REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civ Appli 32 of 2007 (UR 22/07)

NASRA ABDULWAHAB AHMED …….. APPLICANT

AND

MOHAMED BAKHRESSA …….. RESPONDENT

(Application for stay of further proceedings and stay of execution pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya

Mombasa (Maraga, J) dated 31st October, 2006

in

H.C.C.C No. 192 of 2006)

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RULING OF THE COURT

The applicant in this application, Nasra Abdulwahab Ahmed, was the defendant in High Court of Kenya at Mombasa Civil Suit No. 192 of 2006 while the respondent, Mohamed S. Bakhressa, was the plaintiff in that suit. The two were married on 9th January 2002 in accordance with Islamic law on marriage and divorce at a ceremony held in Mombasa. That marriage was not blessed with any children. On 19th June 2006, the respondent pronounced "talak" on the applicant and that marriage was dissolved. During the existence of the marriage, several properties were acquired. It is in dispute as to how the same were acquired and on what basis they were acquired with the respondent alleging in a plaint filed in the superior court on 28th August 2006 that they were acquired and held by the applicant by virtue of a benami transaction between the respondent and the applicant and/or in the alternative, by virtue of a trust for and on behalf of the respondent with no presumption of advancement available to the applicant. In whatever way the properties were acquired, the parties broadly agree that after the dissolution of the marriage, the applicant and the respondent entered into a written agreement on 21st June 2006 in the presence of Messrs Nabhan Swaleh Advocates, Mombasa. That agreement stipulated in the material parts as follows:

"**Whereas the parties were husband and wife married on 9th January 2002.**

And whereas the marriage has now been dissolved vide Talak letter dated 19th June

2006;

IT IS NOW AGREED AND DECLARED AS FOLLOWS:-

1. Nasra Abdulwahab Ahmed shall transfer the Nyali House on Plot No. MN/1/3912 to Mohamed S. Bakhressa and shall also pay him two bankers cheques totaling Kenya Shillings Seventy One Million (Ksh.71,000,000).

2. Nasra Abduwahab (sic) Ahmed shall also transfer the following motor vehicles to Mohamed S. Bakhressa:

(i) Mercedez Benz KAU 001Z

(ii) Mitsubishi Lancer KAS 070K

(iii) Toyota Land Cruiser Petrol KAR 357Q

(iv) Nissan Double Cabin KAV 131D

(v) Toyota RAV4 KAN 317G

3. The above payment and transfer shall be in full and final settlement of all the matrimonial properties, moneys and other issues out of the dissolved marriage between the parties, and Mohamed S. Bakhresa shall have no other or further claim against Nasra Abdulwahab Ahmed."

That agreement was signed by both parties in the presence of their then joint advocate Mr. Nabhan Swaleh, who also signed the agreement as a witness in respect of each signatory.

One would have hoped that was the end of that marriage and matters pertaining to it such as division of matrimonial properties. However, that was not the end. Later, the respondent says he carried out further investigation and discovered that a number of properties, movable and immovable, plus money in other bank accounts were not revealed to him by the applicant when that agreement was entered into. He felt cheated and filed the suit we have referred to hereinabove in the superior court i.e. High Court Civil Case No. 192 of 2006. In that suit, the respondent claimed that after careful investigation, he discovered that the applicant, with intention to defraud him, did not disclose several other properties which are properties that the applicant had acquired in trust on behalf of the respondent during the marriage period. He itemized them in a schedule at paragraph 13 of the plaint. These were properties covered by items Nos (a) to (u) in that schedule. He alleged at paragraph 19 of the plaint that the properties were held by the applicant by virtue of a benami transaction between him and the applicant and/or in the alternative, in trust for and on behalf of the respondent with no presumption of advancement available to the applicant. He therefore prayed for judgment against the applicant for a declaration that the agreement dated 21st June, 2006 is null and void for non-disclosure of material facts and/or in the alternative that the said agreement be varied to include all properties and all the bank accounts contained in clauses (a) to (u) of the schedule of assets at paragraph 13 of the plaint. He further prayed for a declaration that the agreement dated 21st June, 2006 is null and void for non-disclosure of material facts and/or in the alternative that the said agreement be varied to include all properties and all the bank accounts contained in clauses (a) to (u) of the schedule of assets at paragraph 13 of the plaint. He further prayed for a declaration that all those properties are held by the applicant by virtue of a benami transaction between the parties and/or in the alternative are held by the applicant in trust for the respondent. Lastly, he prayed for a permanent injunction to stop any transfer to any other parties and in case any transfer has been made to third parties, injunction be issued to any such third parties to restrain them from further transferring the same properties to any other person(s). He also sought orders to stop any further dealings with the same properties. Those

prayers are detailed in the plaint which forms part of the record. We may not have captured them as fully as they are set out in the plaint but the effect is as stated herein above.

The applicant, in her statement of defence dated 9th September 2006 denied the respondent's allegations in the plaint, save for what we have stated above. There was a reply to that statement of defence filed by the respondent. Together with the plaint, the respondent also filed Chamber Summons dated 25th August 2006 in which he sought several orders. For purposes of this ruling only, the third order sought is relevant. It reads as follows:

"**3. THAT a temporary injunction do issue restraining the Defendant, her authorized agents, servants or any other person acting in her authority (sic) from disposing of and or alienating Plot No. MSA/BLOCK XXII/126, Plot No. MN/I/1934, Plot No. MSA/ BLOCK XVIII/321, Plot No. MSA/BLOCK X/189, Plot No. MSA/BLOCK IX/142, Plot No. MSA/ BLOCK IX/165, Plot No. MSA/BLOCK XXI/332, Plot No. MSA/BLOCK XLVII/45, Plot No. MSA/ BLOCK XXI/454, Plot No. MSA/BLOCK XXI/456, Plot No. MN/I/4205, Plot No. MSA/BLOCK XIV/270 together with all the improvements standing thereon, MV Casaurina Boat, MV Dar Boat and/or collecting the rent accruing from the said properties and/or dealing/interfering in any manner whatsoever with the management of the said properties and a further order that the rent accruing from the said properties be forthwith be (sic) collected by PAUL WAMBUA VALUERS or any other reputed agent as the court may think fit pending the hearing and determination of this suit and a further order freezing the operations of the CFC Bank Ltd. Savings Account No. 5152397668, Bank Account No. 0022101139 held with Southern Credit Bank, Current Account No. 8376790 held with Barclays Bank Ltd., Imperial Bank Ltd (Joint Account) No. 031182400, Bank Account No. 4833542 held with Barclays Bank Ltd, Barclays Bank Ltd. (Dollar Account) No. 7256745 and Barclays Bank Ltd. Account No. 6003210 which are the subject matter of this suit pending the hearing and determination of this suit."**

Those orders were sought by the respondent on the grounds that the applicant held various properties and bank accounts registered in her name in trust and on behalf of the respondent; that the respondent contributed the entire purchase price of the purchase of the above properties and the entire funds which facilitated the opening of the various bank accounts; that the applicant had transferred or was in the process of transferring the subject properties and the funds in the various bank accounts held in trust and on behalf of the respondent in the names of third parties in order to defeat the respondent's claim and that the respondent would suffer irreparably if the applicant herself or her agents and/or servants, were not restrained from dealing in and/or interfering with the various properties and accounts held in trust and on behalf of the respondent. The summons was supported by a lengthy affidavit sworn by the respondent. The applicant resisted the application and also swore a lengthy affidavit in reply to the allegations raised in the respondent's affidavit.

The application was heard by the superior court (Maraga, J) who, after setting out the summary of the rival arguments before him, set out the issues he felt were for decision as follows:

"**I have considered these rival submissions alongside the pleadings and the annextures to the parties' affidavits. I have also considered the authorities cited by the counsel in this application.**

It appears to me that two main legal points arise for determination in this case. The first one is whether the benami principle or transaction is applicable to Kenyan Muslims, and if it is, whether it applies to the parties to this suit. If the two questions are answered in the affirmative, the court will then determine whether or not the principle actually applies to the circumstances of this case."

He then considered the arguements before him and the cases decided on the principle of

benami and having done so, he expressed himself thus:

"**Though not binding on me, these authorities are quite persuasive and I see no reason for departing from them. To overturn or depart from those decisions, cogent evidence will be required to show that the benami principle is no longer part of the personal law of the Muslims in Kenya. I leave that to the trial Judge who will also have to determine whether or not the funds for the purchase of all or some of the properties in dispute were provided by the plaintiff on the benami principle. For now, I hold that the principle applies to Kenyan Muslims."**

Having held that the benami principle applies to Kenyan Muslims, the learned Judge quickly observed on the question of trust that it was raised in the alternative and must abide the full hearing of the entire case. He then proceeded and stated as follows:

"**Taking all these factors and plaintiff's allegation of fraud and misrepresentation into account and the legal issues raised it cannot be said that the plaintiff's claim is frivolous or without foundation as contended by counsel for the defendant. To the contrary, I think the plaintiff has made out a prima facie case with a probability of success. As some of the properties are movable and money in bank accounts the plaintiff's fears of the defendant disposing of them are not without foundation. If they are disposed of then plaintiff is likely to suffer irreparable loss. A preservative order is therefore called for.**

In the circumstances and for the reasons already stated I grant the plaintiff a temporary injunction in terms of prayer 3 of the plaintiff's chamber summons dated 25th August 2006. The other prayers in the application were not urged and I do not think I could have granted them even if they were as they sought orders against people who are not parties to this suit."

The applicant felt aggrieved by that ruling delivered on 31st October, 2006. She intends to appeal against it and filed a notice of appeal on 1st November 2006. In the meantime, she has brought, through her advocates, this application by way of a notice of motion under **rule 5(2) (b)** of this Court's Rules (**the Rules**). In the notice of motion, she is seeking the following two main orders as the first order she sought has been disposed of:-

"**2. That this Honourable Court be pleased to grant a stay of further proceedings in High Court Civil Case No. 192 of 2006 and the stay of execution of the orders made by the High Court of Kenya at Mombasa (the Honourable Justice D. K. Maraga) on 31st October, 2006 which order is annexed to the applicant's supporting affidavit and marked NAA5.**

3. That the Honourable court be pleased to make an order that the applicant be at liberty to access reasonable funds from her accounts maintained in Barclays Bank Limited, CFC Bank Limited, Southern Credit Bank and Imperial Bank for her maintenance and sustenance pending the hearing and determination of this appeal.

4. That the costs of and incidental to this application do abide the outcome of the appeal."

The grounds for the application are that the applicant has an arguable appeal which is not frivolous; that the intended appeal will be rendered nugatory unless all further proceedings and the orders of the superior court made on 31st October, 2006 are stayed, as the orders have frozen all the applicant's banks accounts; the orders have denied the applicant access to rental income from her properties, as the rental income is being unconditionally collected by Paul Wambua Valuers and the applicant and her family have no other means of livelihood other than the rental income of her properties; the properties in question are the only settlement the applicant obtained from the respondent after divorce. The application was supported by an

affidavit sworn by the applicant. The respondent vigorously opposed the application and also swore an affidavit raising in part new matters that were not before the superior court.

Mr. Asige, the learned counsel for the applicant, in urging the application submitted that the intended appeal was arguable and not frivolous, first because the settlement agreement clearly specified that it was final and the court should not have permitted the respondent to renege on that agreement. Secondly, the learned Judge held at the stage of interlocutory application that the benami principles are in law applicable in Kenya and thus made a final decision on that aspect whereas the applicant maintains that the benami principles are applicable in Kenya and should be applied in the instant case. He further maintained that the learned Judge should have rejected the application as the respondent was not certain which principle he wanted to apply in respect of the transaction, if any, between the applicant and the respondent since the application was based on the doctrine of benami or trust which two principles are mutually exclusive. On the nugatory aspect, Mr. Asige contended that the order granted deprived the applicant of the sources of her livelihood such that even if her appeal succeeds later, she will have suffered so much that the eventual victory would be pyrrhic. In answer to a question from the Court, Mr. Asige said that although the applicant had no child to maintain, her status in life and her being a Muslim living with her parents and relatives as is required under Muslim tenets, a sum of Ksh.1,000,000 per month might sustain her pending the hearing and determination of the appeal. Mr. Mabeya, the learned counsel for the respondent's position was that the applicant had not come to court with clean hands as even after the suit was filed, it was discovered that there were several properties she acquired with funds from the respondent which she never declared. He admitted however, that the alleged new discoveries were not subject of the application before the superior court. Mr. Mabeya however, felt the learned Judge applied the right principles in deciding the injunction application that was before him and on the comments the Judge made on benami principles, Mr. Mabeya's view was that that was not an arguable point as the Judge was clear that he left the whole decision to be made by the trial court and his (Judge's) findings were only for the purposes of the application before him and so could not prejudice the entire trial when the matter proceeds to full trial. On whether or not the applicant's intended appeal would be rendered nugatory were it to succeed after the application is refused, Mr. Mabeya was of the view that the applicant has enough to live on from what she never declared. As to the order directing the agent to collect the rent without directing what to do with the money, Mr. Mabeya submitted that the court could supervise the agent as he was appointed by the court to collect such rent.

We have anxiously considered the application, the grounds for the application, the submissions by the two learned counsel and the law. The application for stay of proceedings was not urged by the applicant. In our view, it lacks merit as no good reason was advanced as to why proceedings in the superior court should be stayed simply because an appeal against an interlocutory injunction order is in this court. We dismiss that limb of the application.

The third prayer sought is, in our view, part and parcel of the second limb of the second prayer sought which is seeking stay of execution of the order of injunction made by the superior court. We shall therefore consider that prayer for stay of execution with the third prayer in mind.

As we have stated, the application is brought pursuant to **rule 5(2) (b)** of the Rules. The law as regards the principles to be considered by the court when dealing with such an application is now well settled. First, the applicant has to satisfy the court that the appeal or the intended appeal as the case may be is arguable, in other words, that the appeal or intended appeal is not frivolous. Secondly, the applicant has to demonstrate that the results of the appeal or intended appeal, were it to succeed, would be rendered nugatory by the refusal to grant the application. That legal position is well summed up in the case of **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and another** – **Civil Application No. Nai. 238 of 2005 (unreported)** in which 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 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."

We proceed to consider the application before us with the legal principles enunciated above in mind. In considering the first principle which is whether or not the intended appeal is arguable, we bear in mind that we are not considering the appeal itself and that being the case, we cannot decide, in this ruling, whether the appeal will or will not succeed. All we need to decide is whether it is arguable. Secondly, we note that in law, only one arguable point needs to be demonstrated. In our view, the question as to whether the benami principle which was earlier on introduced into Kenya from India is still applicable in Kenya or not and whether that decision should have been made at the stage of hearing the interlocutory application as the learned Judge did are arguable points. It is also an arguable point as to whether, *prima facie*, it could be applicable to this case. As we have stated, the points may or may not succeed when the appeal has been fully heard but all we are saying is that they are points which at the hearing of the entire appeal are not frivolous, in other words, will be worth pursuing fully whichever way the result goes in the end. There is also the legal status of the agreement that was apparently entered into by the parties and its effect on the entire case filed after it notwithstanding that it was stated to be the final and binding agreement between both parties. We are of the view that the intended appeal is arguable.

The next aspect we need to consider is whether the intended appeal, should it succeed, will be rendered nugatory should we refuse this application. The applicant states that the effects of the order granted by the superior court are to deny her access to rents as well as bank accounts that would sustain her. Thus, by the time she succeeds on appeal, if she succeeds at all, the success will be rendered nugatory as she will have undergone such serious difficulties that the success will not be of any use. She also says there are taxes to be paid on the properties and if the same are not paid, the properties may be sold and so she would have nothing to lay her hands on even if her appeal succeeds. Further, one of the orders is that Paul Wambua Valuers should collect rent but it is not stated what those valuers are to do with the rent which may mean loss of the rent collected or such rent collected not attracting any interest. On the other hand, the respondent states that she has several other properties which she did not declare to the superior court together with other funds in other bank accounts all of which are enough for her maintenance till the intended appeal is heard and decided. Thus, the respondent's position is that the intended appeal, were it to succeed would not have been rendered nugatory, as the properties would still be there preserved and the money would still be there whereas she will be taken care of by monies in those other accounts and rents from those other properties which were not made subject of the application in the superior court.

In our view, in considering whether the success of the intended appeal would be rendered nugatory were we to refuse this application, we need to weigh the claims of both sides, as this Court did in the cases of **Trust Bank Limited and another vs. Investech Bank Limited and 3 others** – **Civil Application Nos. Nai. 258 and 315 of 1999** and also in the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd**. – **Civil Application No. Nai. 358 of 1999**. There is need to avoid hardship to both sides while at the same time preserving the properties and funds such that by the time the intended appeal is heard and determined, the successful party will have properties available and money in the banks and money collected from rents intact but without any one party having undergone unnecessary sacrifices in the process. Justice must be the underlying principle. We have already stated in this ruling that

whatever other properties were purportedly discovered later were not matters before the superior court and it would not be fair for us to base our decision on them. We are also of the view that the applicant, being a single individual without children to maintain, does not need Ksh.1,000,000 per month for her maintenance. We do not consider it her legal responsibility to maintain her parents and other relatives.

On the threat to sell the properties by the Kenya Revenue Authority if taxes on them are not paid as a result of the order made by the superior court, parties were in agreement before us that the superior court did grant leave to the applicant to apply. Although we do not see any entry to that effect in the record before us, we have no reason to doubt the learned counsel on that aspect. In case of such threats, the applicant can avail herself of that opportunity to apply to the superior court for variation of its order so as to avail funds from the bank accounts or from the rents collected to meet payments required on account of taxes.

Considering all these aspects of the matter and doing our best in the circumstances of this case, we are of the view that whereas the intended appeal is clearly arguable, the success of the intended appeal would be rendered nugatory were we to reject the notice of motion in its totality. We need to provide some funds to the applicant to ensure that before the intended appeal is heard and determined, she is not rendered destitute. We will also modify the decision of the superior court and direct what Paul Wambua Valuers will do with the money collected as rents from the subject properties. We therefore make the following orders:

(a) Paul Wambua Valuers shall collect rent accruing from the properties as ordered by the superior court and pay Ksh.300,000/= out of the rent collected to the applicant every month until the intended appeal is heard and determined.

(b) That the balance of the rent be put into an interest earning bank account in trust for the parties herein. Such account to be opened and maintained by Paul Wambua Valuers.

(c) That in case of tax payments, the applicant and/or the respondent may apply to the superior court for necessary orders.

(d) Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 27th day of April, 2007.

R.S.C. OMOLO

……**……**

JUDGE OF APPEAL

P.N. WAKI

……**……**

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……**……**

JUDGE OF APPEAL

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

DEPUTY REGISTRAR