



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli. Nai 4 of 2007 & 5 of 2007 (UR. 3/2007)

MBARAKI BULK TERMINAL LIMITED APPLICANT

AND

EAST AFRICAN BULKING SERVICES LIMITED 1ST RESPONDENT

DISTRICT LAND REGISTRAR MOMBASA 2ND RESPONDENT

EAST AFRICAN MOLASSES COMPANY LIMITED ... 3RD RESPONDENT

**(Application for stay of execution of the ruling of the High Court of Kenya at Mombasa (Sergon J)
dated 15th December, 2006**

in

MISC. APPL. NO. 946 OF 2005)

CONSOLIDATED

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RULING OF GITHINJI, J.A.

In *Civil Application No. Nai. 4 of 2007* the applicant **MBARAKI BULK TERMINAL LIMITED** (MBTL) seeks under **rule 5 (2) (b)** of the Court of Appeal Rules (Rules) an order of stay of execution of the decision of the superior court (Sergon J) delivered on 15th December, 2006 in *Mombasa High Court Miscellaneous Civil Application No. 967 of 2006* pending the hearing and determination of the intended appeal.

In that application, the superior court allowed an application for judicial review made by **EAST AFRICAN BULKING SERVICES LIMITED** (EABSL) and granted an order of certiorari quashing the decision of the District Land Registrar Mombasa made on 9th December, 2005:

- (i) Consolidating titles known as BLOCK/XLVIII/135, 138, 140 to one title MOMBASA/BLOC XLVIII/185, and
- (ii) Registering the transfer of the consolidated title MOMBASA/BLOCK XLVIII/185 in the name of MBTL.

Similarly, in *Civil Application No. Nai. 5 of 2007* MBTL the applicant seeks under **Rule 5 (2) (b)** of the Rules an order of stay of execution of the decision of the superior court (Sergon J) dated 15th December, 2006 in the *High Court Miscellaneous Civil Application No. 946 of 2005* pending hearing and determination of the intended appeal.

By the said order of 15th December, 2005, the superior court allowed an application for judicial review and granted an order of certiorari quashing the decision of the District Land Registrar, Mombasa dated 9th December, 2005 removing the cautions lodged by EABSL against titles Nos. Mombasa/Block XLVIII/135, 138, 139, 140.

The two applications which were filed on the same day were consolidated at the hearing.

The judicial review applications which gave rise to the orders the subject of the consolidated applications were filed by the 1st respondent herein EABSL. It is apparent that the purpose of the judicial review application was to protect a contract of sale dated 25th May, 2005 between EAMCL and EABSL whereby the EAMCL agreed to sell to EABSL all its assets and developments on the four pieces of land Mombasa/Block/XLVIII/135, 138, 139 and 140 situate at Mbaraki High Level Mombasa for a consideration of US. D. 4,000,000. At the time of the agreement, those four pieces of land were leased to EAMCL by Kenya Ports Authority (KPA) for various terms.

The agreement showed that EAMCL had erected buildings, structures, jetty, storage tanks, laid under and over ground pipes, installed plant machinery and equipment and other development and that it had for some years carried on the business of storage and handling in storage tanks and other storage facilities various products and further that all the assets of the business were being sold as a going concern. There were also sub-tenants in the premises such as Oil Taking Tanking (EPZ) Ltd, East African Tea and Coffee parkers EPZ Ltd, Samba Electronic Ltd, Henkel Chemicals (EA) Ltd and Safaricom Ltd. By the agreement the EABSL was required to pay a deposit of USD 80,000 and the completion date was not later than 30th October, 2005. The documents on record further show that at the time of the agreement EAMCL owed over Shs.276,000,000 to Barclays Bank of Kenya Ltd (BBK) which sum was secured by charges and a debenture over the assets.

It appears that the contract was not completed for various reasons and on 7th November, 2005, EABSL lodged cautions against title Nos. Mombasa/Block XLVIII/135, 138, 139 and 140.

By a subsequent agreement dated 10th November, 2005, EAMCL agreed to sell the same properties and assets to MBTL at a consideration of USD 4,000,000 which was apportioned between properties and assets as follows – properties USD 1,410,000 and assets USD 2,590,000. The completion date was agreed as not later than 28th November, 2005. On 25th November, 2005 various documents were executed in furtherance of the agreement of sale including a Discharge of the Charge on title Nos. Mombasa/Block XLVIII/135, 138, 140 by BBK, a Grant of a new lease for 66 years in respect of Title No. Mombasa/Block XLVIII/135, 138, 140 consolidated title No. Mombasa/Block XLVIII/185 by KPA to MBTL the transfer of that lease to MBTL and the transfer of properties and assets to MBTL. On the same date – 25th November, 2005, EAMCL delivered possession of the properties and assets to MBTL. Previously on 17th November, 2005 EAMCL had written to the District Land Registrar, Mombasa, objecting to the registration of the cautions and on 23rd November, 2005 EAMCL filed a suit *Mombasa High Court Civil Suit No. 250 of 2005* against EABSL seeking various reliefs including a declaration that EABSL was in breach of the agreement dated 25th May, 2005 and a declaration that EAMCL is discharged from the performance of that Agreement. The defendant, EABSL subsequently filed an Amended Defence and Counter-claim in that suit. It has joined MBTL as a second defendant in the counter-claim. EABSL seeks judgment by the counter-claim for, among other reliefs: declaration that the agreement of 25th May, 2005 is valid binding and enforceable; a declaration that the transfer of properties known as Mombasa/Block XLVIII/185 (formerly Mombasa/Block XLVIII/135, 138, 140 and Mombasa/Block XLVIII/139 made on 9th December, 2005 is null and void; rectification of the register cancelling the registration of transfers in favour of MBTL and specific performance of the Agreement dated 25th May, 2005.

The District Land Registrar Mombasa heard the objection to the lodging of the caution on 8th December, 2005 and allowed the objection on the following day, 9th December, 2005. All the relevant documents relating to the transaction between EAMCL and MBTL were presented for registration on the same day and duly registered thereby precipitating the application for judicial review.

The principles on which this Court exercises its unfettered discretion to grant a stay of execution, amongst other interlocutory reliefs, are settled. The applicant should satisfy the court not only that the intended appeal is not frivolous but also that unless the order of stay of execution is made the appeal or the intended appeal, if successful, would be rendered nugatory.

The applicant has filed a draft memorandum of appeal containing 14 grounds of appeal which raise several issues of law including the competency of the application for judicial review and the jurisdiction of the court to grant the impugned orders. Mr. Regeru, learned counsel for the applicant has demonstrated and Mr. Oraro, learned counsel for the first respondent, EABSL, has, quite properly conceded that the intended appeal raises several arguable issues of law for determination by this Court.

The second condition whether or not the appeal would be rendered nugatory, if the order of stay of execution is not granted is contentious and problematical. Mr. Jaruman Akida, the Terminal Manager of the applicant, MBTL, gives several reasons in paragraph 16 of the supporting affidavit why the appeal would be rendered nugatory unless stay is granted. Some of the reasons are that; there will be a nullification, revocation and cancellation of the registration of the transfer of the suit premises in favour of the applicant; that the titles to the suit premises shall revert to 3rd respondent (EAMCL) while the applicant has paid full purchase price of USD 4,640,000 inclusive of VAT to EAMCL; the applicant has spent in excess of USD 3,000,000 upgrading and improving the suit premises; that 3rd respondent, if registered as proprietor would be entitled to full rights and benefits of a registered proprietor of land; that applicant would have to lay off its entire staff of 26 employees; that it is highly unlikely that any of the respondents would be in a position to compensate the applicant for the colossal losses that it would suffer; and that the monumental loss, damage, hardship that would inevitably result would defeat the ends of justice and that the intended appeal would be rendered nugatory.

The third respondent EAMCL supports the application. Mr. Esmail Jivaji, a director of the 3rd respondent deposes in paragraph 8 of the replying affidavit, thus:

“8. The 3rd respondent sold the suit property on 25th November, 2005 and has been paid an aggregate USD 4,640,000 for the suit properties and has handed over possession to the applicant. With the cautions re-instated the 3rd respondent would be exposed to claims of breach of contract and consequential damages”.

It seems from the replying affidavit of Ameerali Kassamali Somji; the Chairman and Director of the 1st respondent, (EABSL), that the main fear of the 1st respondent is that the applicant would alienate or charge the plots and assets by way of security if the application is allowed. He states in part in paragraph 34 of the affidavit:

“If on the other hand, a stay is granted in terms prayed for in Mbaraki’s application, the result will not be to preserve the situation which existed on 7th December, 2005 but to enhance and improve Mbaraki’s position after the date whereby it will be able to alienate or charge the said plots and/or other assets by way of security regardless of how the proposed appeal is decided. This would not only have the effect of destroying the substratum of the said appeal but it, would have serious consequences on Bulking Services counter-claim in H.C.C.C. No. 250 of 2005 whereby Bulking Services has prayed for an order of specific performance against Molasses in respect of the agreement dated 25th May, 2005”.

The circumstances which may render an appeal nugatory, if successful, varies from case to case. In money decrees, this Court has recognized that requiring an applicant to pay a huge sum of money before the appeal is heard may render an appeal nugatory. In ***The Reliance Bank Ltd vs. Norlake Investment Ltd.*** [2002] 1 EA 218, this Court said at page 231 paragraph e, f:

“..... the issue of the “balance of convenience” or “the claims of both sides” is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if stay of execution or an injunction is not granted. We do not understand the position to be that in a decree for the payment, of money, for example, the only thing that would render the success of an appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it. In the Oraro and Rachier case [1999] LLR 1118) the court took into account the fact that if the law firm was ordered forthwith to deposit the decretal sum, the firm itself might well be forced to go out of business and such an eventuality may itself be sufficient to render the success of their appeal

nugatory”.

And in ***Kenya Breweries Limited vs. Kiambu General Transport Agency Limited*** – Civil Application No. Nai. 100 of 2000, (unreported) this Court said in part:

“The sum involved amounting to Kshs.241,586,711/58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such large amount of money is involved owing to the damage such a refusal may occasion to the applicant. Indeed the futility of success of the applicant’s appeal to this Court may result from such a refusal for the damage to the applicant may be irremediable even if the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful”.

Lastly in ***Butt vs. Rent Restriction Tribunal*** [1982] KLR 417, this Court said that the court may grant a stay where special circumstances of the case require and considered the large amount of rent which was in dispute in that case as a special circumstances.

There is no money decree in this case. Rather, both the applicant and the first respondent agree that the effect of the orders of certiorari granted by the superior court would be to cancel the registration of the applicant as the registered proprietor of title numbers Mombasa/Block XLVIII/135, 138, 139 and 140 and restore EAMCL as the proprietor and also restore the cautions lodged by the EABSL against those titles. Assuming, without deciding, that, that is the effect of the orders granted by the superior court the deregistration of the applicant as the proprietor of the three titles and the restoration of EAMCL as the registered proprietor would mean that EAMCL would get back free of charge the properties and assets which it had sold to MBTL and that the latter would lose, for the time being, a colossal sum of over USD 4,600,000 (approximately Kshs.300,000,000 at today’s exchange rate of about Kshs.70 to one USD). This is in spite of the fact that EAMCL does not want the properties back having received the purchase price and having paid the loan to BBK.

The value of the four properties comprised about half of the purchase price. The value of the rest of the assets including good will comprised the other half. The properties and the assets were sold as going business concern. If the applicant is deregistered as the proprietor of the landed properties on which the entire business is located it would be legally and physically impossible for the applicant to effectively run the business with the inevitable result not only that the entire business would virtually collapse but also that all the assets would be wasted.

This situation would persist for some years before the appeal would eventually be heard. The applicant cannot without title, for example, effectively deal with the subtenants, or take any legal proceedings to protect the assets or business or deal with the employees or obtain business licences. The third respondent EAMCL has no interest in the properties, assets and business and has no capacity to run or protect the business.

On the other hand the 1st respondent EABSL will not get any direct benefit from the determination of the appeal either way. It is the determination of the pending suit *H.C.C.C. No. 250 of 2005* which will conclusively determine whether the contract of 25th May, 2005 between EAMCL and EABSL would be specifically performed. The properties that EABSL fears would be alienated if the application is allowed can be protected by an appropriate order.

In the circumstances of this case, I am satisfied that the refusal of an application for stay would not only cause a colossal loss of over USD 4,600,000 paid as purchase price but also the virtual collapse of the entire business which would be irredeemable even if the appeal were to succeed.

The loss of such a colossal sum of money and the collapse of the business would in my view render the appeal, if successful, nugatory. That is a result that a court of justice should strive to avoid.

In the result, I would allow the application and grant an order of stay of execution as prayed. To protect the interest of EABSL and prevent the four properties, title Nos. Mombasa/Block XLVIII/135,

138, 139 and 140 from alienation I would order that a prohibitory order (inhibition) be registered against the respective titles prohibiting the registration of any transaction pending the determination of the appeal.

Costs of the application to be costs in the appeal.

Dated and delivered at Nairobi this 16th day of March, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL