IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, SHAH & BOSIRE, JJ.A.)
CIVIL APPLICATION NO. NAI. 325 OF 2000 (159/2000 UR)

BETWEEN

VIPIN MAGANLAL SHAH ..... APPLICANT

AND

INVESTMENT AND MORTGAGES BANK LTD ..... 1ST RESPONDENT

NAKUMATT INVESTMENTS LIMITED..... 2ND RESPONDENT

ATULKUMAR MAGANLAL SHAH .....3RD RESPONDENT

(An application for a stay of execution of the order of the High Court of Kenya at Milimani Commercial Court, Nairobi (Mbaluto, J.) given on the 20th September, 2000, in H.C.C.C. NO. 782 OF 2000 MILIMANI COMMERCIAL COURT and for stay of proceedings in the suit)
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RULING OF BOSIRE, J.A.

This is a motion under rule 5(2)(b) of the Court of Appeal Rules for orders, firstly, that the execution of the orders of the superior court (Mbaluto, J.) made on 20th September, 2000, in its Civil Case No. 782 of 2000 be stayed pending determination of an intended appeal to this Court against the said orders, and secondly, that any further proceedings in the said suit be stayed pending determination of the intended appeal.

Vipin Maganlal Shah, (the applicant), is named the 2nd defendant in the aforesaid suit, with Nakumatt Investments Limited and Atulkumar Maganlal Shah (the 2nd and 3rd respondents herein) as 1st and 3rd defendants respectively, and Investments and Mortgages Bank Limited, the first respondent in the motion, as the plaintiff. The first respondent's suit is for the recovery of the balance of some money it allegedly lent to the 2nd respondent together with accrued interest.

The applicant and the 3rd respondent allegedly guaranteed the repayment of the loan by the 2nd respondent. The suit was commenced by a plaint which the applicant contends was unsigned and undated as at the 8th June, 2000, when he took out a chamber summons under section 3A of the Civil Procedure Act, and Order VI rule 14 of the Civil Procedure Rules, for orders, inter alia, that the suit be struck out on, amongst other grounds, that the plaint was not signed and dated as required by Order VI rule 14, above. Order VI Rule 1, above, provides that:

"Every pleading shall be signed by an advocate, or recognized agent (as defined by Order III, rule

2), or by the party if he sues or defends in person."

In his affidavit in support of the application to strike out the first respondent's suit, the applicant deponed, inter alia, that the plaint which originated the suit was not signed as required by rule 14, above. He also deposes that a signed plaint, which was later found on the superior court file, was not there as at the date the application to strike out the plaint was filed. To this latter averment the 1st respondent's Deputy General Manager has sworn a replying affidavit to say that the signed plaint was filed at the same time with the unsigned copy and was not sneaked in as was being implied by the applicant. Besides, he deponed, the applicant has already filed a written statement of defence to it.

In an application under rule 5(2)(b) of the Court of Appeal rules, it is well established that two broad principles guide the Court in coming to a decision. The first of those is that to succeed the applicant must show that his appeal or intended appeal is not frivolous, or put another way, that it is arguable. Secondly, that unless he is granted a stay or an injunction as the case may be, his intended appeal or appeal if successful will be rendered nugatory (see Kenindia Assurance Company Limited v. Patrick Muturi, Civil Application No. Nai. 107 of 1993 (unreported)). It is also trite law that the court exercises discretionary jurisdiction in applications under the said rule. The discretion is judicial which then means that like all judicial discretions it must be exercised on the basis of evidence and sound legal principles.

Mrs. Ngetho for the applicant submitted before us that a failure to sign and date pleadings, more particularly a plaint, is fatal to the action. Her submissions were wholly based on the wording of Order VI rule 14 (supra).She urged the view that there was material on the court file to show that at the time the applicant took out his chamber summons seeking orders striking out the 1st respondent's suit, there was no signed plaint on record. She referred us to page 40 of the record of the application which is a copy of the signed plaint and which at the bottom of it has the following remarks:

> "Pending application dated 30/5/2000 before Court coming for hearing on 15.6.2000. D.O.K."

The said plaint is also crossed. The crossing and the said remarks were attributed to the Deputy Registrar of the superior court who was later asked by Mbaluto J to swear an affidavit to explain the basis of his remarks. His affidavit is not part of the documents on record, but it was common ground and the decision appealed from is explicit on that, that the Deputy Registrar deposed in his affidavit that the signed plaint did not originate the suit. I hasten to add that the trial Judge did not believe him on that.

So the position as I understand it is that there is a dispute as to whether or not the signed plaint is the one which instituted the 1st respondent's suit. The learned trial Judge held that it originated the suit inspite of the fact that the Deputy Registrar of that court swore an affidavit to the contrary. The Deputy Registrar having not been crossexamined on his affidavit, it is arguable whether there was any proper basis for disbelieving him.

Besides authorities are in conflict as to the legal effect of an unsigned plaint. Mr. Regeru for the 1st respondent cited English and Indian authorities in an attempt to show that, assuming that the 1st respondent's plaint was unsigned, that was merely an irregularity which is curable by the court asking the plaintiff to sign the same. I have read those authorities and in particular Fick and Fick Ltd. v. Assimakis [1958] 2 ALL ER. 182; Halbury's Laws of England 4th Edition, Vol.36, and the Indian Code of Civil Procedure, by Mulla P.502 et Seq; and in my view the authorities are conflicting on that issue. That being the case this court at the hearing of the intended appeal may or may not agree with the applicant that a failure to sign and date a plaint is fatal to the suit it originates. In view of the conclusion I have come to, above, it is my view that the applicant's intended appeal is arguable. It is also arguable whether because the applicant has already filed defence his said action cures the omission to sign the plaint as submitted by Mr. Regeru.

As to whether, unless a stay is granted the intended appeal, if successful, will be rendered nugatory, I say this. The 1st respondent's suit in the superior court is still pending. There is nothing to stop it from setting the suit down for hearing. If the suit proceeds to hearing the applicant will be compelled to go on

with it. While any expenses incurred as a result are compensatable, the inconvenience which may arise might not be fully compensated by an award of costs or damages. Besides if the hearing proceeds at this stage, no doubt the applicant might be called upon to give evidence and thus disclose the evidence he has against the claim. In the event of his intended appeal being successful he would be disadvantaged as the 1st respondent would be in possession of that evidence and would most probably use it to seal any loopholes in its case against him to his disadvantage.

As for stay of the order of the superior court, the prayer has been overtaken by events as the order has been acted upon.

In the result I would grant a stay of the proceedings in the aforesaid suit pending the hearing and final determination of the applicant's intended appeal. The costs of the motion shall abide the outcome of the intended appeal.

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

S. E. O. BOSIRE
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JUDGE OF APPEAL