



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 262 of 2008 (UR. 167/09)

KARUME INVESTMENTS LIMITED APPLICANT

AND

KENYA SHELL LIMITED 1ST RESPONDENT

AND

THE COMMISSIONER OF LANDS 2ND RESPONDENT

(Application for stay of execution from the judgment and order of the High Court of Kenya

at Nairobi (Wendoh, J.) dated 30th July, 2008

in

H.C.MISC.CIVIL APPLICATION NO. 1534 OF 2005)

RULING OF THE COURT

By this Notice of Motion expressed to be brought under *rule 5(2)(b)* of the *Court of Appeal Rules (the Rules)* the applicant, *KARUME INVESTMENTS LIMITED*, seeks essentially one order viz,

“2. THAT execution of the Ruling/Order of the superior court dated 30th July, 2008 in Nairobi High Court Misc. Civil Case No. 1534 of 2005 and all subsequent and/or ancillary proceedings be stayed pending an appeal therefrom to this Honourable Court.”

The application is brought on the following grounds:-

- (a) THAT the applicant has an arguable appeal with excellent chances of success.*
- (b) THAT unless a stay of execution is granted, the intended appeal will be rendered nugatory as the subject matter of these proceedings to wit Land Reference Number 209/6240 valued at over Kenya Shillings Fifty Five Million will have been alienated in favour of Kenya Shell Limited.*

In addition to the foregoing grounds, there is a supporting affidavit sworn by *JAMES NJENGA KARUME*, a Director of the applicant, in which the said *JAMES NJENGA KARUME* deponed as follows:-

1. THAT I am a director of Karume Investments Limited, the intended appellant/applicant herein and I am conversant with the material facts hereof and duly competent and authorized to make this affidavit on behalf of the applicant.
2. THAT I have read the judgment delivered in the superior court on the 30th July, 2008 by the Honourable Lady Justice Wendoh and I have understood the content and purport thereof.
3. THAT the applicant/appellant is aggrieved and dissatisfied by the said judgment and it has instructed its advocates on record to lodge an appeal therefrom to this Honourable Court.
4. THAT the applicant/appellant has now filed in this Honourable Court Civil Appeal (No. 201 of 2008) Karume Investments Limited vs. Kenya Shell Limited and The Commissioner of Lands.
5. THAT the applicant/appellant was issued with a letter of allotment dated 26th April, 2005 by the Commissioner of Lands in respect of Land Reference Number 209/6240 (hereinafter "the suit land"). I annex hereto marked "J.N.K.2" a copy of the said letter of allotment.
6. THAT the applicant/appellant has complied with the conditions set out in the said letter and was awaiting the grant of a lease from the Government of Kenya when the proceedings in the superior court were commenced by the first respondent Kenya Shell Limited.
7. THAT I am advised by Ernest Kahiro Kimani Advocate on record for the applicant and verily believe the same to be true that the effect of the judgment now sought to be appealed from is to quash the decision of the Commissioner for Lands to grant the said letter of allotment and to grant a lease in respect of the suit land to the applicant in the judicial review proceedings M/s Kenya Shell Limited, thus extinguishing the current applicant's rights in respect thereof.
8. THAT if effect is given to the judgment aforesaid before the appeal can be heard the current applicant will suffer substantial loss. The applicant procured a valuation of the suit premises as at 9th November, 2005 which gave a valuation at Kshs.55,000,000/=. Annexed hereto marked "J.N.K.3" is a copy of the said valuation report.
9. THAT it is therefore evident that the applicant stands to lose a commercial property of considerable value if execution is not stayed pending appeal and which appeal would be rendered nugatory if the applicant were to be successful in the appeal.
10. THAT I am advised by Ernest Kahiro Kimani Advocate aforesaid and verily believe the same to be true that the intended appeal has excellent chances of success in that numerous errors of fact and law were made by the learned Judge in arriving at her decision. I annex hereto marked "J.N.K. 4" is the Memorandum of Appeal and the first respondent's application in the superior court.
11. THAT I am advised by M/s Kimani Kahiro & Associates Advocates and verily believe that the record of appeal has been compiled and has been lodged in the Court's Registry and has been registered as Civil Appeal No. 201(CA) Karume Investments Limited vs. Kenya Shell Limited and The Commissioner of Lands.
12. THAT the first respondent shall not be prejudiced in any way by the grant of our order for stay as the applicant/appellant is ready and willing to abide by any order that the Court may impose in granting the orders sought.
13. THAT this application has been made expeditiously and without any undue delay.
14. THAT the applicant stands ready and willing to furnish such security for the due performance of any order as the Court may deem fit to grant and I verily believe that the respondent will not be unduly prejudiced if the order for stay is made.

15. THAT I make this affidavit in support of the applicant's application for a stay of execution pending appeal.

16. THAT the matters deponed to herein are within my own knowledge save where based on information and belief the sources and grounds whereof have been stated."

In order to appreciate what is before us, it may be necessary to give a brief background that has led to the present application. The dispute herein was commenced in the High Court of Kenya at Nairobi in *Miscellaneous Civil Application No. 1534 of 2005* by way of Judicial Review. In that judicial review application brought pursuant to *Order LIII Rule 3(1)* of the Civil Procedure Rules, *Kenya Shell Ltd.*, sought orders against the Commissioner of Lands (named as the respondent) while the applicant herein, (*KARUME INVESTMENTS LTD.*) was named as Interested Party. The orders sought by Kenya Shell Ltd in that Notice of Motion dated 9th November, 2005 were as follows:-

1. An order of certiorari to remove into this court and quash the decision of the Commissioner of Lands;
 - (a) to subdivide the property known as L.R. No. 209/6240 (hereinafter "the suit land");
 - (b) to grant a letter of allotment to Karume Investments Ltd. over the suit land or a portion thereof;
2. an order of prohibition to prohibit the Commissioner of Lands from allocating the suit land to Karume Investments Ltd. or to any other person and from acting in any manner as to deny the applicant use of its extended lease over the suit land pending the hearing and determination of this application;
3. An order of mandamus to compel the Commissioner of Lands to issue a certificate of title in respect of the suit land in favour of the applicant;
4. An order of Judicial Review by way of certiorari, mandamus and prohibition in respect of LR No. 209/6268 (hereinafter "the adjacent property".)

The application was placed before Wendoh, J. for determination. From her judgment, it would appear that the matter had a long history going back to pre-independence days. The learned Judge made the following findings:-

On 17th January, 1962, Kenya Shell Ltd. was granted a lease of 42 years and 6 months by the Government over the suit land. The lease was to run from 1st July, 1962 and subject to conditions in the grant. On 29th March, 1963, Kenya Shell Ltd. leased the suit land to Abdalla Salim Murgian, Osman Ali Abdulla Salim Murgian, Brahim Prakesh Arya and Sait Prakash Arya as sub lessees. The sub lessees were granted an option to renew the sub-lease on condition inter alia, that it would be extended for a similar term subject to payment of K.Shs.62,300/= and annual rent of Shs.600/=. Prior to the signing and registration of the lease, the sub lessees had, with the consent of Kenya Shell, at their own expenses developed a shopping centre and residential premises on the suit land and it was agreed that upon expiry of the lease, the land would revert to Kenya Shell Ltd. It was a term of the lease that they would not transfer or sublet without the consent of Kenya Shell Ltd. On 12th May, 1969, Kenya Shell Ltd. consented to the transfer of the sub-lease to Mr. Njenga Karume and the lease was registered on 24th July, 1972 on the same terms as previous sub-lessees. Mr. Karume then transferred it to Karume Investments Ltd. with the consent of Kenya Shell Ltd on 29th December, 1972 to expire on 30th June, 2004 while the lease of Kenya Shell Ltd. expired on 31st December, 2004.

In 1988 Kenya Shell Ltd. applied for extension of the lease and the same was extended for a further 50 years from 1st November, 1998 subject to certain conditions. On 19th January, 1999, Kenya Shell Ltd. was advised to return the title and submit a new deed plan signed by the Director of Surveys. On 19th January, 1999, Kenya Shell Ltd. received a letter from their agent Mulusya Land Consultants Ltd. that the

extension of the lease as well as the other piece of land were granted to Kenya Shell Ltd. By another letter dated 19th March, 1999, the Commissioner of Lands charged new land rent payable, which Kenya Shell Ltd. paid. After that the *Commissioner of Lands File No. 68971* was tampered with and documents removed therefrom and as a result, the Commissioner authorized the opening of a temporary file. Before the new grant and surrender of lease were signed it was noted that the lease to Karume Investments Ltd. was still subsisting and the surrender and grant could not be registered. The surrender and grant were left in the Registry's safe to await removal of sublease from the record but the documents allegedly disappeared from the registry. When *Karume Investments Ltd.* sub-lease expired, they made an application for the renewal of the sub-lease by a letter dated 19th March, 2004. In June, 2004 the Commissioner of Lands asked *Kenya Shell Ltd* to confirm if the developments on the land were theirs, and the Commissioner gave that as the reason for the delay in extending the lease. In July, 2004, *Kenya Shell Ltd.* confirmed that the developments on the land were theirs. In September, 2005, the Commissioner informed Kenya Shell Ltd. that the land was sub-divided into two with the portion with the petrol station going to *Kenya Shell Ltd.*, while the portion with flats going to *Karume Investments*. Kenya Shell Ltd. was aggrieved by that decision contending that the said decision was arbitrary, capricious and illegal. It later transpired that the whole land (*the portion with the petrol station and the portion with flats*) would be allocated or allotted to *Karume Investments Ltd.* That is the matter that was placed before the superior court by way of judicial review application. The learned Judge considered the rival submissions and in her judgment, the learned Judge found in favour of *Kenya Shell Ltd.* In concluding her judgment, the learned Judge stated:-

“In sum, I grant an order of certiorari to quash the respondent's decision to allot the disputed plots to the Interested Party, and mandamus to compel the respondent to restore the lease to the applicant in respect of both plots. Costs to be borne by the respondent and Interested Party.”

Being aggrieved by the foregoing, the applicant herein filed a Notice of Appeal on 5th August, 2008. A draft Memorandum of Appeal was also included in the record of this application which was filed pursuant to the said Notice of Appeal. But before that appeal is heard and determined, the applicant seeks a stay of the order of the superior court made on 30th July, 2008. This is the application that came up for hearing before us on 26th November, 2008 when Mr. A.B. Shah (*a retired Judge of Appeal*) appeared together with Mr. E.K. Kimani, for the applicant. Mr. Kiragu Kimani, and Miss T. Mwangi appeared for the 1st respondent, while Mr. Antony Ombwayo appeared for the 2nd respondent.

In his submissions, Mr. Shah gave a general background to the dispute and went on to demonstrate that his client had an arguable appeal. For example, he submitted that the development (*flats*) on the plot were bought by the applicant and hence these developments never belonged to *Kenya Shell Ltd.* Mr. Shah further contended that a lease was a contract and for that reason what had been going on between Kenya Government and Kenya Shell Ltd were negotiations. He went on to argue that the lease having expired, the land in dispute reverted to the Government. Another point that Mr. Shah submitted would be subject of appeal, was whether mandamus can establish a legal right. In his view mandamus can only enforce existing rights.

On the nugatory aspect of the intended appeal, Mr. Shah told us that the property in dispute was worth *Shs.55 million* and if the same is given to *Kenya Shell Ltd.*, they are likely to sell it to a third party before the appeal is heard.

On his part, Mr. Ombwayo made very brief submissions. He submitted that it would be arguable whether the superior court could issue an order of certiorari in the circumstances of this case since in his view certiorari can only be issued where the body giving the orders had no jurisdiction. Mr. Ombwayo argued that the issue was whether the correct procedure was followed.

Secondly, so argued Mr. Ombwayo, the issue was whether mandamus was properly issued. He submitted that an order of mandamus can only be issued to compel a body to perform a public duty, and that public duty must be derived from a statute. He submitted that no public duty was cited. In conclusion, Mr. Ombwayo agreed with the submissions of Mr. Shah that the orders of the superior court could not be

issued.

in answer to the foregoing submissions, Mr. Kimani who relied on the replying affidavit filed by the first respondent, started by stating that what the court was being asked to grant was a discretionary remedy and for that reason the court had to take into account special circumstances of each case. He went on to give the history of the dispute informing us that there were tenants in the suit premises and hence the interest of the tenants must be taken into account. He relied on the authority of BUTT V. RENT RESTRICTION TRIBUNAL [1982] KLR 417 and EAST AFRICAN CABLES LIMITED V. THE PUBLIC PROCUREMENT COMPLAINTS REVIEW AND APPEALS BOARD AND ANOTHER – Civil Application No. Nai. 109 of 2007 (unreported).

Mr. Kimani further submitted that the order of the superior court was not capable of being stayed. To buttress his argument, Mr. Kimani relied on this Court's decision in KENYA NATIONAL EXAMINATION COUNCIL V. REPUBLIC – Civil Appeal No. 206 of 1999 (unreported) and JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 3 OTHERS VS. KILACH [2003] KLR 249.

It was Mr. Kimani's contention that the applicant herein ought to have sought an order of injunction rather than a stay order. He further contended that an omnibus prayer as prayed for in this application should not be granted since there are no any other proceedings pending in the superior court.

Mr. Kimani went into detailed arguments which, in our view, may not be necessary at this stage since our jurisdiction in this application is rather limited. We cannot go into the merits of the intended appeal. Our jurisdiction is restricted to determining whether the intended appeal is arguable and secondly, whether our refusal to grant the relief sought would render the intended appeal nugatory in the event that the applicant was successful in the said intended appeal.

The law as to the principles that guide this Court in deciding an application under *rule 5(2)(b)* of this Court's Rules is now well settled. Counsel appearing appreciated this fact and they correctly addressed us on these principles. It is now settled that an applicant seeking orders under that rule has to satisfy the court, first, that his appeal or intended appeal, as the case may be is arguable, that is to say the appeal or intended appeal is not frivolous. Secondly, it must be demonstrated that were the appeal or intended appeal to succeed, such success would be rendered nugatory by the Court's refusal to grant the application. In GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (NO. 2) [1988] KLR 838 this Court stated, inter alia:-

“The general principles on which the court would base its unfettered discretion were first that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the court should ensure that the appeal, if successful, should not be rendered nugatory.”

And in BUTT V. RENT RESTRICTION TRIBUNAL (supra) this Court had stated:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in WILSON V. CHURCH (No. 2) 12 ChD (1879) 454 at P. 459. In the same case, Cotton LJ said at p. 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

In our view, Mr. Ombwayo's approach in his submissions was quite useful to us. As we have already stated we have rather limited jurisdiction at this stage since we must avoid making any firm findings on various issues that may be raised in the intended appeal. Mr. Ombwayo referred us to the two orders of certiorari and mandamus issued by the superior court. We feel it is arguable whether the superior court had the power to issue those orders.

On the nugatory aspect, we were told that the property was worth *Shs.55 million*. In view of the history of this matter, it would appear that the property could easily be sold to a third party hence complicating matters in the event that the applicant is successful in its intended appeal.

In law, one single arguable point is sufficient and that coupled with special circumstances of this case e.g. the issue of tenants being in the suit premises and their interest, would satisfy the principles under *rule 5(2)(b)* of the Court's Rules. Indeed in JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 3 OTHERS V. KILACH (supra) this Court dealing with a similar application stated:

“We think the applicants have shown to us some arguable points in their intended appeal. First they intend to show in their proposed appeal that even if it be true that the son of Mr. Justice Bosire is an employee of the Central Bank, or that Mr. Gatonye has previously acted for that bank, those are not such terribly important factors as to warrant the crippling of the operations of the Commission by an order of stay as Mbito, J did. The respondent on the other hand and relying on the decision of R. V. BOW STREET STIPENDIARY MAGISTRATE ex parte Urgate Pinochet quoted in his letter the contents of which we have already reproduced, contends that the relationship of son and father is such that the judge ought not to sit. We think this, even if it were the only point, is an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating on appeal and is not a frivolous one.

There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5(2); there need not be a chain of arguable points to sustain an application.”

Applying the foregoing to the facts of the present application, we are of the view that taking into account the history of this matter it cannot be said that the intended appeal is frivolous. The intended appeal, indeed, raises substantial issues which are worth investigating on appeal. We are therefore satisfied that this application should be granted. The order that commends itself to us is that the application for the stay of superior court's order made on *30th July, 2008* should be granted pending the hearing and determination of the intended appeal. For avoidance of doubt, we reiterate this Court's order made on *2nd October, 2008* to the effect that the issuance of the extended Grant for *L.R. NO. 209/6240* pursuant to the ruling of Wendoh J. dated *30th July, 2008* is stayed until the hearing and final determination of the intended appeal. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 19th day of December, 2008.

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANO OTIENO

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR