



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 39 of 2007

DHARMESH KUMAR RAMJI VIRPAL SHAHAPPLICANT

AND

INVESTMENTS & MORTGAGE BANK LIMITED 1ST RESPONDENT

HARIT SHETH 2ND RESPONDENT

(An application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling of the High Court of Kenya Milimani Commercial Courts (Azangalala, J.) dated 17th November, 2006 in H.C.C.C. NO. 2335 OF 1997)

RULING OF THE COURT

This application by the applicant, the 3rd plaintiff in the suit, made under *rule 5 (2) (b)* of the Rules of this Court, seeks an order of stay of any further proceedings in the superior court in HCCC No. 2335 of 1997 pending the hearing and determination of his intended appeal against the ruling and orders of Azangalala J made on 17th November, 2006.

By a Notice of Motion expressed to be brought under the provisions of *Order 10 Rule 13* of the Civil Procedure Rules, the Evidence Act and the Inherent Powers of the Court the applicant sought in the superior court an order that the respondents do produce under oath before the next hearing date the documents listed below: -

- 1. Annual Report and Audited Accounts for the 1st respondent for the years 1994, 1995, 1996 and 1997.***
- 2. Central Bank Inspection Report on the 1st respondent for the years 1994, 1995, 1996 and 1997.***
- 3. Terms and conditions to the Loan application.***
- 4. Particulars of all charges and securities pledged to the 1st respondent to cover the 4th respondent's loan and in particular for L.R. No. 209/66/44 and L.R. No. 209/8571 Riverside Drive.***
- 5. 4th respondent's Statement of Account from inception to 31st May, 1997.***

The learned Judge in a reserved ruling dismissed the application on the grounds, *inter alia*, that it was being made belatedly after the applicant had closed his case and when the 1st respondent had commenced its case and that, moreover, there was no prejudice against the applicant if the order to produce was not granted.

The applicant being dissatisfied with the said decision lodged a notice of appeal. Mr. Gachie Mwanza for the applicant submits before us that the documents sought to be produced were materially relevant to the issues raised by the parties in the suit; and more so, by the applicant and that the learned Judge had erred in ignoring the fact that prejudice would naturally follow if a party to a litigation is denied the chance to act as it intends so long as it was within the confines of the law. Thus, the applicant contends that he has an arguable appeal and that the same will be rendered nugatory if stay is withheld.

We have perused the draft Memorandum of Appeal and also considered the submissions made to us in this regard by all counsel and we are clearly satisfied that the applicant has successfully discharged the onus upon him that his intended appeal is arguable and cannot be described as frivolous. But, he has failed to discharge the onus that the intended appeal would be rendered nugatory unless the stay is granted.

In such an application as this the legal position has been firmly established in **Kenya Commercial Bank Ltd. vs. Benjoh Amalgamated Ltd** Civil Application No. Nai. 50 of 2001 (unreported) and **Silverstein vs. Chesoni** [2002] I KLR 867. In the *Chesoni* case, the Court proceeded as follows: -

“..... What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

Our decision in this matter, therefore, must follow the principles already laid down by the court.

However, we are informed from the Bar that the trial in the superior court has been concluded and that the time for submissions has already been set. This being the case, we would think that any other complaints that may be raised by the applicant as regards the conduct of the proceedings or otherwise can be addressed by way of an appeal against the superior court’s final judgment.

Both Mr. Ngunjiri and Mr. Gichuhi for the respondents did raise preliminary objections on the validity of the application on the ground that at the time the Notice of Motion was filed, the counsel for the applicant did not have capacity to do so since he had not come on record for the applicant in the superior court and that the Motion before us offended **Order III Rule 6** of the **Civil Procedure Rules** and thus incompetent.

But, we did not resolve this issue in the first instance as we preferred to dispose of the entire application. As the application is not for granting, we see no reason to decide on the preliminary objection.

This application must fail and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 30th day of March, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR