuum – that is when there is no intended appeal touching on the question of an injunction.

The order of the superior court that the applicant intends to appeal against merely set aside the order requiring the company to compensate the applicant in the sum of Shs.13,088,000/= for improvements done in the petrol station. It was not a positive order capable of execution by enforcement. It seems that by the stay application the applicant is in effect seeking a restoration of the order for payment of the compensation pending appeal which cannot be done at this stage.

As the authors of BLACKS LAW DICTIONARY, sixth Edition, explain at page 1413:

"A "stay" does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal".

The words of Law, V.P. in *Western College of Arts and Applied Sciences v Oranga* [1976] KLR 63 at page 66 L – D) are apt:

"In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction".

Similarly, the order of the superior court which is the subject matter of the stay application is not capable of execution as it did not order any party to do anything or to refrain from doing anything or to pay any sum. The application for stay of execution is to that extend misconceived.

It is apparent that the application for injunction pending appeal is not related to either the orders of the superior court (Ochieng J) made on 6th June, 2006 or to the orders of the superior court (Lesiit J) made on 18th December, 2007. Indeed, it seems that the applicant is not appealing against the orders of Ochieng J for he has not annexed a notice of appeal. The review order made by Lesiit J does not directly give rise to the eviction of the applicant and the court did not order so. Indeed, the intended appeal is not concerned with the eviction of the applicant but the propriety or otherwise of the review order. It is only the six months termination notice dated 7th March, 2008 served subsequent to the review order of Lesiit J that can result in the eviction of the applicant from the premises. However, the termination notice is quite independent from the orders of the superior court. Thus, the application for injunction is extraneous to the orders of the superior court and is to that extent also misconceived.

Lastly, the applicant has not shown that unless the orders of stay and injunction are granted, the intended appeal would be rendered nugatory. As we have already pointed out the intended appeal is concerned with the review order setting aside the order for compensation and not with the eviction. The applicant is only a licensee of the premises and is willing to vacate the premises if adequate compensation is paid. The applicant has not shown that, if its appeal succeeds, the company will not have the means to pay appropriate compensation.

In the result, the application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 9th day of October, 2008.

E. O. O'KUBASU

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JUDG OF APPEAL

E. M. GITHINJI

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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