REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT NAIROBI
Civil Appli 168 of 2005

JOB KILACH …….....…….……. APPLICANT

AND

NATION MEDIA GROUP…….…….....……..1ST RESPONDENT

SALABA AGENCIES LTD …….....…… 2ND RESPONDENT

MICHAEL RONO …….....…….. 3RD RESPONDENT

(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi, Milimani (Mutungi, J.) dated 3rd June, 2005

in

H.C.C.C. NO.80 OF 2003)

****

RULING OF THE COURT

In this application expressed to be brought under **rule 5(2)(b)** of the Court of Appeal Rules, the applicant is Job Kilach, who was the 2nd defendant in Nairobi High Court Civil Case No. 80 of 2003 with Salaba Agencies Limited and Michael Rono, as the first and third defendant respectively. The plaintiff in that suit was Nation Media Group Limited (the respondent). By this application the applicant prays for orders that there be a stay of execution of the decree in the aforestated suit pending the entering and determination of an intended appeal against that decree and costs.

The decree against the applicant arose out of a summary judgment which was entered against him pursuant to an application under **O.XXXV rule 1** of the Civil Procedure Rules. The affidavit in support of that application essentially adopted the averments in the plaint. Paragraph 8 of the plaint lays the basis for the respondent's claim. It states:

"8. By an undertaking dated 29/11/01 between the plaintiff and the 2nd and 3rd defendants who are directors of the 1st defendant, the 2nd and 3rd defendants admitted that the sum of Kshs.11,704,306/= was due and owing by the 1st defendant to the plaintiff."

A copy of the undertaking referred to was placed before the Superior Court. Paragraph (1) thereof states that Job Kilach and Michael Rono, as directors of Salaba Agencies Limited, acknowledge that their

said company owed the respondent Kshs.11,704,306/=; paragraph 2 says the two persons are also directors and shareholders of Agro-Metro Development Limited, the registered proprietor of L.R.No. ELD/MU/LR. No.12/40; paragraph 3 says the said directors had undertaken to sell that property and to immediately release Kshs. 5 million of the proceeds of sale to the 1st respondent and concurrently to give a written undertaking that they would do so; paragraph 5 says that the said directors would in addition execute joint and several gurantees in favour of the 1st respondent in the sum of Kshs. 4 million each as security for the sums due to it; and paragraph 6 concludes that the 1st respondent shall be at liberty to take such action including legal proceedings against the company and its directors "as it shall in its sole discretion deem fit."

The applicant was served with the plaint and summons to enter appearance, appeared and filed a written statement of defence in which in paragraph 3, he denied being a director of Salaba Agencies Ltd or having any direct affiliation with the company as both director and shareholder.

In answer to paragraph 8, of the plaint, he avered, inter alia, that he undertook to guarantee repayment by Salaba Agencies Ltd, although he was neither a director nor a shareholder of that company, on condition that the 1st respondent would in turn "offer a fresh **Newspaper Distribution Agreement** to the 2nd defendant and his company, Salaba Media Agencies Ltd." The 1st respondent failed to enter into a Newspaper Distribution Agreement with his said company with the result that there was no consideration for the guarantee aforesaid. There are other averments in the applicant's written statement of defence which we do not consider material to the determination of the application before us.

Mutungi J. heard the summary judgment application and after setting out what he understood as the scope of an application under **O.XXXV rule 1**, held that the applicant as guarantor had admitted in his written statement of defence that Salaba Agencies Ltd owed the 1st respondent Kshs.11,704,300/=, and that it was sheer legal farce for the applicant to say that even though he had executed the letter of understanding he had not executed any guarantee. The learned Judge reasoned that it was in the letter of understanding that he undertook to pay the debts of the 1st applicant in the event of the latter's failure to pay.

Mutungi, J. delivered his ruling on 3rd June, 2005. The summary judgment application was argued on 23rd July 2004, and a ruling was reserved to be delivered on notice. The lapse of time between the date of hearing and the date of delivery was about eleven months. The applicant contends that lapse of time was inordinately long as made the learned Judge lose the feel of the case. We do not intend to express a view on this aspect at this stage of the proceedings between the parties as doing so might encroach on the jurisdiction of the bench which will eventually hear the intended appeal.

Two broad principles guide the Court in an application under **rule 5(2)(b)** of the **Rules of this Court.** To succeed, an applicant must show, first, that his appeal or intended appeal is arguable and second, that unless he is granted a stay or an injunction as the case may be, his appeal or intended appeal if successful will be rendered nugatory. [See **Trust Bank Limited & Another vs. Investech Bank Ltd & two others** Civil Application Nos. NAI.258 and 315 of 1999 (consolidated)].

On whether or not the applicant has shown his intended appeal is arguable, Mr. Chacha Odera who urged his application, submitted before us that the letter of understanding was not sufficient on its own without more to show any liability on the part of the applicant. He took us through it paragraph by paragraph and concluded that if anything the letter showed that the applicant's liability to the 1st respondent was conditional.

From the pleadings it is clear, assuming the 1st respondent is owed money by Salaba Agencies Ltd, that the applicant is not the principal debtor. The letter of understanding is clear on that. The issue which we think was before the learned Judge in the Superior Court is whether circumstances had arisen which would make the applicant liable.

In an application under **O.XXXV rule 1**, it is trite law that a defendant may show by affidavit "or otherwise" that he should be granted leave to defend the suit against him. The phrase "or otherwise" has been judicially held to include a written statement of defence. We earlier set out the paragraph in the plaint which sets out how the applicant's liability to the 1st respondent allegedly arises. The 1st respondent relies on an alleged written undertaking by the applicant dated 29th November, 2001. The summary judgment application was against the 2nd defendant and not the 2nd respondent. In paragraph 6 of his written statement of defence the applicant concedes he agreed to guarantee repayment of Kshs.11,704,306 by the 2nd respondent but conditional on being offered a **Newspaper Distribution Agreement** which the 1st respondent failed to do. Further, in paragraph 9 of that defence the applicant also avers that his liability had not arisen because the guarantee to the 1st respondent was obtained by deceit.

In court it was contended that no guarantee was ever executed. In the circumstances it is arguable whether the liability of the applicant to the 1st respondent was conditional or absolute.

Regarding whether unless the applicant is granted a stay, his intended appeal will be rendered nugatory, the main ground relied upon is that the decretal amount is quite large that if the applicant is called upon to pay the same he might find himself in a very tight situation. This Court in the case of **Oraro & Rachier Advocates v. Co-operative Bank of Kenya Limited**, Civil Application No. Nai.358 of 1999 enunciated the principles to be followed in considering this aspect of the matter in money decrees. The court said:

"Mr. Gatonye for the respondent bank argued that if Mr. Oraro were to succeed in the appeal the respondent bank was sound enough to be able to refund the sum in question. Ordinarily that is the principle on which this Court acts but recent rulings of this Court suggest that in dealing with this limb of the application the court ought to weigh the claim of both sides."

We will be guided by the same considerations. The applicant is an individual who says in his written statement of defence that the principal debtor is the 2nd respondent. He came in only as a guarantor. The letter of understanding dated 29th November 2005, required him to execute a guarantee to bind himself to do two things. First, remit certain proceeds of sale of designated property to the 1st respondent and second to give a written guarantee to that effect and to pay a sum of Kshs.4,000,000 to the 1st respondent. We appreciate that there is a decree against him but the amount of money he is required to pay is colossal. He did not indicate what he does for a living. Nor did the 1st applicant assist in that regard. That notwithstanding, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. The 1st respondent on the other hand is a leading media company in this country. If the appeal fails it will be compensated by an award of interest on the decretal sum. The balance tilts in favour of granting a stay. We agree with Mr. Chacha Odera for the applicant that the applicant's intended appeal, if successful, will be rendered nugatory unless we grant an order of stay of execution of decree prayed for.

In the result we allow the application by notice of motion dated 20th June, 2005 as prayed in prayer (1) of the motion. Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 5th day of May, 2006. _

S.E.O. BOSIRE

……

JUDGE OF APPEAL

E.O. O'KUBASU

……..……

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR