



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 40 of 2006

RETREAT VILLAS LIMITED APPLICANT

AND

EQUITORIAL COMMERCIAL BANK LIMITED 1ST RESPONDENT

SOUTHERN CREDIT BANKING CORPORATION LIMITED.....2ND RESPONDENT

FIDELITY SHIELD INSURANCE COMPANY LIMITED.....3RD RESPONDENT

(Application for stay of execution of the judgment of the High Court of Kenya Nairobi (Lady Justice Kasango) dated 14th December, 2005 in H.C.C.C. NO. 443 OF 2001 (O.S.))

RULING OF THE COURT

This is an application under *Rule 5 (2) (b)* of the Court of Appeal Rules (Rules) for an order of stay of execution of the judgment of the superior court (Kasango J) delivered on 14th December, 2005 pending the hearing and determination of the intended appeal.

In about 1995 a company known as “3A’s Limited” purchased L.R. No. 209/354/11 with the intention of erecting 16 Villas for sale on the plot. The three respondents collectively financed the project. The project fell through and the three respondents in exercise of mortgagee’s statutory power of sale sold the property to M/s. Retreat Villas Limited, the applicant herein. The sale was financed by the respondents who collectively advanced a total of Shs.72,000,000/= loan to the applicant to purchase and complete the construction of the Villas for sale. The loan was secured by the mortgage in favour of 2nd and 3rd respondents and a second mortgage in favour of the 1st respondent. The facility was also secured by personal guarantees of two directors of the applicant. The applicant subsequently and before the completion of the construction of the Villas failed to honour the scheduled repayments of the loan, interest and bank charges resulting in the respondents appointing two managers over the property with the responsibility of, inter alia, completing the erection of the Villas. The respondents advanced a further Shs.81,750,000/= to the applicant through the managers for the completion of the Villas. At the completion of the Villas, the respondents had paid the contractors over Shs.83,000,000/= leaving a balance of about Shs.8,000,000/=. The managers sold the villas to the purchasers and repaid the loan of Shs.81,750,000/= but the applicant failed to execute the leases in favour of the purchasers apart from the leases of two Villas which the applicant had sold before the managers took over. The respondents ultimately filed a suit claiming the outstanding sum of Shs.135,305,371/34 with interest at commercial

rate of 30% p.a. from 1st July, 2001. The respondents sought additional reliefs including an order:

“..... granting and vesting the duly appointed managers M/s. Sandeep Kaur Balrey and Mrs. Shahnaz Nizarali Sumar with all power and authority to execute 999 year leases on behalf of the said Retreat Villas Limited in favour of the respective purchasers (or their nominees) of the Villas in question”.

The applicant filed a Defence and counter-claim by which it denied that it owed the respondents Shs.135,305,371/34 and averred that the respondents were only entitled to original advance of Kshs.72,000,000/= less payments made from the sale of seven (7) Villas and legitimate interest upto the date the respondents unlawfully took over the project. By the counter-claim, the applicant averred that respondents had trespassed upon the applicant's property and attempted to sell the remaining nine (9) Villas and claimed damages for trespass.

The superior court after full hearing entered judgment for the respondents as prayed and dismissed the applicant's counter-claim with costs on 14th December, 2005. A subsequent application by the applicant for stay of execution pending appeal was dismissed by the superior court on 31st January, 2006.

The present application was filed on 13th February, 2006 and on 15th March, 2006 this Court granted a temporary stay of execution of the decree for payment of Shs.135,305,371/34.

The application for stay of execution is supported by the affidavit of Navinchandra Nathoo Shah, a director of the applicant company. The respondents have filed a long replying affidavit containing voluminous documents running to over 800 pages, sworn by Shehnaz Nizarali Sumar, a managing director of the 3rd respondent and one of the joint managers of the applicant. Shehnaz Nizarali Sumar deposes, in particular in paragraphs 9, 13, 14, 22 that he and the co-manager have already executed all the 14 – 999 year leases in favour of the respective purchasers who have lodged them for stamping and registration.

The principles on which this Court exercises its discretion to grant a stay of execution and other reliefs under **Rule 5 (2) (b)** of the Rules are trite. The applicant should satisfy us that the intended appeal is arguable and that unless the execution is stayed, the appeal, if successful, would be rendered nugatory.

It is stated in the application and in the supporting affidavit that the applicant intends to raise very fundamental issues of law as regards the law of property and the jurisdiction of the court to empower the managers and that the intended appeal has reasonable chances of succeeding. The applicant has filed a draft memorandum of appeal containing 13 grounds of appeal. The bulk of the grounds of appeal, with exception of one (ground 12) question the validity of the taking over of the property by the respondents, the validity of the appointment of the managers or receivers, the legality of the lending of over Shs.81,000,000/= to the managers and the jurisdiction of the court to vest the joint managers with full powers and authority to execute the leases in favour of the purchasers.

Mr. Koceyo, learned counsel for the applicant referred in particular to two grounds of appeal relating to the power to appoint Receivers and the power of the Receivers to borrow money from the respondents. He contended that as the two mortgages which secured the loan were simple mortgages as opposed to English mortgages, the respondents had no power to appoint Receivers and further that the Receivers had no power to borrow money without the authority of the court.

The respondent contended that the intended appeal is not arguable. Mr. Regeru, learned counsel for the respondents, referred to the provisions of the two mortgages, the record of the application and to the respondents' written submissions in the superior court to show that the two mortgages were English mortgages, that the mortgages gave power to the mortgagee to appoint either receivers or managers, that the mortgagees appointed managers and not receivers and that the managers had very wide powers including the power to borrow money without any authority of the court. The applicant is not required to show in an application of this nature that the appeal would definitely succeed or that the appeal has very

high chances of succeeding. It is sufficient, if the applicant shows that he has serious questions of law for the submission to the Court on hearing of the appeal. (See Githunguri vs. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838 at page 844 paragraph 35) or put in another way, that reasonable argument can be put forward in support of the appeal (see J. K. Industries vs. Kenya Commercial Bank Ltd & Another [1987] KLR 506 at page 510 paragraph 35). The fact that there is no convergence of opinion on the nature of the two mortgages and on the validity of appointment of Receivers/Managers and the legality of the borrowing by such Receivers/Managers is in itself an indication that the appeal on this aspect is arguable.

We have no jurisdiction at this stage to determine which of the two opposing views is the correct one. The jurisdiction of the superior court to vest the property in the managers is even questioned in the draft grounds of appeal. On the whole we are satisfied that the applicant has shown that the intended appeal is not frivolous.

Mr. Navinchandra Nathoo Shah deposes in paragraph 26 of the supporting affidavit that unless the stay of execution is ordered the intended appeal will be rendered nugatory and the applicant will suffer irreparable loss and damage that cannot be compensated by damages. It is apparent from the supporting affidavit that the applicant seeks the stay of execution of the entire decision of the superior court including the order empowering the joint managers to execute the leases in favour of the purchasers. Mr. Navinchandra Nathoo Shah further deposes in paragraph 18 of the supporting affidavit that if the managers proceed to execute the long leases in favour of third parties, there is a real danger that there would be subsequent transfers of the properties by the third parties to subsequent parties and hence render the intended appeal nugatory. It is apparent from the supporting affidavit that the main purpose of the application is to obtain an order to prevent the joint managers from executing leases in favour of the purchasers of the Villas. However, as Shehnaz Nizarali Sumar deposes in the replying affidavit, all the remaining leases had been executed and released to respective purchasers who had in turn lodged them in the Land Office for stamping and registration by 14th March, 2006 when the replying affidavit was sworn. The application for stay of the execution of the order empowering the joint managers to execute the leases has thus been overtaken by events.

Indeed, Mr. Koceyo confirmed at the hearing of the application that the application for stay of execution was confined to the money decree. The application for the stay of the execution of the order empowering the joint manager to execute the leases has thus been abandoned.

Regarding the stay of execution of the money decree, Mr. Koceyo contended that the decretal sum – Shs.135,000,000/= is a large sum that it would be onerous for the applicant to deposit that sum and that the fact that the respondent are able to refund the money, if the appeal succeeds, is not the only consideration. Mr. Regeru, on the other hand, submitted that the applicant is a shell company with no other assets and that the applicant will suffer no irreparable loss as there are no assets to be attached and sold.

The applicant has admitted in the supplementary affidavit that it has no resources to meet the decretal amount other than the suit property. The suit property has been sold to the 16 purchasers, who, as disclosed by the respondents in the replying affidavit, have incorporated a company – Retreat Villas Management Company Limited which holds the reversionary interest in the head title. It would be futile in our view to stay the execution of a decree which is not capable of execution. In any case, there is no contention that, if indeed execution proceeds successfully and the appeal ultimately succeeds, the respondents being two banks and an insurance company have the means to make restitution.

In the result, the application has no merit. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 30th day of March, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR