



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

Civil Appli 290 of 2006

1. WINFRED MUTUMI WAMBUA

2. PATRICK MASAI MAKAU APPLICANTS

AND

ABEDNEGO NYAMAI ARON MAKAURESPONDENT

(Application for interlocutory injunction pending an intended appeal from the ruling and order of the High Court of Kenya Nairobi (Kubo, J.) dated 27th September, 2006 in H.C.C.C. NO. 1395 OF 2004)

RULING OF THE COURT

We have before us an application brought by way of Notice of Motion pursuant to *rule 5(2)(b)* of the Court of Appeal Rules in which the applicants, *Winfred Mutumi Wambua* and *Patrick Masai Makau* are seeking an order that “*an interlocutory injunction order do issue to restrain the respondent herein his agents and/or servants from erecting, alienating, managing or otherwise howsoever interfering with the operations and management of T-Tot Hotel, Machakos pending the hearing and determination of the intended appeal herein.* The application is brought on the following grounds:-

- “1. *The applicants who have an undoubted right of appeal desire to appeal to this Honourable Court against the ruling delivered on 27th September, 2006 by the superior court.*
2. *The intended appeal will raise substantial and arguable points of law with very high chances of success in that:-*
 - (a) *The ruling of the superior court was delivered prematurely pending the closure of the applicants submissions in respect of the chamber summons dated 22nd December, 2004.*
 - (b) *The decision by the superior court to rule on the above application without hearing the applicant’s submissions in full is tantamount to a denial of the right to be heard by an impartial tribunal.*
 - (c) *The decision by the superior court to rule on the application prematurely is a manifestation of bias on the part of the superior court against the applicants herein.*
 - (d) *The decision by the superior court to rule on the application prematurely without hearing the closing submissions of the applicants is tantamount to condemning the applicants without a full and fair hearing which is contrary to principles of natural justice.*

3. *The respondent as a joint administrator has breached his fiduciary duty to the estate and beneficiaries of late ARON WAMBUA MAKAU by:-*

- (a) Claiming ownership of the T-Tot Hotel, Machakos which is the main income generating asset of the said estate:*
- (b) Refusing to allow the applicants herein and other beneficiaries to participate in the operations of management of the T-Tot Hotel, Machakos since 8th January, 2004:*
- (c) Failing to avail the banking slips/statements with respect to the operations of the hotel to the beneficiaries of the estate:*
- (d) Failing to bank all of the daily receipts and proceeds of sales of the hotel which is by far the busiest hotel of its class within Machakos town:*
- (e) Failing to account to the applicants and the beneficiaries all the daily collections received from the T-Tot Hotel between January 2004 upto date:*
- (f) Diverting daily sales receipts from the hotel to his own personal use:*

4. *The respondent has also perpetrated a fraud on the said estate and the beneficiaries thereof by:-*

- (a) Claiming ownership of the hotel since year 2001 when the respondent knew that that was untrue since the late ARON WAMBUA MAKAU never mentioned this to any family member:*
- (b) Claiming ownership of all stock, tools of trade, goodwill, movable and immovable property within the hotel to the exclusion of the appellants and all beneficiaries of the estate:*
- (c) Failing to render a true and just account of the proceeds and receipts of the hotel with effect from 8th January, 2004 upto date:*
- (d) Failing to bank the daily collections from the hotel in the designated account:-*
- (e) Diverting daily receipts from the Hotel operations for his own personal reasons:*

5. *The estate aforesaid has suffered and will continue to suffer irreparable loss and damage unless the defendant is restrained by an order of this Honourable court from siphoning out proceeds of sale at the hotel which are of unquantifiable value with impunity and in fragrant (sic) breach of his fiduciary duties to the estate and the beneficiaries thereof.”*

The application before us has its roots in *High Court Civil Suit No. 1395 of 2004* filed in Nairobi. The dispute relates to the estate of *Aron Wambua Makau*. In the said civil suit, the applicants herein as the plaintiffs sued the respondent (as the defendant) seeking judgment against the said defendant as follows:-

- “(a) Special damages.*
- (b) A perpetual injunction order do issue to restrain the defendant, his agents and or servants from entering, alienating, managing or otherwise howsoever interfering with the operations and the management of T-Tot Hotel, Machakos Barclays Bank of Kenya Limited. Machakos Branch account No. 1012729 and any other property of the estate of late ARON WAMBUA MAKAU.*
- (c) A mandatory injunction do issue directing the defendant to return, retribute and re-transfer all assets of the estate of the late ARON WAMBUA MAKAU illegally transferred to himself his agents and or servants.*

(d) *An account of all proceeds and receipts of T-Tot Hotel. Machakos with effect from 8th January, 2004 – 28th February, 2004 upto date of the judgment.*

(e) *Costs*

(f) *Any other order this Honourable court may deem fit.”*

As is usual with such litigation, on the same day that the plaint was filed (22nd December, 2004), the applicants filed a Chamber Summons application stated to have been brought under *Order XXXIX rule 1 and 2* of the Civil Procedure Rules and applied *vide* prayer (b) of the said application for the following substantive order:-

“(b) That an interlocutory injunction order do issue to restrain the defendant, his agents and or servants howsoever from entering, alienating, managing or otherwise howsoever interfering with the operations and management of T-Tot Hotel, Machakos, the Barclays Bank of Kenya Limited, Machakos Branch Account No. 1012729 and any other property of the estate of late ARON WAMBUA MAKAU pending hearing and determination of this suit.”

It was that application that came up for hearing before the superior court (Kubo J) for determination. It would appear that towards the end of the hearing of that chamber summons, the respondent filed a notice of motion seeking leave to re-open his submissions which he had closed. That notice of motion was vehemently opposed by the applicants. The learned Judge of the superior court decided to hear both the remaining submissions on the chamber summons and on the notice of motion. Having done so, the learned judge delivered a ruling in which he concluded thus:-

“I have given anxious consideration to the affidavit evidence on record, both in support of the application and in opposition thereto. My overall assessment of the matter at this interlocutory stage is that the two sets of affidavit evidence on record tend to balance out each other and that the issues raised thereby cannot in my respectful view be properly and authoritatively determined without the benefit of having the deponents appear in court at least to be cross-examined. I am not persuaded that this is a fit case in which the interlocutory injunction sought should issue and the application therefor is hereby dismissed.

The parties should proceed to take a date at the Registry for hearing and determination of the main suit.”

Being dissatisfied by the foregoing the applicants, through their counsel, filed a notice of appeal and pursuant to that notice of appeal filed this notice of motion under *rule 5(2)(b)* of this Court's Rules for an injunction.

When the matter came up for hearing before us on 21st March, 2007, Mr. Kyalo, for the applicants, submitted that the hotel in question was still being managed by the respondent and that the application in the superior court was not fully heard. It was Mr. Kyalo's contention that since the ruling of the superior court was given prematurely then the applicants have an arguable appeal as they were denied the right to be heard.

On the nugatory aspect of the intended appeal Mr. Kyalo submitted that the applicants are not in a position to tell how much money was being realized from the hotel.

Mrs. Mwangangi, the learned counsel for the respondent, opposed the application, mainly on the ground that the suit was still pending in the superior court. Mrs. Mwangangi further submitted that if the order sought was to be granted it would gravely inconvenience the respondent and that the damage to be suffered by the applicants can be very easily assessed.

This being an application under *rule 5(2)(b)* of this Court's Rules, it is upon the applicants to satisfy us not only that the intended appeal is arguable, and is not frivolous, but also that the same intended appeal if successful will be rendered nugatory if stay orders are not granted at this stage. This is a settled law and

if any authority is required, it is readily available in Ruben & 9 Others v. Nderito & Another [1989] KLR 459 where this Court said:-

“In dealing with rule 5(2)(b) applicants, (sic) this Court exercises original jurisdiction and this has been so stated in long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds denovo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge’s discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: See STANLEY MUNGA GITHUNGURI VS. JIMBA CREDIT CORPORATION LTD. Civil Application NAI. 161 of 1988.”

And in its recent decision in BOB MORGAN SYSTEMS LTD & ANOTHER V. JONES (2004) 1 KLR 194 at p. 196 this Court stated:-

“The powers of the Court under rule 5(2)(b) aforesaid are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal if successful, will be rendered nugatory.”

The application before us is rather interesting. We have now been told from the bar that the property on which T.Tot Hotel stands is indeed the respondent’s property but the business being operated thereon is what is in dispute. The superior court had been asked to issue an injunction against the respondent as already stated elsewhere in this ruling. That is the application that the applicants claim was prematurely terminated. But it is to be observed that the learned Judge being alive to the nature of the dispute before him directed the parties to proceed to the Registry and take a hearing date for the determination of the main suit. It would appear that the learned judge had in mind the guiding principles in granting or refusing applications for injunctions as enunciated in GIELLA V. CASSMAN BROWN & CO. LTD. [1973] E.A. 358 where it was stated, among other things, that when the Court is in doubt, it will decide an application on the balance of convenience.

We have anxiously considered the application and we are of the firm view that granting the injunctive orders sought would create more problems to what is on the ground. Since the dispute relates to a hotel business should the applicants eventually succeed in their intended appeal, it would not be difficult to assess the average income of the hotel for whatever period that the respondent would have operated the business. We shudder to think of what chaos would ensue if we were to grant the orders sought.

For the foregoing reasons, we must decline to grant the injunction sought. The application is accordingly dismissed. Costs of the application shall be in the intended appeal.

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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR