



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 4 & 5 of 2007

MBARAKI BULK TERMINAL LTD APPLICANT

AND

EAST AFRICAN BULKING SERVICES LTD 1ST RESPONDENT

DISTRICT LAND REGISTRAR MOMBASA 2ND RESPONDENT

EAST AFRICAN MOLASSESS COMPANY LTD3RD RESPONDENT

An application for stay of execution of the ruling and order of the High Court of Kenya

Mombasa (Sergon J.) delivered on 15th December 2006

in

H.C.MISELLANEOUS CIVIL APPL. NO.946 OF 2005.

RULING OF BOSIRE JA

With the consent of counsel for the parties Civil Application No. NAI.5 of 2007, was consolidated with Civil Application No. NAI 4 of 2007, because the parties are the same and the issues raised in both applications arose from the same decision of the superior court. The applicant in both applications is Mbaraki Bulk Terminal Ltd (*the applicant*) with East African Bulking Services Ltd (*1st respondent*); District Land Registrar, Mombasa (*2nd respondent*), and East African Molasses Company Ltd (*3rd respondent*) as respondents. The two applications are expressed to be brought under rule 5(2)(b) of the Court of Appeal Rules, and the principal order sought is a 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 2005.

The jurisdiction of this Court under that rule is original and in exercise of that jurisdiction the court exercises discretionary powers. An applicant in such an application has to satisfy the court on two issues. Firstly, that his appeal or intended appeal raises arguable points, or put another way that it is not frivolous. Secondly, that unless the stay prayed for is granted its intended appeal if successful will be rendered nugatory. In this matter, it was common ground that the applicant’s intended appeal raises arguable points. That being so I will only deal with the second issue, namely, whether unless the stay

prayed for is granted its appeal or intended appeal if it eventually succeeds, the success will be rendered nugatory. If an applicant does establish one issue but not the other, his application must fail.

The litigation giving rise to the applications started in the superior court when the 1st respondent with leave brought two separate applications for Judicial review pursuant to the provisions of **O.LIII Civil Procedure Rules**. Before I set out the prayers in those applications a resume of the background facts is essential.

The litigation centres on four plots of land namely, Mombasa/Block XLVIII/135, 138, and 139 and 140 respectively, which as at 25th May 2005 were registered in the name of East African Molasses Co. Ltd (3rd respondent) as the leaseholder. It is common ground that on 25th May 2005 the 3rd respondent agreed to sell and East African Bulking Services Ltd (1st respondent) agreed to buy the four plots together with the 3rd respondent's business, goodwill and other assets on the plots at an agreed price of about US\$4 million.

There were other conditions precedent which the 3rd respondent was required to fulfil by 30th September, 2005, failing which the agreement would become null and void. The completion date was mutually extended to 30th November, 2005.

But on 7th November, 2005, which to some misunderstanding, the 1st respondent registered cautions against the titles of all the four plots, claiming a purchaser's interest on each of them. On 10th November, 2005, the 3rd respondent, notwithstanding that the aforesaid contract was still in force, entered into another sale agreement with the applicant agreeing to sell to it the same subject matter of the earlier agreement on more or less the same terms. That was apparently the genesis of the legal tussle between the parties. Whether or not there was any breach of the first contract by either party is not the subject matter of this litigation. There is a pending suit to wit Mombasa High Court, Civil Case No. 250 of 2005 in which the 3rd respondent has sought a declaratory decree to the effect that its agreement with the 1st respondent had become null and void.

On 17th November, 2005 the 3rd respondent, in an apparent attempt to facilitate the transfer of the four plots to the applicant, applied to the land Registrar, Mombasa (2nd respondent) to discharge the cautions the 1st respondent had lodged against the four plots, alleging that the sale agreement of 25th May 2005 was no longer valid. The 2nd respondent fixed the application for hearing inter partes, before her on 8th December, 2005 and despite objection from the 1st respondent, on the ground that an order had been made in Civil Suit 250 of 2005, for the status quo to be maintained, the Land Register proceeded to hear the application. She refused a request for the adjournment of the hearing of the application to a latter date. In a ruling delivered on 9th December, 2005, she discharged the cautions, and on the same day, at the request of the 3rd respondent, consolidated the plots into one title and registered a transfer of the same to the applicant. The 3rd respondent then filed Civil Case No. 250 of 2005; aforesaid, seeking orders that the agreement with the 1st respondent had become null and void as the subject matter of that agreement had been sold to third parties and that possession of the said property had been delivered to them against payment of the purchase price. On 28th November, 2005, the 3rd respondent returned to the 1st respondent the purchase price, which the latter rejected.

It was contended in the court below on behalf of the 1st respondent, that the 2nd respondent did not hear the application for the discharge of the cautions, and instead she discharged the same on grounds other than those which had been proffered by the 3rd respondent. It was also contended on behalf of the 1st respondent that the conduct of the 2nd respondent of acting with haste to consolidate the titles on the same day of her ruling and thereafter registering the transfer thereof to the applicant was a clear manifestation that she was acting in complicity with the applicant and the 3rd respondent to defeat the 1st respondent's claim over the subject property.

The 1st respondent's Chamber Summons for leave to commence Judicial Review Proceedings, dated 13th and 19th December, 2005, respectively, had the following prayers:

In the application dated 13th December 2005, that:-

- (i) The summons be heard on a priority base.
- (ii) Applicant's failure to file a Notice under **O.53 rule 1(1)** of the Civil Procedure Rules be excused.
- (iii) Court grants leave to the applicant to apply for an order of certiorari to move into the court and to quash the decision of the District Land Registrar, Mombasa dated 9th December 2005 ordering the removal of the cautions lodged on 7th November, 2005 against the aforementioned four titles of land.
- (iv) That such leave do operate as a stay of all proceedings before the District Land Registrar relating to the said four titles, pending determination of the application for judicial review.

The prayers in the application dated 19th December 2005, related to the decision to consolidate the four plots and to register the instruments of transfer of the resultant title, namely, Mombasa/Block XLVIII/185.

Leave was granted, the relevant motions were then filed and heard by Sergon J. After hearing the parties' respective counsel he came to the conclusion that the 1st respondent had satisfied him that orders of Judicial Review should issue and he proceeded to grant the same.

In the two motions under consideration the ruling of the superior court has been attacked on both procedural and substantive grounds. But as I stated earlier, the 1st respondent having conceded that the intended appeals by the applicant are arguable, although according to Mr. Oraro for the 1st respondent it was on grounds other than those the applicant proffered, those grounds are not for consideration here. The only issue remaining for consideration is the nugatory aspect.

In his submissions on that issue, Mr. Regeru for the applicant urged the view that unless the applicant is granted a stay, the transfer of L.R. No. Mombasa/Block XLVIII/185, to the applicant will be nullified, the consolidation cancelled and cautions restored as before.

It had already paid the purchase price for the four plots of land, which is unlikely to be recovered immediately, and at the same time and at the same time it has spent a lot of money in upgrading the property, which is unlikely to be recovered. In his view the success of the applicant's intended appeals will thus be rendered nugatory. He also talked about the serious adverse economic effects a reversal of the registration, consolidation and restoration of cautions are likely to have on the applicant's operations and the country in general.

Messrs. Nyaoga and Maroro for the 3rd and 2nd respondents respectively concurred. Mr. Nyaoga submitted that his client is no longer interested in the property, as it had laid off all its workers after selling the property and the business it was operating thereon, and a restoration of the assets to it will, in effect, cause them to lie idle, and there was the potential danger of it being sued by the applicant for breach of contract.

Mr. Oraro for the 1st respondent did not think the applicant had shown its intended appeals would be rendered nugatory unless it is granted a stay. In his view the substratum of the intended appeals was the removal of cautions which were intended to preserve the suit property and not the extent of the applicant's loss if the stay prayed for is refused.

I propose to examine the nature of the reliefs the 1st respondent sought before the superior court and what by seeking the same, it intended to achieve. The 1st respondent was the purchaser of the subject

property. By lodging the cautions against the property, its whole purpose was to prevent the 3rd respondent from alienating the same to third parties. That explains why the 3rd respondent applied for the discharge of the cautions. It felt that its right to sell its property had been curtailed or restricted. Any other relief the 1st applicant sought in its applications before the superior court were only ancillary to the prayer for the restoration of the cautions. The superior court, by its decision against which appeals are intended, did not seek to do more than to restore the parties, in relation to the property, to the positions they were in before the cautions were removed. The only difference is that no order was made for the refund of the purchase price by the 3rd respondent to the applicant, as such an order could not properly be made in a judicial review application.

In the foregoing circumstances, will a refusal of a stay herein render the success of the applicant's intended appealed nugatory?

As rightly pointed out by Mr. Regeru for the applicant, the restoration of the property to the 3rd respondent and cautions on the property will not automatically restore the purchase price and whatever expenses it may have incurred back to it. If the 3rd respondent has the money, certainly it will have no basis for withholding it from the applicant. If, however, it does not have the money, the applicant will have to wait until the 3rd respondent is able to raise it. That loss is however, quantifiable. Besides, if it were to succeed in its intended appeals it will be at liberty to take the property back. Whatever loss it is likely to suffer will be in the nature of profits for not operating or not operating fully its business.

On the other hand, there is the 1st respondent which claims a purchaser's interest in the property. The 3rd respondent concedes it resold the suit property to third parties notwithstanding that the contract for the sale of the property to the 1st respondent was allegedly still in force and while there was a valid injunction order in force. There is a decision in favour of the 1st respondent regarding the four plots. There must be just cause for denying it the fruits of the decision in its favour. If stay is granted the applicant will be at liberty to deal with the property as it wishes. The property might thereby be taken beyond the reach of the 1st respondent.

It intends to exercise its undoubted right of appeal. It was contended on its behalf that unless the stay it seeks is granted, it stands to suffer extreme economic loss, and damages will not be an adequate remedy. The country will also suffer as jobs of various employees will be on the line.

I have considered the applicant's position. If a stay is refused, the likely effect will be that the transfer of the suit property to it will be reversed, the consolidation of the four plots be reversed and the cautions which were in **situ** against the respective individual titles be restored. How will such a step render the applicant's intended appeals, if successful, nugatory? The property will revert to the 3rd respondent which says it no longer has any interest in it. The 1st respondent will not have any way of dealing in the property as the property will not be in its name. Nor will the 3rd respondent have any way of entering into any legal transaction over the property because the cautions will be in place. In view of this I see no possibility of the applicant's intended appeals being rendered nugatory. If it eventually succeeds, the property will be restored back to it. If there will be any loss, it will be economic, which I think is quantifiable, and the court will be entitled to make appropriate orders to remedy any such loss. It was not alleged that the 1st respondent and indeed the third are not able to compensate the applicant for such loss. Nor do I discern any such inability.

In the result the applicant having failed to satisfy the second test for the grant of orders under **rule 5(2)(b)(e) of The Court of Appeal Rules**, I would order that these consolidated applications be dismissed with costs.

As Deverell JA is also of the same view, it is hereby ordered that Civil Application Nos.4 and 5 be and are hereby dismissed with costs.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR