



IN THE COURT OF APPEAL AT NAIROBI

(CORAM: OMOLO, O'KUBASU & GITHINJI, JJA)

CIVIL APPLICATION NO. NAI. 238 OF 2005 (UR. 144/2005)

BETWEEN

NATIONAL INDUSTRIAL CREDIT BANK LTD..... APPLICANT

AND

AQUINAS FRANCIS WASIKE1ST RESPONDENT

LANTECH LTD..... 2ND RESPONDENT

**(Application for stay of execution of the judgment and decree of the High Court of Kenya at
Milimani Commercial Courts, Nairobi (Ibrahim, J) dated 24th May, 2005
in H.C.C.C. No. 1414 of 2001)**

RULING OF THE COURT

National Industrial Credit Bank Limited, the applicant herein, comes to the Court under **Rule 5 (2) (b)** of the Court's Rules and as at present, the only order the applicant seeks from the Court is:

"THAT the Honourable Court be pleased to order an Interim stay of execution of the Decree of the High Court given on 24th day of May, 2005 in Nairobi H.C.C.C. No. 1414 of 2001 between National Industrial Credit Bank Limited (Plaintiff) and Aquinas Francis Wasike and Lantech Limited (Defendants)"

We quite do not appreciate what the applicant means by "an Interim stay of execution;" **Rule 5 (2) (b)** of the Rules provides only for the Court to "order a stay of execution;" we suppose that in the context of the applicant's motion, the applicant had expected that its motion would be heard ex-parte in the first instance, an order of stay granted to it ex-parte (see prayer one in the notice of motion) and thereafter the motion would be set down for hearing inter-partes (prayer 4 in the motion). There is no provision for the Court to do such things under **Rule 5 (2) (b)** and the occasions upon which this Court can grant ex-parte orders are extremely limited — see the proviso to **Rule 76(1)** as an example. We, however, understood Mr. Laibuta, learned counsel for the applicant, to be contending that all the applicant requires from the Court is an order of stay pending the lodging, hearing and determination of the applicant's intended appeal from the judgment and decree of the superior court (Mohamed Ibrahim, J) dated 24th May, 2005. The applicant filed its notice of appeal against the said decision on 26th May, 2005; the Court accordingly

has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out **Rule 5 (2) (b)** does not provide that "..... where a valid notice of appeal;" the Rule simply provides that:-

"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74....."

Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of **Rule 80** under which a notice of appeal can be struck out. 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 the intended appeal, as the case may be, is an arguable and not a frivolous one; and

(b) whether if the stay or injunction sought is not granted and the appeal or the intended appeal were to eventually succeed, such success would have been rendered nugatory by the earlier refusal to grant the stay or the injunction.

Mr. Laibuta contended before us that the intended appeal is arguable and is not a frivolous one and in support of that contention, Mr. Laibuta referred us to the applicant's draft memorandum of appeal, which contains a total of twenty-six grounds of appeal. We have looked at those grounds and in our respectful view, they cannot be described as frivolous. Mr. Ohagga contented himself by saying that Mr. Laibuta did not point out any particular arguable issue and that it was not open to Mr. Laibuta to simply rely on the grounds in the draft memorandum of appeal. With respect to Mr. Ohagga, the draft memorandum of appeal was made part of the record before us and it is perfectly open to the Court to look at the grounds. It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable. We have looked at the grounds contained in the draft memorandum of appeal and in our view the intended appeal is clearly arguable.

Will the intended appeal be rendered nugatory if we do not grant the stay sought? On this aspect of the matter, we wish to point out to the applicant that since it was it who alleges that its intended appeal would be rendered nugatory if a stay is not granted, the legal burden is on it to prove that allegation. In its affidavit in support of the motion the applicant simply averred in paragraph 9:

"THAT if the orders for stay of execution are not granted as sought the Applicant's intended Appeal will be rendered nugatory and the Applicant will suffer irreparably."

No explanation is given for that averment, but when arguing the motion, Mr. Laibuta pointed out to us that the decretal sum of Kshs.2,800,000/- was awarded to the 1st respondent and that if that money was paid over to the 1st respondent, the applicant would not be able to recover it back because the resources of the 1st respondent are unknown to the applicant.

This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge

— see for example **section 112** of the Evidence Act, **Chapter 80** Laws of Kenya.

The 1st respondent swore the replying affidavit in this matter and in Paragraph 1 thereof, he swore that he is the Chief Executive Officer of and the principal shareholder in the second respondent. He did not disclose the value of his share-holding in the 2nd respondent; nor did he say if he earns a salary and if so how much. In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory.

In the end the applicant has satisfied us that it has an arguable appeal and that if the decretal sum is paid over, the respondents might well be unable to pay it back and that would render the success of the applicant's intended appeal nugatory. Accordingly, we grant to the applicant a stay of execution of the decree of the superior court dated 24th May, 2005 and such stay shall be in force until the lodging, hearing and determination of the intended appeal or until further order of the Court. The costs of the motion shall be in the intended appeal.

Those shall be our orders.

Dated and delivered at Nairobi this 10th day of February, 2006.

R.S.C. OMOLO

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.