Kenya Hotel Properties Limited v Willesden Investments Limited (Civil Application 322 of 2006) [2007] KECA 401 (KLR) (9 March 2007) (Ruling)

KENYA HOTEL PROPERTIES LIMITED v WILLESDEN INVESTMENTS LIMITED [2007] eKLR

Neutral citation: [2007] KECA 401 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 322 OF 2006

PK TUNOI, PN WAKI & JWO OTIENO, JJA

MARCH 9, 2007

BETWEEN

KENYA HOTEL PROPERTIES LIMITED ..... APPLICANT

AND

WILLESDEN INVESTMENTS LIMITED ..... RESPONDENT

((Application for stay of execution pending the filing, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mutungi, J) dated 14th December, 2006 in H.C.C.C No. 367 of 2000)

Principles to be considered before granting stay of execution in an application for stay.

The Court of Appeal set out the principles that it considered in determining an application for stay of execution. The court held that an applicant seeking a stay of execution under rule 5(2)(b) of the Court of Appeal Rules must satisfy two established principles; that the intended appeal was arguable and not frivolous and that the appeal would be rendered nugatory if the stay was not granted.

Reported by Diana Mutunga

Civil Practice and Procedure *– orders – stay orders - what were the main principles to be considered before granting stay of execution in an application for stay - Court of Appeal Rules, rule 5(2)(b).*

Brief facts

The applicant filed a notice of motion under rule 5(2)(b) of the Court of Appeal Rules, seeking a stay of execution pending the determination of an intended appeal against the decision of the High Court. The application was premised on the grounds that; a notice of appeal had been filed; the applicant had requested typed proceedings; the intended appeal was arguable with high chances of success; the appeal would be rendered nugatory if a stay was not granted; and the applicant would suffer substantial loss if execution proceeded.

In the High Court, the respondent had sued the applicant for trespass, alleging unauthorized occupation and use of the respondent's leasehold property L.R. No. 209/12748 from 1994 to 1997. The respondent sought mesne profits amounting to Ksh.54,902,400/=, general damages for trespass, damages for loss of business opportunity, special damages, costs, and interest. The High Court dismissed the applicant's defense on liability and awarded damages to the respondent. The present application was filed to stay the execution of that judgment.

Issues

What were the principles to be considered before granting stay of execution in an application for stay?

Held

1. The court held that an applicant seeking a stay of execution under rule 5(2)(b) of the Court of Appeal Rules must satisfy two established principles: first, that the intended appeal was arguable and not frivolous; and second, that the appeal would be rendered nugatory if the stay was not granted.
2. The court determined that the applicant's intended appeal was arguable as it raised significant issues, including whether the trial judge had improperly assessed damages based on his own observations at the *locus in quo*, whether it was proper to award mesne profits alongside loss of business opportunity, and whether interest on mesne profits could be awarded from a date earlier than the filing of the suit. These questions, the court noted, warranted full ventilation in the intended appeal.
3. On the second principle, the court recognized that while monetary decrees generally did not render appeals nugatory if the respondent was financially capable of refunding the decretal amount, undue hardship to the applicant could create an exception. The court considered the substantial amount involved—over Ksh.150,000,000, including interest—and found that compelling the applicant to pay the entire sum could adversely affect its business operations, potentially rendering any success in the appeal a pyrrhic victory. The court also noted that while the respondent, having succeeded in the lower court, was entitled to enjoy the fruits of its judgment, these interests had to be balanced against ensuring that the applicant's business did not collapse before the determination of the appeal.
4. In light of these considerations, the court allowed the application for a stay of execution, subject to the applicant providing a bank or insurance guarantee for the sum of Ksh.70,902,400/= within thirty (30) days from the date of the ruling. That approach ensured that both parties' interests were safeguarded pending the determination of the appeal.

Application allowed.

