



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

Civ Appli 150 of 2006 (UR 85/2006)

CITY COUNCIL OF NAIROBI APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendo, J) dated 17th March, 2006

in

H.C. Misc. Civil Application No. 1261 of 2005)

RULING OF THE COURT

The application before us was brought under **rule 5(2) (b)** of this Court's Rules. The principles that guide the Court when considering such an application are now well settled and they are that for the applicant to reap the benefits of the same rule, he must demonstrate that the appeal, which in this case is Civil Appeal No. 90 of 2006, is arguable or in other words, is not a frivolous appeal. Secondly, he has to show that if the orders of stay sought are not granted and eventually the appeal succeeds, then the results of the same appeal will be rendered nugatory – see the cases of **Trust Bank Limited and another vs. Investech Bank Ltd. and 3 others – Civil Application No. Nai. 258 of 1999 (unreported)** and **Butt vs. Kent Restriction Tribunal (1982) KLR 417.**

In this case, the applicant is seeking orders that pending the hearing and determination of **Civil Appeal No. 90 of 2006**, the execution of the judgment and order of the Honourable Lady Justice Wendo dated 17th March, 2006 be stayed on grounds that the appeal already filed is arguable; that if the stay orders are not granted, the success of the same appeal will be rendered nugatory; that the matter to be considered is of public interest and that as a result of the superior court's judgment, the applicant, City Council of Nairobi, is severely hampered in enforcing its statutory provision that has enabled it to carry out its policy of ensuring that all dilapidated buildings are repainted and refurbished and that the status of the City of Nairobi is restored. The notice of motion was opposed.

The brief facts giving rise to the application as can be deciphered from the record before us (which

was filed without the judgment of the superior court, which fortunately, was later supplied by the respondent) are that the respondent, Barclays Bank of Kenya Limited, is responsible for the maintenance of its property L.R. No. 209/6838 located along Muindi Mbingu Street in Nairobi. The applicant is responsible for enforcing certain aspects of the Public Health Act. It instituted proceedings against the Manager of the respondent bank in Criminal Case No. M1509(A)/05 in the Magistrate's Court at City Hall in which the respondent was charged with failure to comply with a notice contrary to **section 115** as read with **sections 118** and **119** and punishable under **sections 120** and **121** all of the **Public Health Act Chapter 242 of the Laws of Kenya**. That notice was dated 19th January, 2005 and gave the respondent 21 days to repaint their premises in which it was operating as a bank both internally and externally. It was served upon the respondent on the same day, 19th January, 2005. However, the respondent, though served with that notice on 19th January, 2005, was not taken to court till 29th July, 2005. Upon being charged, the same Manager was placed on cash bail of Ksh.90,000/= or bond of Ksh.150,000/= with surety of the same amount. In the meantime and before that case at the City Court could proceed to full hearing, the respondent filed a notice of motion dated 13th September, 2005 in the superior court seeking several orders of Judicial Review, having been granted leave to do so on 24th August, 2005. The orders sought were in brief, an order of *certiorari* moving the court for purposes of quashing the charge sheet and all proceedings relating to Criminal Case No. M1509(A)/05 Republic vs. Manager Barclays Bank (K) Ltd. Market Branch; an order of prohibition issued to the City Council or its agents to prohibit it from commencing any further criminal or other proceedings against the Manager or any of its employees in relation to the painting or repairing of the subject premises; and an order of *mandamus* compelling the respondent to refund to one David Otieno, on behalf of the Bank, the amount of Ksh.90,000/= being cash bail paid to the City Council in the same criminal case.

That application was heard by the superior court (Wendo, J) who in her judgment delivered on 17th March, 2005 allowed the first prayer which was seeking an order of *certiorari* but rejected the prayers seeking orders of prohibition and *mandamus*. In her order allowing the *certiorari* order she stated:

“The applicant has ably demonstrated that the offence with which the applicant was charged is non existent and the charge is therefore incompetent and fatally defective; the Respondent denied the applicants their right to be heard, thus breaching rules of natural justice; the charge was preferred by an un authorized officer who acted in excess of her powers and the respondent acted maliciously by delaying in charging the applicants. The charge sheet and proceedings in case No. 1509(A)/05 are amenable to being quashed and I hereby order them quashed by order of certiorari. I wish to note that since proceedings of the court are sought to be quashed the court should have been joined as a respondent to these proceedings.”

That is the decision that the applicant felt uncomfortable with and hence this application before us. The applicant, through Mr. Kiage, its learned counsel, raised a number of points which it felt made the appeal arguable whereas the respondent's counsel, Mr. Gichuhi, felt the appeal is not arguable. Our view on that first principle is that the question as to whether the superior court had jurisdiction to quash the proceedings and the charge which were already in the subordinate court's custody whereas the same court was not joined as a party in the proceedings before her as she rightly observed is a matter that is arguable and thus we find that the appeal is arguable.

However, we do not see how the same appeal, were it to succeed, would be rendered nugatory if stay orders are not granted. First, all that the judgment was to quash were the charge and proceedings before the subordinate court. That judgment will remain on record and will be valid till the appeal is heard. It cannot be stayed and no court can stop referring to it till the appeal is heard and determined. Secondly, the applicant says that that judgment has hampered them from enforcing the Public Health Act. We are not persuaded that that should be so. All that the court said was that the charge as framed in that case before the subordinate court did not exist in our laws. It did not in any way stop the applicant from reframing the charge to conform to the provisions of the law, neither did it stop the applicant from amending the law to conform to the policy of ensuring cleanliness of the city, which is the wish of all of us. Further, there is nothing to stop the applicants from ensuring that in future the right to be heard is afforded to all property owners in the city who may face such charges and that the prosecution is

undertaken by authorized persons and in good time. All these can proceed while the appeal is pending and we cannot agree that the success of the appeal will be rendered nugatory if this application is not allowed.

That being our view of the matter, this application cannot succeed as the second principle, i.e. that the results of the appeal, if successful, would be rendered nugatory, has not been demonstrated by the applicant. The application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 13th day of October, 2006.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR