



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.)
CIVIL APPLICATION NO. NAI. 95 OF 2001 (UR.56/2001)**

BETWEEN

NAIROBI CITY COUNCIL APPLICANT

AND

QUARDOBA ENTERPRISES LIMITED RESPONDENT

**(An application for stay of execution in an intended
Appeal from the Judgment of the High Court of Kenya
at Nairobi (Justice Mitey) dated 13th March, 2001**

in

H.C.C.C. NO. 1268 OF 1999)

RULING OF THE COURT

This is an application by way of Notice of Motion brought under Rules 5(2)(b) and 42 of the Court of Appeal Rules in which the applicant, Nairobi City Council, is seeking the following orders:

"1.THAT this Honourable Court be pleased to make an order staying the execution of the Decree in the Judgment of High Court of Kenya Nairobi Civil Case No. 1268 of 1999 delivered on 13th March, 2001 against the Applicant pending the hearing and determination of the Applicant's intended Appeal to this Court.

2.THAT such other and/orders be made as this Honourable Court might deem fit and just in the unique circumstances of this matter while pending the hearing and determination of the Applicant's intended appeal.

3.THAT the costs of this application be provided for."

The application is brought on the following grounds:

"1.THAT the Applicant's Intended Appeal raises very substantial points of facts and law in that:

(i)The Honourable Judge erred in law and in facts in granting reliefs which were not specifically stated in the Amended Plaintiff.

(ii)The Honourable Judge erred in law and in facts in awarding damages not specifically

pleaded and strictly proved.

(iii)The Honourable Judge erred in law and in facts in exhibiting open bias against the Applicant in the judgment.

(iv)The Honourable Judge erred in law and in facts in awarding damages based on documents issued to a third party.

(v)The Honourable Judge erred in law and in facts by failing to consider that the Amended Plaintiff contravened all the rules of pleadings.

(vi)The Honourable Judge erred in law and in facts by failing to make a distinction between general and special damages."

The judgment which the applicant is asking this Court to order a stay of, was delivered by Mitey J on 13th March, 2001. The facts of this dispute are rather unique as stated in the Notice of Motion. The respondent, Quardoba Enterprises (the plaintiff in the superior court), operated a petroleum distribution business along 1st Avenue Eastleigh within Nairobi City. The said business was operated by dint of licences issued pursuant to the provisions of the Petroleum Act, the Local Government Act, and Trade Licensing Act. It should be pointed out that the licence under the Local Government Act was issued to the respondent by the Nairobi City Council (the defendant in the superior court). On 24th June, 1999 the defendant gave the plaintiff 48 hours notice to pull down the premises on which the plaintiff operated its business. In a bid to protect itself from looming danger the plaintiff quickly moved to the High Court on 25th June, 1999 and obtained an order restraining the defendant from demolishing the premises. The order was served on the defendant but, despite such service, the defendant's agents moved to the premises and carried out the demolition exercise which led to substantial loss of the plaintiff's property on the premises. That was the beginning of the problems that followed. Upon an application by the plaintiff four employees of the defendant were committed to civil jail for contempt of that order.

The plaintiff was granted leave to amend its earlier plaint so as to include a claim for damages as a result of demolition exercise. Things moved very fast since the plaintiff applied for striking out of the defence and interlocutory judgment. The defence was struck out and interlocutory judgment entered. The suit was then set down for formal proof.

In the Amended Plaint the plaintiff prayed for injunction to restrain the defendant from closing the plaintiff's business, an order to permit the plaintiff to continue its business on the premises, damages and costs. After hearing the plaintiff's evidence, Mitey J awarded the plaintiff various sums on different heads and finally concluded his judgment thus:

"The defendant's action of demolishing the plaintiff's premises on the face of a court order was callous, insensitive, reckless and disrespectful. And in spite of the history of the matter the defendant has done nothing to settle this matter with the plaintiff. This in my view is a further show of defiance. As a mark of this court's displeasure with the defendants conduct I award the plaintiff Shs.10 million as exemplary damages.

The total damages awarded to the plaintiff work out to Shs.30,096,100.00 I enter final judgment for the plaintiff in that sum. The defendant will pay the costs of this suit plus interest on both damages and costs at court rates."

Being aggrieved by the said judgment the defendant, Nairobi City Council (the applicant herein) has instructed its counsel to appeal against the entire decision and to show its seriousness to appeal, a Notice of Appeal was lodged on 14th March 2001. But before the intended appeal is heard the applicant is asking for a stay as, in its view, the intended appeal raises "very substantial points of facts and law".

When this application for stay came up for hearing on 4th April 2001 Mr. Owino for the respondent conceded that the applicant had an arguable appeal. He however, contended that the applicant had not

shown that the appeal would be rendered nugatory if the application was not allowed. It was Mr. Owino's view that his client was entitled to enjoy the fruit of its judgment.

In prosecuting this application Mr. Kahari for the applicant pointed out that the award was for Shs.30 million and that if this amount was paid out then this would paralyse the operations of Nairobi City Council. It was also argued that the respondent was no longer in business and so it may not be in a position to repay the money in the event of the intended appeal succeeding.

In this application we are 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 Applications 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 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 ...".

In the present application it has been conceded by counsel for the respondent that the applicant has an arguable appeal hence we would not dwell on that issue. All we can say is that the applicant's intended appeal is not frivolous. What about the nugatory aspect? Mr. Kahari for the applicant was of the view that if the decretal amount was paid to the respondent it might be difficult to recover the same in event of a successful appeal since the respondent was no longer in business. This is rather interesting because, on the face of it, the respondent has been rendered helpless due to the conduct of the applicant's agents who demolished the business premises of the respondent. We were then told that if a stay is not granted the operations of the applicant might be paralysed since payment of Shs.30 million as ordered by the superior court's judgment would cripple the applicant financially.

We have a delicate matter in our hands. Here we have the respondent which has obtained a judgment in the sum of slightly over Shs.30 million and on the other end of the scale is a judgment debtor being the City Council of Nairobi pleading that we should stay the execution of that judgment since such execution would render it financially crippled and hence paralyse its operations. We have given a brief summary of what led to that judgment and we do not wish to revisit those facts. This being an application for a stay, we would not wish to say much lest we touch on the merits of the intended appeal. In *Butt v. The Rent Restriction Tribunal* Civil Appeal No. NAI. 6 of 1979 (unreported) Madan JA (as he then was) said:

"It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory, per Brett L.J. in Wilson v. Church (N.2) 12 Ch.D. (1579) 454 at p.459."

We respectfully agree with the above observation. In the present application the decretal amount is slightly over Shs.30 million. The applicant fears that its operations might be brought to a halt if it were to pay the said amount to the respondent. We have been told that the respondent is no longer in business and hence it might find it difficult to repay this amount in event of intended appeal being successful. Bearing in mind all that has been urged before us and weighing carefully all the conflicting interests in this matter, we are of the view that the best order that could serve interests of justice would be a conditional stay of execution. Hence, it is hereby ordered that the applicant's application for stay is granted on condition that the applicant deposits Shs.10 million within 30 days of this ruling in an interest bearing account in a financial institution in the joint names of the Advocates for the applicant and the respondent. Costs of this application shall be in the intended appeal. These shall be our orders.

Dated and delivered at Nairobi this 27th day of April, 2001.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

S. E. O. BOSIRE
.....
JUDGE OF APPEAL

E. O. O'KUBASU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.