Orders

i. *The notice of motion was allowed subject to the applicant providing either bank guarantee or insurance guarantee for the amount of Ksh.70,902,400/= within thirty (30) days of the ruling.*
ii. *There was stay of execution of the judgment and decree by the superior court in High Court Civil Case No. 367 of 2000 and dated 14th December 2006 pending the lodging, hearing and determination of the intended appeal.*
iii. *There would be unconditional stay for thirty (30) days from the date hereof to enable the applicant to comply with the above order.*
iv. *Costs were awarded to the respondent.*

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. We have before us an application by way of notice of motion brought under rule 5(2) (b) of the Court of Appeal Rules (the "Rules") dated 20th December 2006 seeking three orders as follows:

> " 1. That the application be certified urgent and the same be heard on priority basis.
>
> 2. That the execution of the judgment and decree by the Nairobi High Court in High Court Civil Suit No. 362 of 2000 and dated 14th December 2006 be stayed pending the lodging, hearing and determination of the intended appeal against the judgment and decree of (Hon. Justice Onesmus K. Mutungi) delivered on 14th December 2006.
>
> 3. That the costs of this application be provided for."

2. The application is based on five grounds which are:

> " (i) That the applicant intends to appeal against the decision of the superior court and have already filed a notice of appeal in accordance with rule 74 of the Court of Appeal Rules.
>
> (ii) That the applicant has requested for the typed proceedings for purposes of lodging the record of appeal.
>
> (iii) That the applicant has an arguable appeal with high chances of success.
>
> (iv) That the intended appeal would be rendered nugatory unless stay of execution is granted as prayed herein.
>
> (v) That if the execution proceeds, the appellant will suffer substantial loss."

3. The application is supported by an affidavit sworn by Roger Kacou, a director of the applicant and there is a draft memorandum of appeal annexed as well. The application is opposed. Both counsel addressed us at length on the merits and demerits of the application.

4. As we have stated, the application is premised on rule 5(2) (b) of the Rules of this Court. The guiding principles that the courts have applied consistently when considering such an application are now well settled and these are that an applicant coming to court under that rule must demonstrate to the satisfaction of the court, first that the appeal or intended appeal is arguable, in other words, that the appeal or intended appeal is not a frivolous appeal. Secondly, the applicant must show that should the appeal or intended appeal succeed, the outcome would be rendered nugatory were the application to be refused. In the case of Reliance Bank Limited (in liquidation) vs. Norlake Investments Limited – Civil Application No. Nai. 93 of 2002 to which we were referred by Mr. Katiku, the learned counsel for the applicant, this Court stated:

> " Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the supplicant must satisfy the court on two matters, namely:
>
> "1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,

2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction".

5. In a plaint dated 25th February 2000, filed in the superior court on 1st March 2000, the respondent, Willesden Investments Ltd. (respondent) sued the applicant for trespass claiming that it is the leasehold proprietor of a property known as L.R. No. 209/12748 separated from the applicant's property by a road. In the year 1994, the applicant trespassed on to the suit property, without its consent and took possession of the property, fencing it off and unlawfully putting it to its own use till February 1997 when the applicant vacated the suit land after protracted exchange of correspondence. As a result of the trespass, the respondent claimed it was deprived of the use and enjoyment of the property from January 1994 to February 1998 both months inclusive and it claimed mesne profits for that period in the sum of Ksh.54,902,400/= on grounds that the suit land had 43 parking bays which were being used for parking cars at the rate of Ksh.70.00/= per car, per hour. It also claimed general damages for trespass for the same period; damages for loss of business opportunity as it had successfully negotiated a loan with IFC for construction of a hotel on the suit property but lost that opportunity as the applicant was at the relevant time in possession of the suit property. It further claimed special damages, which were particularized, costs and interest on the damages demanded.

6. The applicant filed a defence to the claim which was later amended. In the amended defence, the applicant averred that the plaint was scandalous, frivolous and vexatious, or that it was an abuse of the court process because it was time barred pursuant to the provisions of section 4(2) of the Limitation of Action Act Cap 22 Laws of Kenya. It also denied being the occupier of the suit property and that in or about 1994 it wrongly entered into the respondent's suit property and took possession of the same. Further, it stated in the alternative at paragraph 7 of the amended defence that at all material times it occupied the property as a tenant on a lease from the City Council of Nairobi in the honest belief that the City Council of Nairobi was the lawful owner thereof and thus entitled to receive rentals from it till July 1997, when the applicant vacated the suit property; that there was at all material times an easement over the property and that any title created in favour of the respondent was subject to the lease and would not extinguish that preexisting lease. Other matters were raised in defence which we do not find relevant here.

7. After hearing the parties, the learned Judge of the superior court (Mutungi J.) dismissed the defence case on liability and awarded damages to the respondent. In doing so, the learned Judge stated, inter alia, as follows:

8. In the result, I hold that the plaintiff has proved its claim on the balance of probabilities. Accordingly, I enter judgment in favour of the plaintiff, and against the defendant. I award the following to the plaintiff, and against the defendant:-

   (a) Mesne profits from January 1994 to February 1998, both months inclusive, in the sum of Ksh.54,902, 400/= with interest at the court rates from January 1994 to payment in full.

   (b) General damages for trespass for Ksh.10,000,000 with interest from the date of this judgment, at court rates till payment in full.

   (c) Ksh.6,000,000 as damages for loss of business opportunity, with interest at court rates, from the date of this judgment till payment in full.

   (d) Costs of this suit, with interest, at court rates, from the date of filing of the suit till payment in full."

9. It is that judgment that the applicant intends to appeal against and hence this application of stay pending the determination of the intended appeal.

10. Mr. Katiku, learned counsel for the applicant, in his address urged us to accept that the intended appeal is arguable since the applicant was not in possession of the suit property at the relevant time as evidence had showed that a different party, namely Intercontinental Hotel, was the one in actual possession having leased the land from City Council and the applicant never occupied the suit property. It leased the property to Intercontinental Hotel and the lease was produced in evidence. He also attacked the damages awarded by the learned Judge claiming that some of the damages awarded such as Ksh.54,902,400/= though pleaded, was never proved by way of evidence as is required by law. Further, he submitted that the award of Ksh.54,902,400/= was based on Ksh.70/= charge per hour whereas the City Council charge at that time was Sh.70/= per day and finally that the award of Ksh.10,000,000/= and Ksh.6,000,000/= over and above the award for mesne profits was not fair. He submitted that these grounds and others demonstrated that the intended appeal was arguable. On whether or not the results of the appeal, were it to succeed, would be rendered nugatory if the application was not allowed, he relied on the case of Reliance Bank Limited (in liquidation) vs. Norlake Investments Limited (supra) and argued that the amount involved in this case was large by any standards. If the applicant was compelled to pay it, its business and financial position could seriously be affected such that even if it were to succeed in appeal, the victory would be no more than a pyrrhic victory.

11. Mr. Nowrojee, learned counsel for the respondent, maintained that there would be no arguable appeal as the amended defence made it clear that the applicant was the one in occupation and it paid rents to the City Council till July 1997 when it vacated the property. Further, if the City Council or Intercontinental Hotel were in any way involved, they should have been made party(es) by the applicant. As to the damages, he maintained that the damages awarded of Ksh.54,902,400 were proved and referred us to parts of the record that buttress his submission. In any case, he submitted, the applicant had not shown any wrong basis upon which the damages were assessed and given by the learned Judge. On the nugatory aspect of the case, Mr. Nowrojee distinguished the Reliance Case (supra) stating that in the Reliance case, the applicant had set out its financial position and thus made it possible for the court to consider that it would run into financial difficulties if it were to be ordered to pay the amount that was ordered by the superior court. That, he stated, was not the case in the application before us.

12. We have considered the application with the legal principles applicable when considering an application brought under rule 5(2) (b) which we have set out hereinabove in mind. We have considered the record, the arguments by learned counsel for both parties, the affidavit in support of the application and the judgment of the learned Judge of the superior court. In our view, whether the Judge should have assessed damages at the rate of Ksh.70/= per hour per car for the whole period from January 1994 to February 1998, both months inclusive, without giving allowance to the fact that there could be other occasions or days when some car parking slots may not be used and whether the charges were proved to be Ksh.70/= per hour or per day plus the appropriateness or otherwise of the learned Judge relying on his own observations when he went to visit the locus in quo and treating the observations as evidence thereby making him a witness in the case are matters that we feel will need to be ventilated fully in the intended appeal. Further, whether it was proper to award mesne profits as well as profits for loss of opportunity in business cannot be said to be frivolous matters. Finally, (as we need not mention in this ruling all aspects that we feel demonstrate that the intended appeal is arguable) there is the question of when the interest on the mesne profits was to start. We note that the plaint did not specifically seek interest from January 1994, before the case was filed. We note also that in law, unless reasons are given, interest should normally be awarded from the date the suit was filed. These are matters that will need to

be considered in the intended appeal. We think we have said enough to show that we feel the intended appeal is arguable.

13. Would the success of the intended appeal, if it succeeds, at all be rendered nugatory if this application is refused at this juncture? That is the next matter for us to consider. The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all. Hence the cases such as of Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd. – Civil Application No. Nai. 358 of 1999 (unreported) where it was held by this Court that if an applicant is compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable. In that case, this court considered several cases and stated:

14. Mr. Gatonye for the respondent Bank argued that if Mr. Oraro were to succeed in the appeal the respondent bank was sound enough to be able to refund the sum in question. Ordinarily that is the principle on which this Court acts but recent rulings of this Court suggest that in dealing with this limb of the application the court ought to weigh the claims of both sides. This Court in the case of Clarkson (Insurance Brokers) Limited vs. South Coast Fitness Centre, - Civil Application No. Nai. 204 of 1995 (unreported) stated that:

> "the amount involved is, by any standard a large one and we think we ought to secure the position of the applicant in this matter."

15. In the case of Trust Bank Limited & another vs. Investech Bank Limited and 3 others – Civil Application Nos. Nai. 258 & 315 of 1999 (unreported) this Court said:

> On the second limb of the applications, namely, whether unless a stay is granted, the applicant's intended appeals will be rendered nugatory, the decree upon which a stay of execution is sought being a money decree, and since the respondent in our view, is a bank with sound financial base, we do not think the intended appeals, if successful, would be rendered nugatory unless the stay prayed for is granted. "
>
> We must weigh the claims of both sides. If M/s Oraro & Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the respondent bank is kept out of the sum of Shs.10,000,000 it would not be affected. This is in our view, in this case, the position, when we are considering the situation. The balance of convenience overall favours the applicants."

16. It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind. We do agree with Mr. Nowrojee that to convince the Court to follow the decision in Reliance Bank case (supra), the applicant needs to do more than merely saying that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to "put on the table" its financial position and how the same would be affected. Of course, we do not need to emphasize that this approach of weighing position of parties as was done in Oraro's case (supra) is only available in cases where the decretal amount is acceptably large in the circumstances of the case.

17. In the case before us, the applicant is in business. The amount it is required to pay to the respondent is over Ksh.150,000,000 when the interest is considered as the interest on Ksh.54,902,400 was ordered to be paid from January 1994. Interest on other awards were to start from the date of judgment which was 14th December 2006. That amount is by any standards a large amount. The applicant states at paragraph 13 of its supporting affidavit that if it is compelled to pay that money its business will be adversely disabled, and that it stands to suffer irreparably as it may be forced to dispose of its key assets to satisfy the decree and it says the respondent may not be able to refund the money once paid to it. Although Mr. Nowrojee rightly says that this was not enough, the respondent did not challenge those assertions by way of a replying affidavit and so the assertions, deficient as they are, still stand. On the other hand, the respondent, having succeeded in its case before the superior court, should also not be denied the fruits of its sweet victory in that court. Doing the best in the circumstances, what commends itself to us is an approach that would ensure that the applicant's business is not seriously affected while at the same time the respondent is also assured that its money will be there for it should the intended appeal not succeed. That will make it certain also to the applicant that if it succeeds in its intended appeal, it will not have done so after its business will have fizzled out and thus the victory will have been rendered nugatory.

18. In the light of the above, we order that the notice of motion is allowed subject to the applicant providing either bank guarantee or insurance guarantee for the amount of Ksh.70,902,400/= within thirty (30) days of the date hereof. Thus, there shall be stay of execution of the judgment and decree by the superior court in High Court Civil Case No. 367 of 2000 and dated 14th December 2006 pending the lodging, hearing and determination of the intended appeal upon condition that the applicant do within thirty (30) days from the date hereof provide a Bank Guarantee or Insurance Guarantee for the payment to the respondent of the sum of Ksh.70,902,400/= failing which the application will stand dismissed. There shall be unconditional stay for thirty (30) days from the date hereof to enable the applicant to comply with the above order. Costs to the respondent.

19. Order accordingly.

DELIVERED AND DATED AT NAIROBI THIS 9TH DAY OF MARCH, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

Deputy Registrar