



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 3 of 2006

TRANSWORLD SAFARIS (K) LIMITEDAPPLICANT

AND

BHASKER SOMABHAI PATEL 1ST RESPONDENT

PUSH HIRABHAI PATEL (Suing as personal representative of the estate

of Nekeen Somabhai Patel)..... 2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ransley, J.) dated 27th September, 2005

in

H.C.C. Suit No. 1221 of 2001)

RULING OF THE COURT

We have before us an application by way of notice of motion dated 7th November, 2005, brought under **rule 5(2) (b)** of the Rules of this Court in which the applicant, **Transworld Safaris (K) Limited**, is seeking orders as follows: -

“1. That this Honourable Court be pleased to an order (sic) for stay of execution of the decree from the judgment of the High Court at Nairobi in Civil Case No. 1221 of 2001, pending the hearing of an appeal from the said decision in the Court of Appeal.

2. That costs of the application be provided for.”

The application is made on the grounds that the applicant has an arguable appeal, the notice of appeal of which has already been filed and which it seeks to be heard and determined before the decree from the judgment of the superior court is executed; that the applicant stands to suffer substantial loss if the decree issued in the superior court is executed and that the appeal may be rendered nugatory if execution of the decree from the superior court is not stayed. There is an affidavit in support of the application sworn by the Managing Director of the applicant in which the deponent amplifies the grounds in support of the application. The respondents, **Bhasker Somabhai Patel** and his wife **Push Hirabhai Patel** opposed the application and in an affidavit sworn by the first respondent, **B.S. Patel**, the respondents state that the

application is incompetent because the notice of motion does not comply with the requirements of **rules 74 and 76** of this Court's Rules as it was not lodged in the superior court registry; that the application is incompetent because the applicant has not complied with the requirements of **rule 81** of this Court's Rules; that no formal application for stay has been made in the superior court; and that the results of the appeal, if successful, would not be rendered nugatory were we to refuse this application as the respondents are residents in Kenya and would be able to refund any monies paid to them in execution of the decree were the applicant's appeal to succeed after the superior court's decree is executed.

Mr. Muriuki Mugambi, the learned counsel for the applicant, submitted that the intended appeal is arguable as the suit in the superior court was filed outside the time allowed either by the Limitation of Actions Act Chapter 22 of the Laws of Kenya or by the Carriage by Air Act 1993 on the strength of leave granted ex-parte to the respondent in High Court Miscellaneous Civil Suit No. 209 of 2001 (O.S) which leave the learned Judge hearing the suit in the superior court was in law enjoined to investigate at the time of hearing the suit but which according to Mr. Mugambi, he (the Judge) did not so investigate. On the nugatory aspect, Mr. Mugambi's main argument was that the respondents, being retirees have no resources to enable them refund the money once execution is done if the appeal succeeds. He however proposed that, if the court orders, they can deposit the sum into an interest earning account till the appeal is heard and determined.

Mr. Osmond, the learned counsel for the respondents, on the other hand submitted that the application is not competent as the applicant has not complied with the requirements of **rule 81** of this Court's Rules and that being the case, the intended appeal would be incompetent. Limitation was not pleaded and the learned Judge dismissed that argument on that score. It is therefore not an arguable issue. He further submitted that the intended appeal would not be rendered nugatory were it to succeed after this application is dismissed as the respondents have not retired and are still carrying on their business and so are able to refund whatever monies are paid to them in execution of the decree should the appeal succeed.

The application, as we have stated above, is brought under **rule 5(2) (b)** of this Court's Rules. The law as to the principles that guide this Court when considering an application under that rule are now well settled. An applicant seeking an order of stay of execution under **rule 5(2) (b)** has to demonstrate first, that the appeal or intended appeal is arguable, that is that the appeal or intended appeal is not frivolous. Secondly, he has to demonstrate that were the intended appeal to eventually succeed, the results would be rendered nugatory by this Court's refusal to grant the application for stay – see the cases of **Githunguri vs. Jimba Credit Corporation Ltd (No.2) (1988) KLR 838**, **J.K. Industries Ltd vs. Kenya Commercial Bank Limited (1982 – 88) 1 KAR 1688** and **Reliance Bank Limited (In liquidation) vs. Norlake Investments Limited – Civil App. No. Nai. 98 of 2002 (unreported)**.

In the application before us, the record shows that the respondents filed Civil Suit No. 1221 of 2001 in the superior court suing as personal representatives of the estate of Nekeen Bhasker Somabhai Patel who died in an air traffic accident on 6th December, 1994. He was supernumerary crew member of the appellant for the purpose of gaining operational experience in the applicant's Piper Chieftain Kenya Registration No. 54 – SMR. That suit was filed sometimes in July 2001, about 5½ years after the accident. The plaint states at paragraph 15 thereof that that plaint was filed with leave granted by the superior court in High Court Miscellaneous Civil Suit No. 209 of 2001 (OS). In the amended defence, the applicant maintained at paragraph 10 thereof that the suit was filed out of the period provided under the Carriage by Air Act (No. 2 of 1993) and stated that the Limitation of Actions Act Cap 22 Laws of Kenya is not applicable. The learned trial Judge considered that question of limitation at length and which law applied in this particular case and made a finding that the Carriage by Air Act (No. 2 of 1993) did not apply to the air crew such as the deceased who was in the plane as an air crew. Having made that finding, the learned Judge while appreciating that the trial court would in law revisit the order granting leave to the respondents to file the suit and reconsider it, did find, however, that in this case, the applicant did not plead limitation under the Limitation of Actions Act (Cap 22) and so the learned Judge declined to consider whether or not the suit was time barred under the Limitation of Actions Act (Cap 22). Mr. Osmond in his argument on this point urged us to reject the application on grounds that the intended appeal will not see the light of day as the applicant, after filing a notice of appeal, never applied for proceedings and sixty days within which the appeal should have been lodged had expired. He admitted

however, that he had not applied to strike out the notice of appeal or the record. Mr. Mugambi submitted from the bar that he had applied for proceedings.

The answer to Mr. Osmond's contention is that for purposes of the application before us, all that is needed is that there be a valid notice of appeal on the record. The notice of appeal on the record before us has not been struck out and so it is a valid notice of appeal. In the case of **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another** – Civil Application No. Nai. 238 of 2005 (unreported) this Court faced with a similar situation 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 injunction.”

In our view, and without making any decision on that aspect at this juncture, we do find that on the issue of limitation the intended appeal is arguable.

The next point we need to consider is whether if we were to refuse this application, the results of the appeal, if it were to succeed, would be rendered nugatory. The main argument advanced by Mr. Mugambi on that point is that the respondents are retirees and there is no evidence as to their income that would enable them refund the money once execution is done. Mr. Osmond says the respondents intended to retire sometime back but reversed that decision so that they are still in business and would be able to refund the decretal amount if the applicant's intended appeal were to succeed. We have considered those rival submissions. We also note that it is now two years since the judgment was delivered but the respondents have not moved to execute. In the circumstances of this case, what commends itself to us is and we hereby order that subject to the applicant depositing the entire decretal amount into an income earning bank account in the names of the advocates on record for the applicant and for the respondents within **FOURTEEN (14) days** of the date hereof, there shall be stay of execution. However, if the applicant fails to satisfy the above condition, this application shall stand dismissed. The costs of this motion shall be borne by the applicant in any event. Those shall be our orders.

Dated and delivered at Nairobi this 9th day of November, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR