



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appli 96 of 2007 (UR 63/2007)

ZINGO INVESTMENT LIMITED APPLICANT

AND

MIEMA ENTERPRISES LTD. RESPONDENT

(An application for stay of execution to restrain the Respondent from attaching and selling applicant’s goods in furtherance of the Ruling and Order at the High Court of Kenya at Milimani in Nairobi (Warsame, J) dated 22nd March, 2007

In

H.C. Misc. Civil Appl. No. 552 of 2005)

RULING OF THE COURT

This being a motion asking the Court for an order of stay of execution, the applicant, Zingo Investments Ltd, was required to satisfy the Court that its appeal, which has already been filed, is an arguable one and that unless we grant to the applicant the order of stay it seeks, its already filed appeal, were it to succeed in the end and we refuse to grant the stay sought, the success of the appeal would have been rendered nugatory. For the purposes of this ruling, we assume in favour of the applicant that it has an arguable appeal and we need not go into the details of the arguments which were presented before us by Mr. Muriithi, learned counsel for the applicant, and Mr. Meenye, learned counsel for the respondent, Miema Enterprises Ltd. Accordingly, we shall only deal with the second aspect of the two requirements, namely that were we to refuse to grant an order of stay now and the applicant’s pending appeal were to eventually succeed, that success would have been rendered nugatory.

The position before us appears to be as follows:-

The Ruling of Warsame, J against which the applicant has appealed was delivered on 22nd March, 2007. By a notice of motion dated and lodged in the superior court on 29th March, 2007, the applicant had beseeched the superior court for orders:-

- “1. THAT this application be certified urgent and be heard ex parte in the first instance due to reasons of urgency.**
- 2. THAT this Honourable Court be pleased to extend by a further Ninety (90) days the time within which the 2nd Objector should deposit a sum of Kshs.3 million as a condition for stay pending appeal.**

3. THAT costs of this application be provided for.”

It is not quite clear from the record before us what took place immediately after Warsame, J pronounced his Ruling, but it appears that an oral application for an order of stay was made and it was agreed before us that as a condition for stay, the applicant was required to deposit Kshs.3 million in an account to be opened in the names of the respective counsel. The money was to be so deposited within seven days of the order. So on 29th March, 2007, the applicant applied to the learned Judge for extension of the seven days to ninety days. The motion to extend the time came before the same Judge on 2nd April, 2007 and on that day, the record of the Judge shows as follows:-

“Court: By consent the 2nd objector’s [now the applicant before us] motion dated 29.3.2007 be and is hereby settled on the following terms:-

- 1. The 2nd objector/applicant do deposit the sum of Kshs.3 million within 90 days to be deposited in the joint names of both advocates on record.**
- 2. The 2nd objector/applicant do (sic) a formal stay of execution in the Court of appeal (sic) within 30 days from to-day.**
- 3. The 2nd Objector/applicant do pay the decree holder’s advocates costs of K.shs.85,000/- and the auctioneers charges hereby agreed (sic) Kshs.150,000/- within 60 days of to-day.**
- 4. Either party be at liberty to apply.”**

Mr. Muriithi agreed before us that these orders were recorded by consent of the parties but he contended that he was before this Court pursuant to the second order which allowed the applicant to apply for a stay to the Court within 30 days of Warsame J.’s orders. Mr. Muriithi then told us that if the applicant were to be compelled to deposit Kshs.3 million as stated in the consent order, the applicant’s operations as a company will grind to a halt and that being so, if the applicant’s appeal which has been filed were to succeed, the success would have been rendered nugatory. With the greatest respect to Mr. Muriithi, we find this submission untenable. The applicant had itself freely undertaken to deposit that money within a stated period and during that undertaking the question of its operations grinding to a halt did not arise at all. The agreements and the other obligations of the applicant which were pointed out to us by Mr. Muriithi were all there when the consent orders were recorded. We have not been convinced that the operations of the applicant will grind to a halt if the applicant was to be asked to comply with its own undertaking which it freely gave. Of course, cases such as **RELIANCE BANK LTD. V. NORLAKE INVESTMENTS LTD. [2000] 1 EA 227 and ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LTD. [2000] 1 EA 236**, show that where it is properly proved that a refusal to grant an order of stay would cause an applicant such hardship as would be out of all proportion to any suffering a respondent might undergo while awaiting the hearing of an appeal, the Court would accept that as a factor amounting to rendering the success in the pending appeal nugatory. On its own showing, this applicant was ready and willing to deposit the Kshs.3 million within ninety (90) days from 2nd April, 2007. The applicant has not shown to us what has changed since its undertaking. In the event, the applicant has failed to satisfy us that its appeal will be rendered nugatory if that appeal were to succeed. That being our view of the matter, we order that the applicant’s notice of motion dated 25th April, 2007 and lodged in this Court on 26th April, 2007 be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Nairobi this 13th day of July, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.