REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, O'KUBASU & GITHINJI, JJ.A.)
CIVIL APPLICATION NO. NAI. 307 OF 2004 (156/04 UR)

BETWEEN

EQUIP AGENCIES LIMITED…… APPLICANT

AND

MBAKI AGRIC INPUTS LIMITED.…… RESPONDENT

(An application for Stay of Execution of the Rulingand Orders of the High Court of Kenya at Nairobi
(Kasango J.) dated 24 th November 2004
in
H.C.C.C. NO. 582 OF 2004)
****

RULING OF THE COURT

The applicant, **Equip Agencies Ltd**., comes before us by way of notice of motion under Rule 5(2) (b) of the Court of Appeal Rules (the Rules) seeking the following orders:-

> ***"(a)***
>
> ***(b) THAT the ruling and orders of the High Court of Kenya made on 24 th November, 2004 and any other proceedings based on the said order or otherwise and any consequential orders and proceedings be stayed pending the filing of the Applicant's intended Appeal against the said ruling and/or orders and the hearing and determination thereof.***
>
> ***(c) THAT costs of this application be pro vided for."***

What has given rise to this application is a ruling by the superior court (Kasango J.) delivered on the 24th November, 2004 in which the learned Judge, pursuant to an application by the respondent made the following orders:-

> ***"(a) That the defe ndant is hereby ordered to furnish within 30 days from this date hereof a banker's guarantee to pay the plaintiff Kshs.11,250,000. The said guarantee is to be furnished to the plaintiff's counsel.***
>
> ***(b) In default of (a) above the plaintiff is hereby granted leave to carry out an attachment of the defendant's goods to the value of Kshs.11,250,000 and on attachment the goods shall be kept in storage to await the conclusion of this suit.***

(c) The plaintiff is awarded the costs of the application dated 29 th October 2004."

The respondent's application which resulted in the above orders was stated to have been brought under "***ORDER XXXVIII RULE 1, 2, 4, 5 AND 6 OF THE CIVIL PROCEDURE ACT & PROCEDURE RULES AND SECTION 3 & 3A CIVIL PROCEDURE ACT*** ." In that application which was brought by way of chamber summons the respondent sought the following orders:-

"(a)

(b) The Honourable Court do issue warrants of attachment of the defendant's movable and immovable property and in particular vehicles, machines, hardware, chemicals and the goods of trade and in stock in the defendant's godowns/shops or premises before judgment in this suit.

ALTERNATIVELY

The Honourable (sic) be pleased to issue a warrant to arrest the defendant directors and bring them to court to show cause why they should not furnish security for their appearance. And for the sum claimed in the plaint.

(c) The costs of this application be provided for.

(d) Any other relief the Court may deem just to grant for the interest of justice."

The learned Judge considered the application and came to the conclusion that the respondent was entitled to the reliefs sought in its chamber summons application. In the course of her ruling, the learned Judge stated as follows:-

> ***"The court has to be satisfied on two points. One, that the plaintiff has a cause of action which is prima facie unimpeachable and two, the court should have reason to believe that unless jurisdiction is exercised there is a real danger that the defendant will remove himself from th e ambits of the powers of the court."***

When this application for stay under rule 5(2)(b) of this Court's Rules came up for hearing, Mr. Odera, for the applicant, faulted the learned Judge's findings as set out above. It was Mr. Odera's contention that the learned Judge was in error as what she stated was not, according to Mr. Odera, what was intended by Order XXXVIII of the Civil Procedure Rules . He argued that Order XXXVIII refers to movement of goods or of the defendant out of the jurisdiction of the court. In his view mere movements of the applicant's goods from one place (Mombasa Road) to another (Dares- salaam Road) but within the jurisdiction of the court does not come within the ambit of Order XXXVIII of the Civil Procedure Rules.

On his part, Mr. Gikunda, for the respondent, opposed the application by stating that the application in the superior court was as a result of fear by the respondent that the goods might be disposed of. Mr. Gikunda contended that it was necessary for the applicant to satisfy the court on the nugatory aspect of the application, which in his view, the applicant failed to do.

We have considered what was placed before the superior court leading to the orders made on *24th November 2004* , and we are of the view that the respondent brought that chamber summons application because of the fear that the applicant might dispose of the property. The respondent and its advocates were satisfied that the applicant was indeed indebted to the respondent. That position is well captured in the grounds upon which the respondent's application was brought which were as follows:-

> ***"(a) The defendant actually received the plaintiff's goods in the year 2003.***
>
> ***(b) The plaintiff delivered the goods to the defendant's customer.***
>
> ***(c) The defend ant was duly paid for the goods but is reluctant to pay the plaintiff.***

(d) The defendant issued cheques to the plaintiff which cheques were dishonoured on presentation to the bank.

(e) The defendant is moving his property from his known place of busines s with intention to delay or obstruct execution of any decree the plaintiff may obtain.

(f) The defendant is transferring his property mainly vehicles, chemicals, hardware and other goods of trade to INTER -TRACTOR LTD.

(g) The plaintiff may get a judgmen t in vain."

From the above it seems to us that the respondent was of the view that the applicant had no valid defence to the suit filed in the superior court and that the applicant was cleverly trying to move its property from its place of business to another place.

The marginal notes to rule 5(1) of Order XXXVIII of the Civil Procedure Rules reads:-

"Where the defendant may be called upon to furnish security for production of property."

And rule 5(1) of Order XXXVIII provides as follows:-

Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him -

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to p roduce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

Our reading of the foregoing is that a defendant may be called upon to furnish security where the court is satisfied that the defendant has intention to obstruct or delay the execution of the decree by selling his property or removing it from the jurisdiction of the Court.

Mr. Odera, for the applicant, pointed out that there was no evidence to show that his client was about to dispose of its property or that it was moving its property from the jurisdiction of the court. It was his view that the intended appeal was not frivolous, and that to demand payment of Shs.12 million from his client would cripple its business. Mr. Gikunda, for the respondent, conceded that they did not have evidence of any property being disposed of but he contended that his client feared that they may have nothing to sell in event of a judgment in their favour.

We have now considered the rival arguments submitted before us and having regard to the fact that we are not dealing with the main appeal it is appropriate to remind ourselves of the principles applicable to an application under rule 5(2)(b) of the Rules. These principles are now, we think, well settled. There is a long line of authorities on these principles but we only cite **Reuben & 9 Others vs. Nderito & Another [1989] KLR.459** in which this Court stated:-

"In dealing with rule 5(2)(b) this Court exercises original jurisdiction and this has been stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (a new) on the propriety or otherwise of granting the relief sought. And as we have always

> ***made clear, this exercise does not constit ute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful would be rendered nugatory. See Stanley Munga Githunguri vs. Jimba Credit Corporation Ltd Civil Application NAI 161 of 1988."***

Applying the above to the facts of this application we are satisfied that this is a proper case in which a stay should be granted. It is clearly arguable that the provisions of ***Order XXXVIII*** were not applicable to the circumstances of the case, and the operations of the applicant may well be crippled while the respondent does not have a judgment against it. We therefore allow the application for stay as prayed in the Notice of Motion dated 1st December, 2004 . Costs of the application shall be in the intended appeal. Those shall be our orders.

Dated and delivered at NAIROBI this 23rd day of December, 2004.

R.S.C. OMOLO

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR