



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & KEIWUA JJ.A)

CIVIL APPLICATION NO. NAI 33 OF 2003

BETWEEN

FRANCIS MBURU ROBI T/A ROBICO CHEMICALSAPPLICANT

AND

ECOLAB E. A. LIMITEDRESPONDENT

RULING OF THE COURT

This is an application by the unsuccessful defendant made under the provisions of rule 5(2)(b) of the Rules of this Court, for stay of execution of the decree of the superior court (Nyamu J) given on 7th February, 2003. It seeks a stay pending the determination of the intended appeal from the said decision.

The plaintiff's claim against the defendant was for a sum of Shs.2,400,000/- being sum due and owed by the defendant to the plaintiff for goods sold by the plaintiff to the defendant, at the defendant's request and order during the year 1997. This claim was denied by the defendant in an amended statement of defence which also included a counterclaim. The plaintiff took out a Notice of Motion under Order XXXV rule 1 of the Civil Procedure Rules seeking judgment against the defendant for the said claim of Shs.2,400,000/-. Having considered the submissions of counsel appearing for both parties the learned Judge expressed himself thus:

"It is clear to me from the evidence annexed to the affidavit in support of the application that for each order and/or consignment of goods delivered to the Defendant the plaintiff forwarded the goods to be delivered together with a delivery note indicating the description of the goods delivered, the quantity of the goods, the unit price and the net price payable. Although this is denied in the defence the Defence counsel in his submission says that the goods were signed for by the Defendant as an employee. All the delivery notes were signed by the Defendant. It is contended that he had no authority from his partners who have not been disclosed. There is no doubt that the plaintiff dealt with the Defendant and therefore he has nothing to do with the alleged lack of authority from the Defendants partners.

In addition although it is contended that the defendant paid for the goods he did not offer any evidence of payment. No particulars concerning offshore sums allegedly due to the Respondent have been given. The Defendant has not demonstrated to the court any triable defence and I accordingly enter judgment for the plaintiff as prayed in the amended Plaint dated 6th August, 1999 and further grant to the Applicant the costs of this application.

With the foregoing the applicant herein was faced with a judgment in the sum of Shs.2,400,000/- together with costs. The applicant now comes before us seeking a stay of the said judgment pending

appeal.

Mr. Njoroge, Counsel for the appellant, told us that a notice of appeal had been filed but the appeal itself was yet to be filed. He pointed out that there were procedural errors by the superior court. For example, he pointed out that an earlier application for summary judgment had been dismissed and that the amended plaint had been filed much later than the time when the application for summary judgment was filed.

In this application this Court is being asked to grant a stay under rule 5(2)(b) of the rules of this Court, and in so doing we are exercising judicial discretion as was stated by this Court in Trust Bank Limited and Another v. Investech Bank Limited and 3 others - Civil Application NAI 258 and 315 of 1999 (unreported):

"The jurisdiction of the court under rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case ..."

When we asked Mr. Njoroge to tell us how the appeal, if successful, would be rendered nugatory if a stay was refused, he said that his client's business would be crippled. But the respondent has a judgment in its favour and that must be taken into consideration. Mr. Nyiha for the respondent was of the view that the intended appeal was not arguable. He also reminded us that the respondent was a multi-national company which would have no difficulty in refunding Shs.2,400,000/- in the event that applicant was successful in its intended appeal.

We have carefully considered the rival contentions of the parties in this matter and while we think that the applicant has an arguable appeal, we are not persuaded that the intended appeal will be rendered nugatory if the order of stay is not granted.

Accordingly and, for the reasons above stated this application, in our view, fails and is ordered dismissed. The costs, thereof shall be in the interested appeal.

Dated and delivered at Nairobi this 7th day of March, 2003.

R.S.C OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL