REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: TUNOI, GITHINJI & WAKI, JJ.A

Civil Appli NAI 155 of 2005 (94/2005 UR)

BETWEEN

MALDE TRANSPORTERS LIMITED……..…… APPLICANT

AND

BASHIR ARAB MOHAMMED and

FATUMA HAJI HASSAN (Suing as the

Administrators of the estate of

ARAB MOHAMMED AHMED……..……..1ST RESPONDENT

JOHN NGANDU KINUTHIA……..……...……..2ND RESPONDENT

(Application for stay of proceedings pending the hearing and

determination of an appeal from the decision and order of the High Court of Kenya at Nairobi (Ojwang, J) dated 3
rd
June, 2005
in
H.C.C.C. NO. 365 of 1999)
****

RULING OF THE COURT

This application expressed to be brought under Rule 5 (2)(b) of the Rules of this Court seeks an order to stay the proceedings of ***H.C.C.C. NO. 365 of 1999 BASHIR ARAB MOHAMED AND FATUMA HAJI HASSAN V. JOHN NGANDU KINUTHIA AND MALDE TRANSPORTERS LTD***. pending the hearing and determination of the applicant's intended appeal. The facts giving rise to this application are briefly as follows. By a plaint filed in the superior court on 24th February, 1997, the 1st respondent sued the applicant and the 2nd respondent for damages arising out of an alleged negligent driving of a motor vehicle causing the death of one ***Arab Mohamed Ahmed.*** After service of summons a defence was duly

filed. However, the 1st respondent failed to take steps in prosecuting the suit necessitating the applicant to seek orders for its dismissal for want of prosecution. But on the date of the hearing of the application the 1st respondent did not attend Court and the application was allowed "as no action [had] been taken in the suit for over 3 months" and the suit was accordingly dismissed on 30th July, 2002.

Undaunted, the 1st respondent by a Notice of Motion dated 14th October, 2002 sought to vacate the orders of 30th July, 2002. On 21st January, 2003, Mbito, J set aside his earlier orders and allowed the 1st respondent to proceed with the suit on condition that the suit was set down for hearing within 90 days thereof.

Inexplicably, nothing of the sort happened and what followed was a multiplicity of varied and sometimes conflicting applications by both parties. These were brought, more or less, oblivious of previous orders of the court. This led Ojwang', J to observe:

> ***"It is already quite clear that confusion has in the past marred the filing and disposal of applications falling under the main suit. Such confusion was no less apparent when this matter came up before me on 20th January, 2005.As already noted, the old application of 26th January, 2001 was the one listed for hearing before me, and not the 2nd defendant's chamber summons of 6th June, 2003 the hearing of which had been contemplated in the directions of Lady Justice Aluoch given on 24th September, 2003. So, today the 2nd defendant's Chamber Summons of 6th June, 2003 has not yet been heard, and no date has been taken for its hearing. Yet, come 26th January, 2005 the 2nd defendant filed another Chamber Summons dated 25th January, 2005. In this later application the 2nd defendant is making the very same prayers against the plaintiff which had been made in the earlier Chamber Summons of 6th June, 2003".***

The learned Judge thought that the multiplicity and the myriad applications had neither justification nor basis in law but only amounted to misleading the court and were, indeed, definite abuse of process.

The applicant was further accused of acting improperly by fixing a hearing date for its application and yet not proceeding with it nor even turning up to prosecute the application. The learned Judge in berating it said:-

> ***"Why was the 2nd defendant intent on leap-frogging those two applications and instead having a much later application of 24th January, 2005, heard? I can see no logical explanation for these attempts to move the Court and I must conclude that they were improper. It shows lack of communication between counsel for the 2nd defendant and counsel for the plaintiffs; it shows a disturbing unilateralism on the part of the 2nd defendant; and it shows a state of affairs set to lead this Court to a misdirection. It is replete with elements of abuse of the process of the court."***

The learned Judge then struck out with costs the applicant's Chamber Summons of 25th January, 2005; restated the orders made by *Mbito,* J. on 21st March, 2003 and directed that in default the applicant to be at liberty either to set down for hearing its Chamber Summons of 6th June, 2003 or to file a more suitable application as may be necessary. An earlier order made by *Kuloba,* J. on 28th March, 2003 refusing extension of limitation period was also vacated.

Being aggrieved by these orders, the applicant expeditiously lodged a Notice of Appeal and has annexed to this application a draft Memorandum of Appeal.

The principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under ***Rule 5(2)(b***) of the Rules of this Court are well known. See for instance ***BUTT V RENT RESTRICTION TRIBUNAL [1982] KLR 417, J.K. INDUSTRIES V KENYA COMMERCIAL BANK LTD & ANOTHER [1987] KLR 506.***In exercising its unfettered discretion the Court considers, inter alia, whether the appeal or intended appeal is arguable and whether the appeal would be rendered nugatory if the order sought is not granted.

Mr. Kamau Karori for the applicant has submitted before us that the orders made by the learned judge have no basis in law and had compounded the injustice allegedly perpetrated upon the applicant if it is forced to participate in proceedings based on what he terms "patently illegal orders". He averred that the applicant was denied a fair hearing and that by this the learned Judge breached the rules of natural justice. *Mr. Karori f*urther averred that the learned Judge erred in giving orders which were not prayed for in the application before him.

We have considered these submissions and also perused the draft Memorandum of Appeal. We are satisfied that intended appeal is certainly arguable and is not frivolous. Would success in the intended appeal be rendered nugatory if the stay sought is not granted? Mr. Karori avers that litigation is generally inconvenient and the applicant should not be made to undergo the unnecessary rigours of vain litigation. Mr. Ahmednassir for the 1st respondent, on the other hand, has vehemently opposed the application contending that the intended appeal is not arguable and it would not be rendered nugatory in any aspect if the application is not granted.

We would think that every litigation is inconvenient to every litigant in one-way or another. Also, no one in his right senses enjoys being sued and ip so facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the Orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.

For the above reasons, we do not find any merit in the entire application. It is dismissed with costs to the 1st respondent.

DATED and DELIVERED at NAIROBI this 15th day of July, 2005.

P.K. TUNOI 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