REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI
Civ Appli 292 of 2005

1. ANDREW LETEIPA SUNKULI

2. ZILPHAH NTEMEL SUNKULI ……………….........................………… APPLICANTS

AND

SOUTHERN CREDIT BANKING CORPORATION …….........................……. RESPODENT

(An application for stay of execution of decree dated 10th September, 2005 pending the lodging, hearing and determination of appeal from the Ruling of the High Court of Kenya at Milimani Commercial Court Nairobi (Mutungi J) dated 4th May, 2004

in

H.C.C.C. NO. 394 OF 2002)

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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) in which the applicants **Andrew Leteipa Sunkuli** and **Zilpah Ntemel Sunkuli** (the applicants) are seeking two orders against the respondent, Southern Credit Banking Corporation, together with an order that the costs of and incidental to the application abide the result of the intended appeal. The main orders sought are:

"1. That the execution of the decree dated 10th September 2005 be stayed pending the lodging, hearing and determination of an appeal from the ruling of Mr. Justice Onesmus Mutungi delivered on 4th May 2004.

2. That the applicants be at liberty to apply for further orders and or direction as this Honourable Court may deem just and expedient to grant".

The application is premised on two major grounds which are that the applicants have an arguable appeal with good prospects of success as the judge in refusing to set aside exparte judgment which had

been entered against the applicants and thus refusing to grant the applicants (who were the defendants in the superior court) leave to file defence against the claim against them by way of plaint dated 25th March 2002 and filed on 2nd April 2002, erred in that he failed to make a finding that the draft defence filed together with the application to set aside the exparte judgment disclosed triable issues of fact and that required to be determined at full trial of the suit. Second ground was that if the application is not granted, the respondent who was about to execute the decree for a total sum of Ksh.5,505,275/10 would proceed to execute the same decree and thus even if the intended appeal succeeded, the results would be rendered nugatory. Several instances were cited in support of those two main grounds. We do not intend to go into each of them save to say that the totality of them all is that the applicants' contention is that the intended appeal is arguable and that the results would be rendered nugatory if the application is not granted were the intended appeal to succeeded.

The brief facts, as shown by the record are that by an agreement in writing dated 4th August 1999, the respondent agreed to sell and the applicants agreed to purchase Land Reference Number 1/890, situate at Nairobi for Ksh.10,500,000/=. That sale was subject to the Law Society Conditions of Sale (1989) in so far as the same were not inconsistent with the terms of the agreement of sale. It was further agreed that the parties would share equally the outstanding rates and incidental expenses which reduced the purchase price to Ksh.9,039,873/=. The applicant paid out of the same amount, a sum of Ksh.1,260,000/= being the agreed deposit. Upon the payment of that deposit, and before the completion of the sale by mutual agreement, possession of the subject property was given to the applicants by the respondent on 25th October 1999. However, the transfer in favour of the applicants was not registered till 30th March 2000. The respondents therefore claimed Ksh.1,630,603 being interest on the sum of Ksh.9,039,873/= the balance of the purchase price from 25th October 1999, being the date possession of the subject property was given to the applicants until 15th April 2000, being the date on which the balance of the purchase price was payable to the respondent. After that claim was filed in court, and before the defence was filed, parties apparently discussed possibilities of a settlement of the suit out of court. Time was given for the same, and filing of Defence was suspended to allow for settlement out of court. When it became clear to the respondents that such settlement could not be reached, the respondent's advocates gave the applicants' advocates 14 days to file defence. That was in writing. After the same 14 days expired, exparte judgment was applied for and was entered on 5th August 2002 as by then, despite the notice, the applicants had not filed defence to the claim. The entry of the exparte judgment did not go well with the applicants. Hence their application to set aside the exparte judgment. That is the application that was rejected by the superior court (Mutungi J) in his ruling delivered on 4th May, 2004. We may add here, for what it is worth, that that ruling was delivered ten months after the application was heard. On 11th May 2004, the applicant filed Notice of Appeal in this Court against the ruling. In the meantime, the applicant filed an application for stay of execution in the superior court which application was dated 13th May, 2004 and was brought under **Order 41 Rule 4** of the *Civil Procedure Rules*. That application was dismissed on 20th May 2005, about one year after it was filed. The applicant then filed this application before us which as we have stated above is brought under **Rule 5 (2) (b)** of this Courts Rules.

It is now well settled law that in considering an application for stay of execution as the one before us, the Court has to be satisfied that the applicant has demonstrated two principles. First is that the appeal or intended appeal is arguable. The second is that if the application is not granted, the results of the appeal if successful will be rendered nugatory – see the case of **J. K. Industries Ltd vs. KCB** (1982 – 88) 1 KAR 1088.

In this application, we have perused the ruling of the superior court as well as the entire record which includes a copy of the draft Defence and draft Memorandum of Appeal. What was before the superior court was an application to set aside exparte judgment which was entered as a result of failure on the part of the applicant to file defence to the respondent's claim. The applicants had in law to satisfy the superior court that they had excuse for either failure to file defence or for filing it late (if the defence was on record). Mr. Nyaribo, the learned counsel for the respondent, is right on that aspect. The Court was not satisfied that there was reasonable or acceptable excuse for the applicants' failure to file defence even after the respondents had extended time for doing so and had given the notice to file the same defence. In

our view, we do not provisionally feel there is arguable point on that aspect although we are not hearing the appeal and it is not yet time to decide on that. However, the second aspect which the superior court had to look into after finding that the applicants had no acceptable excuse for failure to file defence in time, was the draft defence, if there was one before it, so as to see if it disclosed a reasonable defence, and if it did then the superior court was duty bound to allow the defence to be filed. See the case of **Haji Ahmed Sheikh t/a Hasa Hauliers vs. Highway Carriers Ltd** (1982 – 88) 1 KAR 1184.

This is what Ms. Ouma, the learned counsel for the applicants relies on for her submission before us when she says the learned Judge of the superior court erred in that he did not look at the defence to see if the same defence raised triable issues or in other words to see if the defence was reasonable. The learned Judge of the superior court stated as follows on this pertinent issue:

"**On whether or not the defendants have a good defence, I have closely compared the Draft defence dated 31.10.2002 attached to the application to set aside the exparte judgment with plaint, dated 25.3.2002. My findings and conclusions on this aspect are as follows:**

The defence admits all the contents of the Plaint apart from whether or not the plaintiff is entitled to the sums claimed in paragraph 10 of the plaint, for occupation of the premises prior to completion of the sales transaction. This sale agreement was subject to the law society conditions where the definition of interest rate had been rendered inapplicable by virtue of the repeal of Section 39 of the Control Board Act.

However, in the alternative, the Defendants aver that the possession was given to the Defendants pursuant to special condition of sale agreement which ousted the law society conditions even if they were applicable here".

Having rightly pointed out the issues that emerged from the reading of the plaint and draft defence before him, he then went on to consider the merits of the draft defence and made a decision that the case was based on equity and so saw nothing in the defence to be viewed as triable or as reasonable. In our view, what was before him was to look at the draft defence and see if it raised a triable issue or if it was reasonable. That he went further than that, is an arguable point in the intended appeal. We thus find on the first principle that the intended appeal is arguable.

Would the results of the intended appeal if successful be rendered nugatory were we to refuse this application? That is the next matter we would consider.

The decree was admittedly a monetary decree. The respondent is a banking institution and can readily refund the decretal amount which originally was Ksh.1,630,603/= and was at as the date the decree was drawn Ksh.2,588,861/47 but which we are told from the bar, has increased to about Ksh.6,000,000/= as a result of the interest that has been added to the original amount. Further, we are aware of the case of **Richard Kemoli and Others vs. Kenya National Capital Corporation & Another** *Civil Application No. Nai. 161 of 1999* this Court stated that:

"**It is not enough to say that the applicant will be burdened financially, that is a natural consequences of a judgment entered against him".**

All these aspects must, however, be considered against the need to ensure justice to all parties before the Court. In doing so, several other aspects must be considered as well. In the case of **Shell Limited vs. Benjamin Karugu Kibiru and Ruth Wairimu Karuga** (1982 – 88) 1 KAR, Hancox, JA (as he then was) stated, inter alia, as follows:

"**As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause".**

Further, in the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya** – *Civil Application No. Nai. 358 of 1999*, this Court made it clear that where the amount awarded is too large and might bring the applicant's business to ruins, the court may interfere to ensure that a stay is granted till the appeal is heard.

Lastly, in the case of **Butt vs. Rent Restriction Tribunal**, *Civil Application No. Nai. 6 of 1979* to which we were referred, the predecessor to this Court held, inter alia, that:

"The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal".

The totality of all the above is that, there is no hard and fast rule on the issue except that each case must depend on its own facts and justice must be done to both parties before the Court. It all boils down to the old and well known principle that the court in exercising its discretion on whether or not to grant stay must do so upon reasons and not capriciously.

In the application before us, the applicants are a couple. The amount due is now about Kshs.6,000,000/=. We were told from the bar that the parties are negotiating a settlement. As we have stated the intended appeal is arguable. Putting all these together, we feel that justice would be done to both parties by granting a stay upon conditions.

Subject to the applicants depositing into a joint account of the parties' respective advocates Ksh.1,200,000/= (one million two hundred thousand) within fifteen (15) days of the date of this ruling, there shall be stay of execution of the orders arising from the ruling of the superior court (Mutungi J) dated and delivered on 4th May 2004. In default this application shall stand dismissed with costs. Costs of this application to be in the intended appeal. Orders accordingly.

Dated and delivered at Nairobi this 27th day of October, 2006.

P. K. TUNOI

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JUDGE OF APPEA

E. M. GITHINJI

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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