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

Civil Appli. Nai 136 of 2007 (UR 89/2007)

SURJIT SINGH ……..……. 1ST APPLICANT

MALKIAT SINGH ……..……..…….. 2ND APPLICANT

AND

CALTEX OIL (KENYA) LTD ……..……..……...…RESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Courts (Mutungi, J) dated 30th November, 2006

in

H.C.C.C No. 500 of 2001)

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RULING OF THE COURT

In an application by way of notice of motion dated 11th June 2007 and filed in Court on 18th June 2007, the applicants, Surjit Singh and Malkiat Singh (applicants) are seeking an order that pending the filing, hearing and determination of an intended appeal against the ruling and order of the superior court (O.K. Mutungi J.) dated 30th November, 2006 but delivered on the 11th December 2006, in Milimani Commercial Court Civil Case No. 500 of 2001, there be a stay of execution of the judgment dated 22nd November 2004 on grounds:

"(a) That the applicant being aggrieved by the said decision has filed a notice of appeal to the Court of Appeal.

(b) That the intended appeal is not frivolous as it raises arguable issues.

(c) That unless this application is granted the outcome of the intended appeal is likely to be rendered nugatory in the event that the appeal succeeds."

The respondent, Caltex Oil (Kenya) Limited (respondent) opposed the application and vide its lengthy affidavit in reply sworn by Edith Malombe, stated in short that the intended appeal is not arguable and

would not be rendered nugatory if this application is not allowed as the respondent has substantial asset base and ability to refund any payment made to it. Before us Mr. Odunga, the learned counsel for the applicants, submitted that the issue as to whether the applicants were served with court process or not was *res judicata* when the matter came up before Mutungi J. is an arguable point. He further stated that the amount of money that was awarded against the appellant was too large and that necessitated the court exercising its discretion so that the applicants' business may not be hurt by the payment of the same amount before the intended appeal is heard.

Mr. Omar Amin, the learned counsel for the respondent, on the other hand opposed the application stating that the application had neither merit nor substance. The question of whether the issue as to whether the applicant had been properly served with court process was *res judicata* as the advocate representing the applicants was in court and even cross-examined the witnesses. On the question as to whether if the application is granted the intended appeal would be rendered nugatory, Mr. Amin submitted that the outcome of the intended appeal would not be rendered nugatory were we to refuse the application and the appeal eventually succeeds. He stated further that in any event, the applicants did not offer any security. For the last proposal, Mr. Amin referred us to the case of Kenya Shell Ltd vs. Kibiru and another [1988-1989) EA 226.

It is not easy to get full grasp of the entire case as copies of the pleadings were, for some unknown reasons, not annexed to the record. However, from the scanty information availed in the record such as the judgment of Anyara Emukule J. dated 22nd November 2004 and the subject ruling delivered by Mutungi J. on 30th November 2006, the brief facts were that by a plaint dated and filed on 5th April 2001, the respondent sued the applicants for the sum of Ksh.18,889,924/= being the total debt due and owing to the respondent by the applicants for goods sold and delivered at the sum of Ksh.5,139,970/10 being the net sum of dishonoured cheques and balance of Ksh.13,749,954/10 being the net sum due and owing to the respondent by the applicants for goods sold and delivered or supplied (less the sum of the dishonoured cheques), bank and incidental charges amounting to Ksh.9,000/=, interest on the same sums claimed at court rates, costs of the suit and such further or other reliefs as the court deemed fit and just to grant. Thus, the respondent was claiming a simple debt from the applicants on the basis of goods sold and delivered part of which was paid for by cheques which on presentation were dishonoured. The applicants filed a statement of defence dated 20th July 2001 on 25th July, 2001. In that statement of defence, the applicants jointly and severally denied indebtedness to the respondent. That suit was heard by the superior court (Anyara Emukule J.). It would appear from the record that at the commencement of that hearing, both counsel were present and the learned counsel for the appellant, Mr. Ngaira, was representing the applicants. However, before the hearing could be finalised, he withdrew from representing the applicants and the court ordered final submissions to continue in the absence of the applicants and their counsel after that court was satisfied that the applicants were served with the hearing notice but when the matter was called out, they were not there to proceed with their defence and submissions. In his judgment, Emukule J. stated that Mr. Ngaira cross-examined the only respondent's witness before he withdrew from the case. After submissions by the learned counsel for the respondent, the learned Judge awarded Ksh.18,898,924/20 to the respondent addressing himself as follows:

"In the result therefore, there shall be judgment for the plaintiff against the defendants jointly and severally as follows:

(a) In the sum of Ksh.18,889,924/20 comprising:

(i) the general admitted debt of Ksh.13,749,954/10

(ii) amount of dishonoured charges (sic) Ksh.5,139,970/10

(iii) Bank and incidental charges Ksh.9,000/=

(b) Interest @ court rates.

(c) Costs of this suit if not agreed to be taxed by the taxing officer."

That judgment was delivered on 22nd November 2004. On 30th November 2004, the applicants filed chamber summons under Order 6 rule 13(1) (d) and Order 9 B rule 8 of the Civil Procedure Rules in the superior court. They sought in that application two main orders namely:

"3. That judgment entered on 22/11/04 be set aside; the plaint filed by the plaint (sic) be struck out; direction that one Elius Ochieng, a process server of this court, do attend the hearing of this application for purposes of being cross-examined and clarification of the contents of his affidavit sworn on 18.10.04 and filed on 21.10.04.

4. Costs of the application be provided for."

That application was brought on grounds that failure of the applicants to attend court for hearing on 25th October 2004 was due to non-service of the hearing notice upon the applicants personally, inadvertent failure of the person served to bring the notice to the attention of the applicants, and failure by the applicants' previous advocates to properly inform the applicants of his withdrawal from representing them. The applicants cited further as their ground for seeking setting aside of the judgment entered by Emukule J. that the plaint upon which the judgment emanated was a nullity; that defence raised several triable issues which needed to be ventilated. The respondents' response to that application was contained in a notice of preliminary objection filed on 10th December 2004. These were first that the issues raised in the application were *res judicata*; that the court lacked jurisdiction to sit on appeal of its own decision and that the prayers sought were incompetent and lacking in law and procedure. The learned Judge of the superior court (Mutungi J.) considered the application and the preliminary objection to it and concluded as follows:

"Overall therefore, and for the reasons given above, the preliminary objections are upheld with the result that the application – the chamber summons – is hereby dismissed with costs to the plaintiff/respondent and against the defendants (Applicants)."

The applicants felt aggrieved by that ruling and intend to appeal against it. In the meanwhile, they have brought this application as stated above.

The law as regards the principles to be considered by this Court when dealing with an application under rule 5(2) (b) is now well settled and well documented. We need only restate them from the case of Reliance Bank Ltd. (In Liquidation) vs. Norlake Investments Ltd – Civil Application No. Nai. 93 of 2002 (unreported) where this Court stated:

"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters namely:

1. That the appeal or intended appeal is an arguable one, that is, it is not a frivolous appeal.

2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or injunction."

On the application before us, we are satisfied that the issue as to whether, raising the question of service upon the applicants with the hearing notice for the hearing that went on after their advocate had withdrawn from proceeding with the case in an application for setting aside the judgment entered by Emukule J. was *res judicata,* is an issue that will need to be ventilated in the intended appeal. Will the results of the intended appeal if favourable to the applicants be rendered nugatory by our refusal to grant this application? Mr. Odunga said the amount is too large and if the applicants are ordered to pay it fully before their appeal is heard, their business may be ruined to an extent that by the time their appeal comes up for hearing, if it succeeds, the harm will have been done and so any positive results will be meaningless to them and their business. Mr. Amin did not directly respond to that argument by Mr. Odunga, but referred us to the case of Kenya Shell Ltd. vs. Kibiru and another (supra) in which Platt Ag. J.A. (as he then was), dealing with a case involving money decree stated:

"It is not normal in money decree for the appeal to be rendered nugatory if payment is made."

That was before this Court revisited the same issue in the cases of Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd – Civil Application No. Nai. 358 of 1999 and Clarkson (Insurance Brokers) Ltd vs. South Coast Fitness – Civil Application No. Nai. 204 of 1995 (unreported) and Trust Bank Ltd & Another vs. Investech Bank Ltd. & 3 Others – Civil Application No. Nai. 258 & 315 of 1999 (unreported). In all these cases, this Court was of the view that in cases where a judgment debtor is adjudged to settle a substantial money decree, it becomes necessary for the court to qualify the usual principle that success of a money decree so long as it is certain that the respondent was capable of repaying the decretal sum, could not render any intended appeal nugatory. The court has to consider the interests of justice where undue hardship would be caused to the applicant if stay is refused purely on grounds that he can be monetarily compensated.

We must therefore weigh the positions of the parties. Having done so, what commends itself to us is that the application is allowed subject to the applicants depositing into an interest earning bank account in the names of both advocates for the applicants and for the respondent a sum of Ksh.5,200,000/= (five million two hundred thousands) within twenty one (21) days of the date hereof failure to which execution shall not be stayed.

For clarity, the execution of the order and ruling of the superior court (Mutungi J.) dated 30th November 2006 but delivered on 11th December 2006 is hereby stayed subject to the applicants depositing Ksh.5,200,000/= (five million two hundred thousand) into an interest earning bank account in the names of the advocates for the applicants and the advocates for the respondent within twenty one (21) days of the date hereof. Failure to do so, the application dated 11th June 2007 stands dismissed.

There shall be stay of execution for a period of 21 days from the date of this ruling to enable the order herein to be complied with.

Dated and delivered at Nairobi this 5th day of October, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR