REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civ Appli 59 of 2006

KABUNDU HOLDINGS LIMITED ……..……. APPLICANT

AND

ALI K. MOHAMED T/A SKY CLUB RESTAURANT……RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Mombasa (Maraga, J) dated 6th September, 2005

in

H.C.C. Appeal No. 82 of 2004)

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RULING OF THE COURT

We have before us an application by way of notice of motion dated 27th day of February 2006 brought by the applicant, Kabundu Holdings Limited and signed by the alleged company attorney and director Mr. Patrick Kabundu in which the applicant is seeking three orders together with an order for costs to be provided for. When the application came up for hearing, the applicant, through its alleged company attorney and director, Patrick Kabundu, perhaps aware of the technical hurdles involved, dropped the first two prayers and pursued only the third and fourth prayers which state as follows:

"**3. That I further and/or in the alternative, (sic) there be a stay of execution of the order of the High Court of Kenya at Mombasa of Justice D.K. Maraga dated 6th September, 2005 together with all the consequential orders arising from the said orders pending the lodging, hearing and determination of the applicant's intended appeal.**

4. That of the costs (sic) of this application be provided for."

The application is brought under **rule 5(2) (b)** of the Court of Appeal Rules (**the Rules**). The law as to the principles that guide this Court when hearing an application under that rule are now well settled. This Court has consistently stated that an applicant seeking an order of stay of execution under **rule 5(2) (b)** has to demonstrate first that the appeal or intended appeal is arguable, that is to say, that the appeal or

intended appeal is not frivolous and secondly, that if the intended appeal eventually succeeds, the results of the same appeal will be rendered nugatory by the court's refusal to grant the application for stay. In the case of **National Industrial Credit Bank Ltd. vs. Aquinas Francis Wasike and another – Civil Application No. Nai. 238 of 2005 (unreported)**, this Court stated:

"**We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5(2) (b) is being considered.**

What falls for consideration by the Court under rule 5(2) (b) is:-

(a) Whether the appeal or the intended appeal, as the case may be, is an arguable and not a frivolous one; and

(b) Whether if stay or injunction sought is not granted and the appeal or intended appeal were to eventually succeed, such success would have been rendered nugatory by the earlier refusal to grant the stay or the injunction."

It is with the above principles in mind that we now proceed to consider the application before us. First, the brief facts.

The respondent is a tenant of the applicant in premises known as Mombasa/Block XX/47A. The two entered into a lease agreement sometime in June 1994. That lease agreement expired on 28th July 1999 and thereafter the respondent claims the tenancy remained a protected tenancy under the **Landlord & Tenant (Shops, Hotels and Catering Establishment) Act Chapter 301 Laws of Kenya**. The amount of rent to be paid became a bone of contention between the two and the consequences of the disagreement resulted into a myriad of cases between the parties. One such case was CMCC No. 2711 in which an application was decided by the Chief Magistrate at Mombasa and ruling delivered on 21st July 2004. The present respondent appealed against that decision. In that appeal, several applications were filed, going by the reading of the ruling of the superior court (Maraga, J) dated and delivered on 10th June, 2005. Two of those applications were chamber summons dated 11th February 2005 filed by the present respondent seeking injunction and notice of motion dated 26th April 2005 filed by the present applicant, which sought, *inter alia*, setting aside or vacation of an order of injunction granted earlier on on 17th February 2005. When these two applications came up for hearing before Maraga J., a preliminary objection was raised by the then counsel for the present respondent in which he argued that Mr. Patrick Kabundu, appearing for the Kabundu Holdings Limited, the present applicant, had no capacity to act for Kabundu Holdings as he was not a director holding any shares in the same company. That preliminary objection was heard on 12th May 2005 and at the end of the hearing, in a ruling delivered on 10th June, 2005, the learned Judge stated, *inter alia*, as follows:

"**The appellant has, however, not provided any proof that the Articles of Association of the Respondent require any shareholding qualification for its director. I therefore find that the respondent passed a proper resolution allowing Mr. Kabundu to appear on its behalf. Consequently the preliminary objection fails and it is hereby overruled with costs to the respondent."**

Following that ruling, the respondent in this application armed himself with the Memorandum and Article of Association and filed a fresh application before the superior court seeking to strike out applications dated 26th April and 22nd June 2005 and filed by Kabundu Holdings, the applicant herein, on grounds that Mr. Patrick Kabundu had no capacity to act for the applicant. The respondent swore an affidavit supported by the Memorandum of Articles of Association for Kabundu Holdings Limited in which he alleged that one of the qualifications required for one to be a director of Kabundu Holdings Limited was that one had to hold at least one share in the company, a qualification which he alleged Patrick Kabundu did not meet. The superior court heard that application. The applicant's main argument in that application was that the question as to whether Mr. Patrick Kabundu had locus standi in the matter was res judicata as the same had been canvassed and a ruling delivered on it at the hearing of a preliminary

objection and had been resolved in favour of the applicant. The superior court after hearing the arguments put forward by both parties, considered the matter and clearly indicated that it agreed the matter was res judicata but went on to state:

"**I would have stopped here and dismissed this application as being res judicata. I am however concerned by Mr. Kabundu's continuing to appear on behalf of the respondent in this appeal in view of the revelation that he has no locus standi and his actions are illegal. I am therefore constrained to consider this revelation as a special circumstance ousting the application of the doctrine of res judicata to the peculiar facts of this case."**

The learned Judge then went on to consider those special circumstances and the law and then stated at the end of his ruling:

"**In the circumstances and for the reasons given I hold that Mr. Kabundu has no locus standi in this matter and is therefore debarred from appearing for the respondent in this appeal. I also strike out the applications dated 26th April 2005 and 22nd June 2005 filed by him. As I have allowed the application on grounds other than those addressed by the appellant, I order that each party bears its own costs."**

The applicant felt aggrieved by that ruling and filed a notice of appeal dated 7th November, 2005. This was obviously late as it was well after fourteen days had expired from the date of the delivery of the ruling the subject of the intended appeal, but, as is clear from the decision in the case of **National Industrial Bank Ltd. vs. Aquinas Francis Wasike (supra)**, it is not for us to decide on the validity of that notice of appeal at this juncture. Having filed that notice of appeal, the applicant proceeded to file this notice of motion. Before us, Mr. Patrick Kabundu, for the applicant, raised two main points in support of his contention that the intended appeal is arguable. These were first, that the learned Judge erred in revisiting the matter of whether or not Patrick Kabundu had locus standi as that matter had been canvassed in a preliminary objection raised by the respondent, and a decision had been made on it. That matter was therefore res judicata. The second point was that in raising a matter as to who would represent the company in its legal matters, the respondent was delving into the internal affairs of the applicant and the court erred in entertaining such an application as that was, in law, not proper. As to whether the results of the intended appeal would be rendered nugatory were this application to be refused and the intended appeal eventually succeed, Mr. Kabundu's argument was that as a result of the order barring him from representing the company, the respondent has taken advantage and is no longer paying the rent due. Further, the respondent is using that order to get *ex-parte* orders against the applicant in the knowledge that the applicant is crippled as its legal representative was by the ruling of 6th September 2005 barred from representing it and arguing its cases.

The respondent, through its learned counsel, Mr. Oyoo, opposed the application and filed what it purported to be a replying affidavit sworn on "***17th January, 2006***". We have declined to consider that affidavit first because it is headed –

"**AFFIDAVIT IN REPLY TO NOTICE OF MOTION DATED 3RD MARCH 2006"**

and at paragraph 2, it confirms that it is sworn in response to "***Respondent's application dated 3rd March 2006***." Such an application does not exist in the record. What we have and which is under consideration is the applicant's notice of motion dated 27th February 2006. We cannot accept Mr. Oyoo's contention that the mistakes were all as a result of typographical error. Secondly, we decline to consider the replying affidavit because it was apparently sworn on 17th January, 2006, a month before the application it was replying to was filed on 2nd March 2006. This again made it a different affidavit altogether. Be that as it may, Mr. Oyoo submitted that the intended appeal is not arguable as the learned Judge was alive to the issues before him and explained at length why he did not apply the doctrine of res judicata and he gave good and legally acceptable grounds for doing so. As to the question of who stands to suffer even if the intended appeal were to succeed, Mr. Oyoo contended that it was the respondent who stands to suffer as he has lost a lot of his goods worth a lot of money because of the applicant's deliberate and illegal action

in respect of the entire dispute between the parties.

In our view, going by the principles we have set out earlier in this ruling, we have no doubt in our mind that the question as to whether the learned Judge had the jurisdiction to revisit his ruling through another and fresh application which was not an application for review and in doing so overturn his own ruling is clearly an arguable point. We are not to be understood to be saying that the intended appeal will succeed on those points. All we are saying is that they are arguable points and stand a chance of being decided either way after they are fully ventilated at a full argument in court.

That being our view, the next point we need to consider is whether if the intended appeal succeeds, the results of that success would be rendered nugatory were we to refuse this application.

We have anxiously considered that aspect. The orders made by the superior court stay of which is being sought were two. The first was an order barring Mr. Patrick Kabundu from appearing for the applicant, Kabundu Holdings Limited. The second order was an order striking out the applications dated 26th April 2005 and 22nd June 2005 which were both applications by the applicant. If the intended appeal succeeds, then Mr. Patrick Kabundu will be reinstated to his former position of an attorney dully authorized by the law to represent the applicant in all cases initiated by the applicant and filed against the applicant. Our refusal of this application will not make it impossible for Mr. P. Kabundu to resume the same position once the intended appeal succeeds.

As to the two applications that were ordered struck out, we fail to understand why the company cannot hire another advocate to apply for their reinstatement or even to file fresh applications on the same grounds since they were not dismissed but were merely struck out. The orders did not bar the company from being represented by any other advocate and the company is still at liberty to pass a valid resolution appointing an advocate to represent it or even to meet the qualifications that made Mr. Kabundu be disqualified and once that is done, another valid resolution can be passed by the company to have Mr. Kabundu represent it and none would bar him from doing so. All actions proposed can be taken even in a matter of less than two days and whoever represents the company can make similar applications to the ones which had been struck out on 6th September 2005 and the same would proceed.

Mr. Kabundu's stand was that the applicant is losing and has lost a lot of money by way of unpaid rent because of the order the applicant intends to appeal against. In our view, that money cannot be said to have been lost. The tenant who is supposed to pay it is still there. He can be identified. His place of business is the subject premises, and once the applicant hires an advocate or regularizes the position of Mr. Kabundu, the same advocate or Mr. Kabundu can claim it through court action and if the suit succeeds, the money will be there for the company. If the applicant is not minded to act quickly and recover it as suggested here, it can wait when its appeal succeeds, then the money will still be there and Mr. Kabundu will represent the company and recover it through court action or otherwise. Either way, the appellant's success will not be rendered nugatory if this application is not allowed.

The totality of all the above is that much as we do with respect agree with Mr. Kabundu that the intended appeal is arguable, we are not persuaded that the result, if it succeeds, would be rendered nugatory were this application to be refused. That being our view of the matter, we decline to allow the appeal. It is dismissed. For what we have stated above, we will not order costs in favour of the respondent in this application. He will bear his own costs. The applicant will also bear its own costs. Order accordingly.

Dated and delivered at Nairobi this 9th day of February, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR