



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

Civil Appli 289 of 2005

CHARLES OTISO G. OTUNDO APPLICANT

AND

RAMESH CHANDER DHINGRA 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 (Ojwang', J) dated 7th October, 2005

in

H.C.C.C No. 1930 of 1997)

RULING OF THE COURT

We have before us an application by way of notice of motion brought under **rule 5(2) (b)** of the Court of Appeal Rules (the "**Rules**"). It is dated 25th October, 2005 and filed on 27th October, 2005. It is seeking an order that:

“The Honourable Court be pleased to grant an order of stay of execution of the judgment and decree dated 7th October 2005 in Nairobi H.C.C.C No. 1930 of 1997, together with all consequential orders, pending the hearing and determination of the intended appeal to this Honourable Court.”

The genesis of the application is, in brief, that the applicant, Charles Otiso Otundo, is the owner of four plots namely L.R Nos. Nyaribari Chache/B/B/Boburia/1448, 2780, 2995 and 3328. He leased out part of these properties to the respondent, Ramesh Chander Dhingra, who used part of the properties as an educational institution known as Gusii Highlights High School. There was a primary school which remained in the hands of the applicant. The respondent was, for purposes of developing the educational institute, allowed to build and did build more classrooms and supporting premises on the same properties. By an agreement dated 24th November, 1995, made between the applicant and the respondent, the applicant agreed to sell and the respondent agreed to buy the same properties at an agreed price of Ksh.10,500,000/=. The respondent paid to the applicant Ksh.2,000,000/= as a deposit pursuant to their agreement. There were charges on the properties in favour of Kenya Commercial Bank Limited. The respondent redeemed the charges by tendering the sum of Ksh.871,107.40 to the Bank. This was done at the behest of the applicant and was considered as part of the purchase price. The respondent claimed that

the applicant refused and/or failed to complete the said contract as he refused to hand over the primary school despite several demands to that effect. The respondent therefore moved to court to seek specific performance of the agreement dated 24th November, 1995, an order of vacant possession of the primary school, and all residential houses built on the primary school land and in the alternative, damages for breach of contract. Further, the respondent sought rescission of the contract and payment to the respondent of Ksh.2,886,107/40 part of which was paid to the applicant directly and the other part paid to the Bank on behalf of the applicant with interest at 35% per annum from 24th November, 1995 till payment in full. The applicant in a statement of defence filed on 23rd January, 2001 admitted that there was an agreement between him and the respondent for the sale and purchase of the properties at agreed purchase price of Ksh.10.5 million and that he received Ksh.2,000,000/= as deposit towards the purchase price. He also admitted that there was a lease of part of the property to the respondent. He further admitted that he authorized the respondent to pay Ksh.868,435.40 to the bank but said he did not sanction the redemption of the charged properties as alleged by the respondent. Other than the above, the applicant denied the allegation made by the respondent in the plaint and stated that it was the respondent who was in breach of the agreement as he did not complete the sale within 120 days as was stipulated in the agreement. That was the matter that was before the superior court (Ojwang', J) for hearing. After hearing the suit, the superior court, in a lengthy judgment decided as follows:

“1. The defendant shall refund to the plaintiff the sum of Kenya Shillings 2,886,107/40 with interest at the rate of 35% with effect from 24th November, 1995 until payment in full.

2. The defendant shall pay general damages in the sum of Kenya Shillings Twenty Million (20,000,000/=), bearing interest at Court rates with effect from the date hereof, until payment in full.

3. The defendant shall bear the plaintiff's costs to this suit, which costs shall bear interest at court rates from the date of filing suit.”

In coming to that conclusion, the learned Judge of the superior court was to a large extent constrained to consider the effect of the provisions of the Land Control Act (**Cap 302**) as no consent had been obtained for the transaction that was before him. Having considered the same, he was of the following view:

“I therefore hold that, notwithstanding that the transfer of the suit properties, namely L.R. Nos. NYARIBARI CHACHE/B/B/BOBURIA/1448, 2780, 2995 and 3328 to the plaintiff cannot take place in the absence of the consent of the Kisii Land Control Board, the defendant still bears liability in private contract towards the plaintiff. It is precisely the conduct of the defendant, who has definite contractual obligation to the plaintiff, which has rendered the transfer process void under the public land management law, the Land Control Act (Cap 302). The defendant committed himself in a valid legal instrument to perform certain obligations towards the plaintiff, in return for considerations and commitment from the plaintiff. The Law of Contract requires the defendant to make good the loss which he has thus occasioned to the plaintiff. I hold that the defendant must make recompense in the form of damages.”

The applicant (who was the defendant in that suit) was not amused. He felt aggrieved by the decision and on 19th October, 2005, he filed a Notice of Appeal against the judgment. The record of appeal has not been filed but he has filed what we may term “Draft Memorandum of Appeal” and having done so, he now comes before us with this application.

The learned counsel for the applicant, Mr. Oguttu Mboya, submitted that the intended appeal is arguable. Mr. K'Opere, the learned counsel for the respondent, readily conceded that the intended appeal is to some extent arguable stating that in his mind, whether or not the award for general damages against the applicant should have been made is an arguable matter. Later, he also agreed albeit reluctantly that the award of interest rate at 35% in respect of the money, Ksh.2,886,107/40 was also an arguable issue.

In our view, after perusing the judgment of the superior court and looking at the memorandum of appeal,

we have no hesitation whatsoever in finding that the intended appeal is arguable and is not frivolous. Without, in any way prejudicing the appeal, we feel, in our mind, that the question as to whether general damages should have been ordered in breach of contract (if it was breached at all) in a case such as this where the contractual agreement could not be enforced on account of operation of law and particularly where land transactions that could not proceed to fruition because no consent of the Land Control Board under the Land Control Act (**Cap 302** Laws of Kenya) should attract, whether in some special or in all cases, penal consequences in the form of general damages is an arguable point. Secondly, it is also arguable whether if a breach is made of a contract such as was entered into herein, general damages should be awarded and under what principles should such awards be considered. Thirdly, the rationale guiding the award of 35% rate of interest as was awarded in this case is also arguable. Thus, the intended appeal is arguable.

Having come to that conclusion on the arguability of the intended appeal, we must further consider whether, if the appeal were to succeed, would the results of the appeal be rendered nugatory if this application is refused, for in law, an application under **rule 5(2) (b)** of the **Rules** must be looked at with the two principles in mind i.e. first, whether the appeal is arguable and secondly, whether if the application is refused, the results of the appeal, if successful, would be rendered nugatory. In the case of **Trust Bank Limited and another vs. Investech Bank Limited and 3 others** – **Civil Application No. Nai. 258 of 1999 (unreported)** this Court stated *inter alia* as follows:

“The jurisdiction of the court under rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly, that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly, that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case.”

In the case before us, the parties are in their individual capacities. The amount ordered against the applicant is in total, Ksh.22,886,107/40. This is not a small amount by any standards for an individual debtor. Neither is it a small amount for the creditor to refund once he is paid it. The amount of Ksh.2,886,107/40 awarded as refund of monies paid to the applicant attracts interest rate of 35%, and that is from 24th November, 1995. It must have gone over Ksh.13,000,000/= as we were told from the bar. The amount of Ksh.20,000,000/=, which attracts interest at the court rates, must also be close to Ksh.30,000,000/=. In the case of **Clarkson Notcut (Insurance Brokers) Limited vs. South Coast Fitness Center** – **Civil Application No. Nai. 204 of 1995 (unreported)** this Court stated in a matter involving large amounts of money as follows:

“The amount involved is, by any standard a large one and we think we ought to secure the position of the applicant in this matter.”

In the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited** – **Civil Application No. Nai. 358 of 1999**, this Court was of the view that when faced with a situation such as is now before us, then the Court must weigh the claims of both sides, for if the applicant were to be required to pay the full decretal amount, it could find itself in a tight situation whereas the interest of the respondent also must be considered. In the case of **Reliance Bank Ltd. vs. Norlake Investments Ltd.** (2002) IEA 227 it was stated by this Court *inter alia* as follows:

“The point which emerges from these cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. However, in the case of Butt v. The Rent Restriction Tribunal (1979) LLR 1247 (CAK) ante, Madan, J.A took into account the amount of money involved. In the Kenya Breweries Limited case, the Court again took into consideration the amount of money the applicant was required to pay under the decree and the court came to the conclusion that the damage that would be entailed in the immediate payment of the money might be so severe that the applicant might never recover from it even if the money were to be refunded to it in the event of its appeal succeeding. All these are legitimate factors for the court to take into account when it is

considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted.”

Mr. K’Opere urges us to either order that the applicant pays the amount of Ksh.2,886,107/40 which was not disputed together with interest at either court rate or 35% ordered by the court as a condition for the stay or that the applicant be ordered not to interfere with the respondent’s stay on the plots till the appeal is heard, again as a condition. Mr. Oguttu Mboya counters that submission by saying that the respondent has rent arrears in favour of the applicant which stood at Ksh.2.1 million as at 28th January, 2002 when the applicant’s counsel wrote to their auctioneers to proceed and levy distress. As to their being ordered not to interfere with the respondent’s stay on the property, there is already an order of Business Tribunal stopping the applicant from evicting the respondent and so the respondent’s stay at the property is not in any way threatened.

We do feel that in the circumstances disclosed in this case, like the circumstances that were in the **Reliance** case (supra) it would be too onerous to require the applicant to pay to the respondent or to deposit into court money that was ordered in the judgment whether the amount of Ksh.2,886,107/40 plus interest at whichever rate or the amount of Ksh.20,000,000/= with interest at court rate. We also feel it would be a duplication to order as a condition, that the respondent stays on the property till the intended appeal is heard and determined. We further feel that as the matters to be raised in the intended appeal are serious legal issues that need the decision of this Court in the interest of the entire country, we cannot shut the door on the applicant in his intended appeal by tying such conditions to the intended appeal.

That being our view of the matter, this notice of motion is allowed. The applicant is granted an order staying the execution of the judgment dated and delivered on 7th October, 2005 until the intended appeal is heard and determined. Costs of this application shall be in the intended appeal. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 17th day of March, 2006.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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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