

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, BOSIRE & O'KUBASU, J.J.A)
CIVIL APPLICATION NO. NAI 332 OF 2001 (177/200 UR)
BETWEEN

BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED APPLICANT
AND
SAMUEL WAIGANJO THUO T/A WAIGANJO & ASSOCIATES RESPONDENT

An application for stay of execution in an intended
appeal from an order of the High Court of Kenya,
Milimani Commercial Courts at Nairobi (Hon.
Commissioner of Assize Ransley) dated 12th
September, 2001

in
H.C.C.C NO. 161 of 2000)

RULING OF THE COURT

The applicant Balozi Housing Co-operative Society Limited filed an application by way of Notice of Motion brought under Rule 5(2) (b) of the Court of Appeal Rules which application was filed in this Court on 27th September, 2001. The applicant was unhappy with the order of the superior court to the effect that the applicant should deposit Shs.20 million within 21 days failing which judgment would be entered in favour of the respondent.

When the application came up for hearing yesterday (4th October, 2001) Mr. Kembi Gitura for the respondent raised a preliminary objection to the effect that the applicant should not be heard since the applicant had improperly proceeded ex parte in the High Court where it obtained an extension of time within which to comply with the aforesaid order.

In dealing with this preliminary objection the starting point is the ruling of the High Court. In his ruling the learned Commissioner of Assize (Mr. Ransley) concluded thus:-

"I think this is a case where conditional leave to defend should be given. I propose that the Defendant be and is hereby given conditional leave to defend on depositing with the Advocates of the parties in an interest earning account with a reputable bank a sum of Shs.20 million within 21 days from today. Failing which the plaintiff will have judgment as prayed".

The ruling was delivered on 12th September, 2001 so that the time within which to deposit the said sum of Shs.20 million expired on 2nd October, 2001. The applicant failed to comply with that requirement and instead filed an ex parte application before the High Court where it obtained an extension of time under rule 26 of the Civil Procedure Rules under which we think the applicant proceeded in the High Court in seeking and obtaining extension of time provides:-

"2.No motion shall be made without notice to the parties affected thereby. Provided however that the Court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any as to the court seems just, and any party affected by such order may move to set it aside".

As already stated the ruling of the High Court was delivered on 12th September, 2001 and this application was not filed until 27th September, 2001. There is no explanation as to the delay in either seeking the extension or taking out the present motion. The advocates for both parties practice in Nairobi. Indeed, we

were told that the applicant's counsel had telephoned the respondent's counsel seeking a consent for extension of time which request was promptly rejected by the respondent's counsel. It was therefore improper for the applicant's counsel to go behind the respondent's counsel's back and make an ex parte application for extension of time. In our view, that application in the High Court should have been served on the respondent's counsel. We think Mr. Kembi Gitura is right in raising the preliminary objection. We think that in the circumstances the applicant is undeserving of a hearing on a priority basis, and therefore decline to hear the applicant's Notice of Motion. It should be relisted in the normal manner.

Dated and delivered at Nairobi this 5th day of October, 2001.

R. O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR