REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, GITHINJI & WAKI, JJ.A)
CIVIL APPLICATION NO. NAI. 336 OF 2004 (UR 176/04)

BETWEEN

KINGS MOTORS LTD. ……..……APPLICANT

AND

SHELL & BP (MALINDI) KENYA LTD. ……....……RESPONDENT

(Application for stay of execution pending the filing, hearing and

determination of an intended appeal from the decision of the High Court of Kenya at Nakuru (Kimaru, J.) dated 25.11.2004
in
H.C.C.C. NO. 265 OF 2004)
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RULING OF THE COURT

This is an application by **M/S. Kings Motors Ltd** (hereinafter the "applicants") under ***rule 5(2)(b)*** of the ***Rules*** of this Court for stay of execution pending the determination of an intended appeal against the decision of the superior court (Kimaru, J) made on 25th November, 2004. In that decision, a temporary mandatory injunction was issued compelling the applicant, its servants and or agents to vacate all that parcel of land known as Nakuru Municipality/Block 11/650 within 14 days of the ruling in default of which they would be evicted. The applicant was also restrained by temporary injunction from using or in any way dealing with the said parcel of land. This Court on 29th December, 2004 issued a temporary stay of execution of the two orders until the hearing and determination of this application.

The salient facts giving rise to the application are not in serious conflict. **Nakuru/Municipality/Block 11/650** (hereinafter "the suit property") is an undeveloped plot registered in the name of one ***Juma Muchemi*** as a leaseholder for a period of 99 years from 01.12.1969. The designated user of the plot under the lease issued on 27.05.1996 was **"for petrol service station".** By a written sub-lease dated 23.07.1996 and registered on 07.08.96, ***John Muchemi*** (hereinafter the "Landlord") leased the suit property to **M/S. Agip (K) Ltd** (hereinafter "the Tenant") for a period of 15 years from 01.08.96 at a monthly rent of Shs.70,000/= which amount was paid in lump sum for the entire period. It was one of the covenants of the lease that the tenant would at its own cost and expense construct a petrol service station on the plot and, if the landlord so chose, he would be given the first option to operate it. By October 2000, the petrol service station had not been constructed. Instead Agip (K) Ltd changed its name to Shell and BP (Malindi) Kenya Ltd and obtained a Certificate of change of name from the Registrar of Companies on 12.10.2000. By dint of ***section 20(4) of the Companies Act*** , a change of name does not affect the contractual rights or

obligations of a company. In effect therefore Shell and **BP (Malindi) Kenya Ltd** stepped into the shoes of the tenant. But the landlord did not see it that way. He swore an affidavit before the superior court in support of the applicant, as he did before us, that the tenant was in breach of the covenant against transfer, subletting or parting with possession of the leased premises without his consent and he had unilaterally therefore decided to repossess the property for his use. The use he put it to was to hand it over to the applicants who entered therein in September 2004 and started the business of selling motor vehicles. They were promptly sued as trespassers by the tenant who contemporaneously applied for and obtained the two temporary orders referred to above.

The principles governing the exercise of this 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 another way, the applicants must show that they have an arguable appeal; and secondly this Court should ensure that the appeal, if successful is not rendered nugatory. Has the first principle been satisfied?

In acceding to the prayer for prohibitory temporary injunction, the learned Judge of the superior court made findings that the lease between the parties was still subsisting and had not been terminated under the provisions made therein. The change of name by the tenant did not affect the lease and so the excuse was not available to the landlord to repossess the property. Consequently, he held, the applicant was a trespasser and the fact that the tenant was not in continuous physical occupation did not mean that it was not in possession of the suit property. The learned Judge also examined at some length the principles applicable to the grant of a mandatory injunction and came to the conclusion that the applicant was unable to show a claim superior to that of the tenant. Furthermore the landlord, in connivance with the applicant had brazenly and in blatant breach and disregard of the lease agreement installed the applicant into the suit property. The Judge rejected an award of damages as an alternative remedy and found it necessary to stop the applicants from stealing a march on the tenant.

Before us however, learned counsel for the applicant Mr. Kanyangi submitted that it was wrong to grant the two orders which effectively determined the main suit before hearing the parties. He was of the view that mesne profits would be sufficient compensation for any damage suffered by the tenant and that, in any event the balance of convenience was in favour of rejecting the tenant's application. For his part, Mr. Majanja, learned counsel for the applicant, stressed that the suit was between the tenant and a trespasser who had no superior title to show for his invasion of the suit property. The fact of the matter is that the tenant's lease is still subsisting.

On our part, on careful consideration of the material before us, we highly doubt that the intended appeal is arguable. Assuming for one moment however that it is, we still have to examine whether the refusal to grant a stay would render it nugatory. We do not see how. There is no affidavit from the applicants to show what damage they would suffer if the orders are enforced and how irreversible that would be. It is in any event doubtful that a trespasser would suffer legal damages. Instead it is the landlord who swore that he would suffer loss. As correctly submitted by Mr. Majanja, however, the landlord was fully paid the rent due for the suit property for 15 years. At any rate the suit property is still available, in the event the applicants succeed in their appeal.

For those reasons we are not satisfied that the application is meritorious. We dismiss it with costs.

Dated and delivered at Nairobi this 4th day of February, 2005. kenyalawreports.or.ke

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR