IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 269 OF 2008 (UR 174/2008)

RISING FREIGHT LIMITED……..……APPLICANT

AND

RIVERLAND LIMITED…..……RESPONDENT

(An application for stay under Rule 5(2)(b) of the Court of Appeal Rules pending the hearing of an intended appeal from the judgment and/or decree of the High Court of Kenya at Nairobi (Lesiit, J) dated 19th September, 2008

in

H.C.C.C. No. 77 of 2004)

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RULING OF THE COURT

The notice of motion which we are dealing with and which is the subject of this ruling is dated 8th October, 2008. It was lodged in court on 9th October, 2008, under a certificate of urgency. It is brought under Rule 5(2)(b) of the Court of Appeal Rules praying for:-

"1. ……..

2. THAT this honourable court be pleased to order stay of execution of the judgment and/or decree of the High Court, Lesiit, J pending the hearing and determination of the applicant's intended appeal against the said judgment and/or decree.

3. THAT the costs of this application be provided for."

By its decision of 19th September, 2008, the superior court (Lesiit, J) entered judgment for the plaintiff against the defendants as follows:-

"I enter judgment for the plaintiff against the defendant:

(a) In the sum of Kshs. 9,073,000/=.

(b) The Plaintiff will also get the cost of the suit.

(c) The Defendant will pay interest at court rates in (a) and (b) above from the date of judgment until payment in full.

Dated at Nairobi this 19th day of September, 2008.

LESIIT, J.

JUDGE"

The applicant was aggrieved by the said judgment and has moved this Court for a stay of execution of the judgment awaiting the filing of an intended appeal. The application was based on the following grounds:-

a. The applicant's intended appeal raises a substantial issue of law and is an arguable appeal with very good prospects of success in that:

i. The judgment of the superior court is not supported by the pleadings as framed.

ii. The pleadings as framed clearly undermine the insurance principle of subrogation.

iii. The pleadings as filed have the potential of making the respondent benefit contrary to the principles of indemnity.

iv. The decision of the superior court although right in the context of the pleadings as filed, is fundamentally wrong in light of the clear principles of subrogation which had arisen by the time of filing of the suit.

v. The superior court with respect supported the case on extraneous principles and/or considerations.

b. The intended appeal will be rendered nugatory if an order of stay is not granted in that:

i. The respondent is a little known company with no credible means of paying back a sum of Kshs. 13,000,000/= that will have been paid to it.

ii. The applicant shall have been saddled with a clearly unjusticiable judgment and will have suffered immense loss and damage.

iii. Payment of the sum of Kshs.13,000,000/= has the potential of crippling the Applicant's operations."

Mr. O. K. Odera, counsel for the applicant submitted that the decision of the learned Judge cannot stand the scrutiny of law as it is based on wrong principles of law and extraneous matters. That the pleadings in the superior court did not refer to the insurance principle of subrogation, and that though the learned Judge considered subrogation, her decision was based on the common law principle of negligence. He contended that the superior court having made subrogation an issue, it should have made a decision.

Mr. Odera submitted further that if a stay is not granted, the intended appeal will be rendered nugatory as the respondent has been paid Kshs.9.3 million by its insurance, and is seeking a further payment of Kshs. 13 million from the applicant, which payment has the potential of crippling the applicant's operations. He urged the Court to grant a stay of execution from the judgment and/or ruling of the superior court pending the hearing and/or determination of the applicant's intended appeal. Some of the grounds of the appellant's intended appeal are contained in the affidavit in support of the application. It is sworn by K. B. Solanki, a director of the applicant company.

Mr. Sarvia, learned counsel for the respondent submitted that the intended appeal is not arguable. He said that there was a document produced at the trial in the superior court which showed that the respondent (*Riverland Limited*), who was the plaintiff, insured the consignment with M/s Tausi Assurance Company Ltd, and after the loss made a claim on their insurance (*Marine Insurance*) and Tausi duly paid the respondent the sum of Kshs.9,073,000/=, as shown by the Discharge Voucher and the a letter of subrogation signed by the respondent. This information was within the knowledge of the applicant. However, that notwithstanding the respondent sued the applicant in the superior court claiming the cost of the goods, i.e. Kshs.9,073,000/= together with interest thereon at commercial rates from 9th February 2001 till payment in full. In that plaint, the respondent gave particulars of loss, particulars of breach of contract as well as particulars of negligence and or breach of duty of care of the applicant (defendant), its servants and or agents.

On the second principle of the appeal being rendered nugatory if a stay is not granted and the appeal succeeds, Mr. Sarvia submitted that both the respondent and Tausi are sound companies as shown in the replying affidavit, and, "*there is no danger whatsoever that the decretal amount will not be refunded in the very unlikely event that the applicant's intended appeal succeeds*."

This application, as already stated is brought under **rule 5(2)(b)** of this Court's Rules. The jurisdiction exercised by the Court under this rule is now well settled. It is both original and discretionary in that for an applicant to succeed, it must satisfy two principles namely, that the appeal or intended appeal is arguable, that is, that it is not frivolous and secondly, that unless a stay is granted, the appeal or intended appeal as the case may be, will be rendered nugatory in the event that it succeeds, see **GITHUNGURI vs JIMBA CREDIT CORPORATION LTD No. 2 (1988) KLR 838** and **RELIENCE BANK LIMITED** *(In liquidation)* v **NORLAKE INVESTMENTS LIMITED [2002]. I EA 218.**

The issue for our consideration is whether the applicant satisfies the two principles governing an application of this nature.

The plaint in the superior court prayed for judgment against the defendant for Kshs.9,073,000/= plus costs and interest, being the value of the respondent (plaintiff's) goods lost whilst in the possession of the applicant (defendant). The plaint also alleged breach of contract and further prayed for damages for negligence.

The defence on the other hand denied breach of contract and negligence, and instead blamed one Benedict Shihemi Ayaka, its employee who was charged, convicted and imprisoned for the loss of the goods.

Though we are not dealing with the appeal, the pleading show that the facts were seriously disputed. The respondent obtained a judgment in the sum of Kshs. 9,073,000/= plus costs and interest, and is thus entitled to the fruit of that judgment. The applicant on the other hand is challenging the findings of the learned Judge on various grounds as shown in the affidavit in support of the application.

The learned Judge in her judgment considered the case of **SECURICOR COURIER (K) LIMITED vs BENSON DAVID ONYANGO** and **MARGARET R. ONYANGO C.A. No. 323 of 2002,** and said:-

"Counsel relied on this case in support of her submissions that an award in general damages could not be made for breach of contract. That case has however dealt with another issue which is relevant to this case, which is the issue of exemption clauses in contracts for courier service. In that regard, the Court of Appeal held that in Kenya such contracts are purely governed by common law…."

The learned Judge went further to say:-

"I have quoted the above case of Securicor Courier (K) Limited because it is relevant to the instant case. This case applies in all fours to the instant case in the sense that if the plaintiff and the defendant had signed a consignment contract the terms of that contract would have been used to

determine to what extent if any the defendant would have been liable for the loss of the consignment in issue in this case. In the instant case the parties did not sign any such contract and they (sic) are therefore no exemption clauses applicable and this there (sic) relationship is governed under the common."

This is one of the findings by the learned Judge which gave rise to the submissions by learned counsel for the applicant that the learned Judge's judgment was based on "*wrong principles of law*", and "*extraneous matters*." This complaint is captured in the supporting affidavit of K. B. Solanki at paragraph 10 thereof as follows:-

"10. I am advised by my advocates on record which advice I verily believe to be true that the Applicant's intended appeal is not frivolous, is arguable and indeed has high chances of success in that:

i. The pleadings before the superior court, I am advised do not support the ultimate finding of the learned Judge based on the principle of subrogation.

ii. The claim having been filed after payment by the insurance Company the pleadings could only be based on a claim of subrogation.

iii. The judgment of the superior court, I am advised, has the potential of making the Respondent benefit contrary to the insurance principles of indemnity."

We have considered the submissions of both learned counsel and the pleadings, and are satisfied that the intended appeal is indeed arguable.

On the appeal being rendered nugatory if a stay is not granted and the appeal succeeds, the evidence on record confirms that the respondent was paid Kshs. 9,073,000/= by its insurance company Tausi Ltd on 23rd March 2001 before the suit in the superior court was filed. This was said to have settled the respondent's claim under the policy of insurance. By the superior court's judgment, the respondent is to be paid a further sum of Kshs.13,000,000/=, which money the respondent's legal manager Winfred Muoki averred in her affidavit dated 21st October, 2008, belongs entirely to Tausi Ltd. The applicant lamented that the said sum of Kshs.13,000,000/= if paid to the respondent which is, "*a little known company with no credible means of paying back the sum of Kshs.13,000,000/=*" will have the effect of crippling the applicant company if the intended appeal succeeds. The respondent denied this claim, and stated in the affidavit of Winfred Muoki aforesaid at para 4 thereof that,

"Tausi is a well established and well-known insurance company which has been in continuous operation for 15 years with a capital base of over Kshs.142,000,000/=, assets of over Kshs.948,000,000/=, government securities, deposits cash and bank balances amounting to over Kshs.452,000,000/=…."

Having considered the respective positions of the parties to this dispute, we are of the considered view that in the circumstances of this case, the appeal or intended appeal might be rendered nugatory, if a stay is not granted, and the appeal succeeds. We therefore grant a stay of the superior court's judgment/decree of 19th September, 2008 on condition that the applicant deposits a sum of Kshs. 6.5 million into an interest earning account, within a period of 21 days from the date hereof. The stay order will lapse automatically if the above condition is not met. Costs to await the outcome of the intended appeal.

Dated and delivered at Nairobi this 21st day of November 2008.

E. O. O'KUBASU

……

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR