



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, SHAH & O'KUBASU, J.J.A

CIVIL APPLICATION NO. NAI. 334 OF 2001 (179/01 UR)

BETWEEN

ELIJAH KIPNG'ENO ARAP BII APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

RULING OF THE COURT

This is an application by way of notice of motion brought under rule 5(2) (b) of the Court of Appeal Rules in which the applicant, Elijah Kipngeno Arap Bii, is seeking orders that:-

"1.The respondent its servants and agents be restrained from the selling, putting up for sale either by public auction or private treaty or otherwise, transferring, or in any other way disposing of the suit properties that is to say L.R. No. 631/710 (I.R No. 33961) Kericho, L.R No. 209/9854,

Nairobi L.R No. 20262 (I. R No. 65911) Nairobi and motor vehicle KAH 857Z pending the hearing and determination of an intended Appeal against the Ruling and orders of the Hon. Mr. Justice A.G. Ringera delivered on 28th June, 2001.

2.The costs of and incidental t o this application abide the result of the intended appeal ".

The applicant as the plaintiff filed a suit against the defendant, the respondent herein (Kenya Commercial Bank Ltd) in the superior court seeking judgment for:-

"A. Shs.409,603,135.00

B. Interest thereon from 21st March, 1998.

C. General damages

D. A Declaration that the sacking and removal of the plaintiff was unlawful and wrongful.

E. Aggravated damages

F. An injunction to restrain the Defendant by itself its officers, servants, directors, auctioneers or otherwise howsoever or at all from selling, alienating, possessing or dealing with the suit property to wit L.R. No. 631/710 (I.R No. 39617) Kericho, L.R No. 209/9854, Nairobi, No. NAIROBI/BLOCK 99/122, Nairobi and motor vehicle KAH 857Z. G. Costs of this suit

F. Such further other or consequential relief as this Honourable Court deems fit".

Simultaneously with the filing of that plaint the applicant took out a chamber summons application stated to have been brought under "Order 39, Order 50, Civil Procedure Rules, S.3 Judicature Act, Cap. 8, S.25(8) Judicature Acts 1875-75, Sections 3A and 63, Civil Procedure Act, Cap. 21, Indian Transfer of Property Act, 1882, the inherent powers of the Court and all other enabling powers and provisions of law". In that Chamber Summons application the applicant sought the following orders:-

"A.

B.

C. The Defendant by itself, its officers, agents, servants, directors, auctioneers, or otherwise howsoever BE RESTRAINED FROM selling whether by auction or otherwise dealing with the suit property to wit L.R No. 631/710 (I.R 39617), Kericho, L.R. No. 209/9854 Nairobi L.R No. 20262 (I.R. No. 65911) Nairobi and motor vehicle KAH 857Z or any property of the plaintiff whether in purported exercise of a statutory power of sale or otherwise howsoever until the determination of this suit.

D. The costs of this application be provided for".

That application came up for hearing before Ringera, J. who after considering all that was urged before him dismissed it with costs to the respondent. It is that order of dismissal that provoked this application for an injunction pending the hearing and determination of an intended appeal.

The main suit between the applicant and the respondent is yet to be heard in the superior court. In the plaint filed in the superior court the applicant pleads that he was appointed the General Manager of the respondent bank with effect from 3rd March, 1993 and that the appointment was agreed to be until his retirement upon his sixtieth birthday which was to fall on 24th August, 2009. But then like thunder from the sky, on 20th March, 1998 the Minister for Finance announced through the media that the applicant had been dismissed as the General Manager of the bank, and on the same day the bank entered the said dismissal in its records. The following day the applicant's office was physically taken and a new General Manager instated. So as to put the issue of dismissal beyond any doubt the bank in its letter of 21st April, 1998, informed the applicant that he had been dismissed with effect from 23rd March, 1998. The applicant avers that his dismissal and removal as the bank's General Manager was wrongful and unlawful and hence his claim for special damages in the sum of Kshs.409,003,135/- being the quantified loss of salary and benefits from the date of his removal from office until 24th August, 2009 when he would have honourably retired. In the same plaint the applicant pleaded that he had taken out loans including a car loan facility which were being claimed by the bank in the sum of Kshs.91,339,547.48 as at 1st November, 1999. The said loans were said to have been fully performing and in fact prepaid and were also fully secured for substantially more than the sums due. They carried an agreed interest rate of 8% and 3% per annum pursuant to the staff rates. The applicant further avers that upon his wrongful removal from office the bank claimed the total sums due on the said loans and then unilaterally changed the interest rates from 8% and 3% to 40% and 39% per annum which latter rates were wholly unconscionable and without basis in law. It was further pleaded that the bank had put up the applicant's properties for sale as a chargee and mortgagee demanding a sum of Kshs.91,339,547.48 and the bank had in addition instructed bailiffs to repossess the applicant's Mercedes Benz E. 230 registration number KAH 857Z acquired under the staff loan scheme.

We have endeavoured to set out the salient points of the applicant's case in the superior court which points would be articulated when the main suit comes up for hearing and also what the applicant sought in

his application which was finally dismissed by Ringera, J. What we must emphasize here is that what was before the learned Judge of the superior court was an application for a temporary injunction. The principles which guide the court in dealing with such an application are well settled and are clearly spelt out in the often cited case of Giella v. Cassman Brown & Co. Ltd. {1973} E.A. 358. The applicant must first show he has a prima facie case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.

As was stated at the commencement of this judgment what is before us is an application under rule 5(2) (b) of this Court's Rules. In Trust Bank Limited & Another v. Investech Bank Limited & 3 others - Civil Application Nos. Nai 258 and 315 of 1999 (unreported) this Court made the following

"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 the 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. These are the guiding principles but these principles must be considered against facts and circumstances of each case ".

When the application came up for hearing before us on 5th February, 2002 Mr. K'Owade for the applicant based his arguments on the above stated principles. The thrust of Mr. K'Owade's argument was that the learned Judge of the superior court made findings which were final in nature and hence such findings would prejudice the main suit. In our view Mr. Kowade's submission on the issue of some findings being of final nature has some merit. In dealing with that application the learned Judge in a bid to be thorough appears to have made some very definite and what appear to be conclusive findings on matters which were yet to be determined. However, in the course of his ruling the learned Judge had very correctly directed himself thus:

"The court should also bear in mind that in assessing whether there is a prima facie case or not it is not called upon to and indeed it ought not to pronounce itself definitively on the contested facts and issues of law. I will approach the application before me with that perspective of the matter".

The learned Judge having correctly directed himself as stated above went on to say as follows:

"The applicant having been paid three months salary in lieu of notice I am in agreement with Mr. Kairaria's submission that he is unlikely to get the millions he has pleaded in the plaint. Indeed he will probably be entitled to not a cent over and above what has already been paid to him. In short the applicant's case to the extent it is predicated on a successful action for unlawful dismissal and compensation for loss of salary and benefits upto year 2009 appears to be no more than a pious hope. It is not a case with a probability of success at the trial".

We are of the view that in the face of a contract of an employment which clearly stipulated termination thereof by either party by a three months notice or payment in lieu of such notice, the learned Judge was correct in stating that the applicant's case rested at best on a pious hope. He ought not to have stated that the applicant was not entitled to a cent over and above what he had been paid. Perhaps in saying so (not even one cent) the learned judge overreached himself. But from the circumstances of this application, we think that the applicant's intended appeal is frivolous. Consequently, the said application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 1st day of March, 2002.

J. E. GICHERU

.....

JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR