



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

**CORAM: TUNOI, WAKI, J.J.A & DEVERELL, AG. J.A.
CIVIL APPLICATION NO. NAI. 315 OF 2004 (163/2004)**

BETWEEN

INTEGRATED WOOD COMPLEX LIMITED.....1ST APPLICANT

HOSEA KIPLAGAT.....2ND APPLICANT

AND

KENYA NATIONAL CAPITAL CORPORATION LIMITED.....RESPONDENT

(Application for stay of execution pending an appeal from the Ruling of

***the High Court of Kenya at Nairobi (Azangalala, Ag.J) dated 4 th
November, 2004***

in

H.C.C.C. NO. 299 OF 2003)

RULING OF THE COURT

This is an application by ***INTEGRATED WOOD COMPLEX LIMITED and HOSEA KIPLAGAT***, the applicants, under rule 5(2)(b) of the Rules of this Court for an interim stay of execution pending the determination of an intended appeal against the decision of the superior court given on 4th November, 2004, whereby the applicants' defence was struck out and judgment entered for the respondent by way of summary judgment in the sum of Shs.82,706, 408/60 with costs and interest thereon at the rate of 30% p.a. from 18th October, 2000, until payment in full.

It would appear that there is no dispute on the salient facts giving rise to the application before us. By an agreement entered into in January, 1990, between the respondent and the 1st applicant, the latter agreed to extend a Lease Hire Facility to the former for the sum of Shs.10,318,790/85 to enable the 1st applicant refinance a Lease Hire debt held in the respondent's books in the name of ***Speedways Trans Africa Freighters Company Ltd***. Under the said Agreement, the Lease Hire Facility was to be secured by a Lease Hire Agreement over three Mercedes Benz trucks, all the said vehicles being registered in the respondent's name and the director's personal and irrevocable continuing guarantee for the sum of Shs.10,318,790/85. By a financial plan worked out between the parties, the applicants covenanted to pay to the respondent monthly rental and such interest and charges that would become due thereon.

As is not uncommon in commercial transactions of this nature, the applicants defaulted in servicing the repayment facilities and the respondent went to court to enforce payment. It did so by plaint lodged in the superior court on 22nd May, 2003.

The applicants filed a defence on 22nd July, 2003, and the relevant paragraphs for the purposes of this application are paragraphs 4,5,6, and 7 in which it is stated:-

“4. In answer to paragraphs 5 and 8 of the Plaint the second defendant says that his liability (which is denied), if any, has not crystallized as no notice has been given of first defendant’s default.

5. The second defendant in further answer to paragraph 5 and 8 of the plaint says that the terms and conditions of the agreement or Hire purchase Agreement if any between the plaintiff and the first defendant have been varied without notice, approval or consent of the second defendant, therefore making the alleged guarantee if any, null and void.

6. The defendants in answer to paragraphs 5,7,8 and 9 of the plaint say that the interest rate charged by the plaintiff is unlawful unconscionable and punitive and contrary to section 39 of the Central Bank Act and section 44 of the Banking Act. The alleged rate of interest was not agreed.

7. The Defendants deny that Kshs.82, 706, 406.60 is due and owing to the plaintiff or that they agreed to 30% rate of interest as alleged in paragraph 10 of the plaint or at all and will put the plaintiff to Strict Proof thereof.”

The learned Judge, ***Azangalala, Ag.J.*** (as he then was), in his ruling on a motion brought under Order XXXV Rules 1, Order L R 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for summary judgment held that the defence filed by the applicants to the respondent’s suit was a sham and does not raise bona fide triable issues. He struck out the defence and entered judgment as prayed for in the plaint.

A draft decree for Shs.183,177,700/58 inclusive of interest has been drawn and the respondent’s bill of costs was taxed on 24th November, 2004. We were further informed from the bar that a truck among the fleet had been auctioned and that this course of events has prompted this application.

The principles governing the exercise of the court’s jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put the other way round, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory.

Have the applicants satisfied the first principle? Mr. Billing argued on behalf of the applicants that the interest rate charged was unlawful, unconscionable and punitive. Moreover, Mr. Billing contended the Agreement between the parties had been illegally varied. He further submitted that the liability of the 2nd applicant was limited to Kshs.10,318,790/85 and not more.

The applicants, as we have said, do not in earnest deny the fact that there exists an agreement of their indebtedness to the respondent. What they dispute is the enormity of the debt ballooned by the interest rate charged.

The record of the application for summary judgment incorporated several letters, especially those dated 28th January, 1999, 13th November, 2000, and 14th February, 2001, acknowledging the debt in full but pleading for time to settle it. The issue of the illegality of the debt or the enormity of the rate of interest have not been raised. It is worthy of note that to date, several years afterwards no serious attempt has been made towards, the satisfaction of the debt.

Clause 1 of the Form of Guarantee executed by the 2nd applicant reads in part: -

“... hereby guarantee to you the due payment of and undertake on your demand in writing to pay to you, all sums including interest provided that our total liability under this guarantee shall not exceed the sum of Kshs.10,318,790/85 and interest thereon and other charges and expenses as aforesaid both before and after demand and so that interest and other charges and expenses as aforesaid shall be payable as well after as before any judgment to be obtained hereunder.”

It is to be noted that the liability guaranteed by the 2nd applicant covered accrued interest, other charges and subsequent expenses.

Mr. Billing has been unable to show to us how the Agreement between the parties was unilaterally or illegally varied to incorporate an entirely different rate of interest. Our perusal of the said Agreement shows that the interest chargeable on the amount of the Lease Hire Facility was initially at the rate of 18% per annum but the respondent reserved the right to revise this rate without notice to the applicants.

On the material before us, we highly doubt that the intended appeal is arguable as no serious issues will be capable of being canvassed.

In dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted, we consider the fact that the respondent is an established financial institution and would have no difficulty if required to pay back the full decretal amount.

For the foregoing reasons, we decline to exercise our discretion in favour of the applicants and dismiss the application with costs to the respondent.

Dated and Delivered at Nairobi this 4 th day of January 2005 .

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR.