



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI JJA & DEVERELL AG. JA)
CIVIL APPLICATION NO. NAI 296 OF 2004 (150/2004 UR)

BETWEEN

KENYA COMMERCIAL BANK LTD..... APPLICANT

AND

ALLOYS KAYIHURA KAVEN

T/A ALLOYS KAVEN & CO BAKERY..... RESPONDENT

22nd November 2004 and any further proceedings of the High Court of Kenya at Milimani Commercial Courts (Hon. Lady Justice Kasango Ag. J.) dated 22nd November 2004

in

HCCC NO. 224 OF 2003)

RULING OF THE COURT

Kenya Commercial Bank Ltd, the applicant before us, is aggrieved by the decision of Mary Kasango, Ag. J. made on the 22nd day of November 2004. By that decision, the learned Judge ordered as follows:-

“1. The defendant [i.e. the applicant herein] shall within seven (7) days from this date hereof forward to the plaintiff’s counsel the title document and discharge of charge in relation to property L.R. No. 14431 NGONG TOWNSHIP which shall be held by the said counsel until further orders of this court.

2. If the defendant fails to supply account (sic) in accordance with the order of 29 th January, 2004 of Justice Emukule within two weeks from today the plaintiff may move this Court for leave to register the discharge of charge.

3. The defendant shall bear the plaintiff’s costs of the application of the Notice of Motion dated 16 th April, 2004 which costs shall be agreed within fourteen days if no agreement the same shall be subject to taxation.”

The “plaintiff” referred to in these orders is Alloys Kayihura Kaven T/A Alloys Kaven & Company Bakery, who is now the respondent to the motion before us. The motion before us is one under Rule 5(2)

(b) of the Courts Rules seeking to stay the learned Judge's orders. As is apparent from the orders of the Judge, they were made so as to compel the applicant into complying with certain earlier orders, which had been made by Emukule, Ag. J. on 29th January 2004. The orders of 29th January 2004 had basically directed the applicant to supply to the respondent the accounts of all the transactions upon the respondent's bank accounts, which the respondent kept with the applicant. The respondent, as a customer of the applicant, had been granted a loan/ or loans and had been allowed to operate an over-draft account and the respondent had offered his property known as L.R. NO. 14431/NGONG TOWNSHIP as security for the loan(s) and the over-draft. As is usual in such situations, a dispute arose between the parties and by his plaint dated the 23rd April, 2003 the respondent had sought various orders against the applicant, among which orders were:-

“(a)

(b) A declaration that the First, Further and Second Further charge are null and void on the ground of fraud and/or for want of consideration;

(c) A declaration that the Defendant made illegal and unauthorized debits on the plaintiff's accounts.

(d) An order discharging L.R. NO. 14431 of all charges in favour of the Defendant.

(e) An order for accounts.”

Before these claims could be gone into by way of a hearing the respondent moved the superior court by way of summons in chambers under **Order XIX Rules 1 and 2 of the Civil Procedure Rules**, and the orders sought in the summons were:-

“1. That the Defendant do within 14 days of the order, render to the plaintiff a proper account including the exact monies advanced by way of loan, interest and the rates of interest imposed specific deductions or charges levied on the plaintiff's accounts for which the following securities were taken: -

(a) Charge over L.R. No. 14431 Ngong Township.

(b) Further charge over L.R. No. 14431 Ngong Township;

(c) Second further charge over L.R. No. 14431 Ngong Township.

2. That the Defendant do, within 14 days of the order, provide to the plaintiff proper accounts including bank statements that may arise from overdraft facilities, if any.

3. That the court do make further inquiries and issue directions in this matter.”

It is this summons which formed the basis of Emukule, Ag. J.'s orders of 29th January, 2004 and as we have said, it is the orders of Emukule, Ag. J. which Kasango, Ag. J. was enforcing when she gave her orders against which it is proposed to appeal. The applicant filed its notice of appeal on 23rd November 2004. In the meantime, the applicant asks us to stay the orders.

That being the position, the applicant was bound to satisfy us on two well known points, namely that its intended appeal is arguable and is not a frivolous one, and secondly that if we do not grant the stay orders sought the intended appeal, if it were to succeed, would have been rendered nugatory.

Having listened to both Mr. Mwangi for the applicant and Mr. Ojiambo for the respondent, we are satisfied that the applicant's intended appeal is arguable. We have already set out the main orders sought by the respondent in his plaint. The respondent seeks a declaration that the three charges created over his property were null and void because the charges were either fraudulent or they were made without any

consideration for their making. It is only if and when the respondent would have proved these claims that he might be entitled to have the charges registered against his property discharged. Mr. Mwangi told us that in ordering that the title document and a signed discharge of the charges be handed over to the respondent, the Judge in effect gave to the respondent summary judgment. Mr. Ojiambo in fact conceded that the effect of the orders they have obtained is to give to the respondent summary judgment. The applicant shall argue in the intended appeal that it was not legally justifiable for the learned Judge to proceed in that fashion. The applicant shall also argue that they had supplied to the respondent all the accounts in its custody and there was no more to be supplied. We think these points are arguable and that the applicant's intended appeal is not a frivolous one. The applicant has satisfied us on that aspect of the matter.

Will the intended appeal be rendered nugatory if we do not grant the stay orders sought? The title documents which have been released to the custody of the respondent's advocates were given to the applicant as security for loans and over-draft. There is still a dispute as to whether all the loans for which the title documents were used as security have been paid. There is the very real possibility that the superior court might in the end release the title documents to the respondent and order the discharge of the charges – even before the issues raised in the plaint have been determined. If that were to happen the applicant would have lost its security and even if its intended appeal were to succeed, that success may well be rendered nugatory. Once the charges are discharged and the respondent is given possession of his title documents, no one can tell what he might do or not do with the property. Once again, we are satisfied that the applicant has discharged the burden placed on it by the Court's second requirement i.e. that its intended appeal would be rendered nugatory if we do not grant to it the stay orders it seeks.

Accordingly, we allow the notice of motion dated 25th November and lodged in the Court on 26th November 2004 and order a stay of the execution of Kasango Ag. J's orders made on 22nd November 2004 until the hearing and determination of the intended appeal or until further orders of the Court. The title documents to L.R. No. 14431 NGONG TOWNSHIP and the signed discharge of the charges which were handed over to counsel for the respondents pursuant to the superior court orders are to be forthwith handed back to the applicant. We, however see no reason to order a stay of any further proceedings in the High Court. The costs of the motion shall be costs in the intended appeal. Those shall be our orders on the matter.

Dated & Delivered in Nairobi this 10th day of December 2004

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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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