



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

CORAM: OMOLO, WAKI & DEVERELL, J.J.A.

CIVIL APPLICATION NAI 279 OF 2005

BETWEEN

TENDE DRIVE VILLAS LIMITEDAPPLICANT

AND

DAVID KAMAU1ST RESPONDENT

NATIONAL INDUSTRIAL CREDIT BANK LTD2ND RESPONDENT

CHARLES BOSIRE3RD RESPONDENT

ESTHER MUBOKA BOSIRE4TH RESPONDENT

AZIZ MOHAMMED PIRAK5TH RESPONDENT

(Being an application for temporary injunction and stay of execution pending the hearing and determination of an intended appeal against the ruling and order of the High Court of Kenya at Nairobi, Milimani Commercial Courts, (Mr. Justice Azangalala) dated 25th July, 2005

in

H.C.C.C. NO. 127 OF 2005)

RULING OF THE COURT:

This is an application for temporary injunction and stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya (F. Azangalala J.) dated 25th July, 2005 in Nairobi High Court Civil Case number 127 of 2005.

The superior court summarised the nature of the application as follows:-

“The Chamber Summons dated 9th March 2005 is brought under Order 39 Rules 1, 2, and 3 of the Civil Procedure Rules, Section 106 of the Government Lands Act Cap 280, Section 3A of the Civil Procedure Act and or other enabling provisions of the law. It is seeking one primary prayer which is that the Defendants by themselves, agents, servants or any other

persons acting on their behalf be restrained from levying out any distress or otherwise against the Plaintiff on LR No 3734/1141 and 3734/ 1143 Lavington and/or evicting or interfering with the peaceful enjoyment or quiet possession by the Plaintiff in L.R. No. 3734/1141 and 3734/1143 Lavington (hereinafter “the suit property”) until the hearing and determination of this application and and/or suit.”

In its ruling the superior court set out the principles applicable to the grant of an interlocutory injunction citing the case of ***Giella v Cassman Brown & Co Ltd and another*** (1973) EA. 358 being that, first the applicant must show a prima facie case with a probability of success at the trial. Secondly an interlocutory injunction will not be granted unless the applicant would suffer an injury, which cannot be compensated in damages. Thirdly if the court is in doubt, it should decide the application on a balance of convenience. It must be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted where it is shown that the applicant’s conduct with respect to matters pertinent to the suit does not meet the approval of a court of equity.

The superior court applied these principles and recited the facts and history of previous litigation between the same parties raising broadly similar issues. It came to the conclusion that: *“I have found that the Applicant does not have a prima facie case with a probability of success and in any event its anticipated loss can adequately be compensated in damages.”*

The superior court made a further finding that the applicant was not deserving of the equitable relief of injunction due to his non-disclosure of facts material to the application which appear to have been designed to mislead the court. The court then went on to dismiss the application of the first Plaintiff in the suit who is the applicant in the present application before us.

The principles to be applied in this Court in applications for stay and/or injunctions pending appeal are to some extent different from those applicable to similar applications in the superior court based on the ***Giella case (supra)***.

This Court, has original jurisdiction under ***rule 5(2)(b)*** and in considering the application before it, is concerned with whether it is arguable that Azangalala J made an erroneous ruling to the effect that the application for injunction and stay in the superior court should be dismissed.

If this is not arguable then the applicant will have failed to surmount the first hurdle in successfully obtaining the injunction and stay sought in this Court

The second hurdle to be surmounted by an applicant is to show that if the application now before us is not granted, the pending appeal, if successful, will be rendered nugatory.

We will deal with the nugatory hurdle first.

The appeal is against the decision of Azangalala J. in which he refused to make restraining orders as set out above pending the hearing of the suit in the superior court. If this Court does not grant the interim injunction and stay now sought, the consequence will be that, pending the hearing and determination of the appeal, there will be nothing to prevent the respondents from levying distress against the applicant or from evicting it from the suit property or otherwise interfering with the applicant’s peaceful enjoyment or quiet possession of the suit property. The applicant submits that, if any of these events happened, they would cause it irreparable damage and the success in the appeal would be rendered nugatory.

We consider that this is a valid argument with the result that if the applicant succeeds on the first limb, then his motion must succeed.

We now turn to consider the first condition precedent to the granting of an application for a stay or interim injunction which is as to whether the intended appeal against the decision of Azangalala J. is arguable or, in other words, not frivolous.

After careful consideration we are satisfied that the intended appeal against the decision of Azangalala J is not arguable. It is not necessary or desirable that we go into any detail as to the reasons for this view at this stage lest we prejudice the intended appeal. Suffice it to say that we find the Judge's reasons compelling and have not been persuaded otherwise by the applicant.

We therefore order that the application by Tende Drive Villas Ltd. dated 14th October 2005 be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 16th day of December, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR