



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NO.137 OF 2016 (UR.107/2016)

BETWEEN

**OMAR FAROUK OSMAN.....
.....APPLICANT**

AND

**PINNACLE (K) TRAVELS & SAFARIS LIMITED.....1ST
RESPONDENT**

MOHAMMED TATAWI

**ALEXANDEDRE NIYUNGEKO ANTENEH
ARAM**

MAUREEN MUDE

JANE UWIMANA

(Sued as Officials of EASTERN AFRICAN

**JOURNALISTS ASSOCIATION (EAJA).....2ND
RESPONDENT**

(A 5(2)(b) application seeking stay of proceedings and of the High Court of Kenya at Nairobi (Olaga Sewe, J.), dated 20th May, 2016

in

H.C.C.C. No.538 of 2015)

RULING OF THE COURT

[1] By a notice of motion dated 27th May, 2016 lodged on 31st May, 2016, **Omar Farouk Osman**, the applicant seeks orders under section 3A of the Civil Procedure Act and Rule 5(2)(b) of the Court of Appeal Rules, for *inter alia*, orders of stay of: proceedings in High Court Civil Case No.528 of 2015;

orders issued by the High Court on 3rd May, 2016, 29th February, 2016 and 30th October, 2015; pending the hearing and determination of his appeal that he has filed in this Court.

[2] According to the notice of appeal dated 23rd May, 2016 lodged on 25th May, 2016, the applicant is dissatisfied with the decision of the High Court (Sewe, J.), delivered on 20th May, 2016 and intends to appeal against the whole of the said decision. That ruling of the High Court is reflected as an order in the proceedings of the High Court forming part of the record of appeal. We reproduce the ruling/order hereunder verbatim:

“Order: this is the 2nd time the issue of compliance is coming up. I made it clear on 18th May, 2016 that compliance was imperative before the hearing of the application could proceed. No compliance has been made and no particular reason given for this state of affairs. It is unhealthy for counsel to concede that compliance be postponed pending hearing and determination of the 1st defendant application (sic). I reiterate the orders of 18th May, 2016 and stay the instant application pending compliance.

If leave to appeal is required the same is hereby granted.”

[3] The events leading to the order of 20th May, 2016 are briefly as follows: The applicant is a Somali national who is an official of the African Union Commission. He is the holder of a Somali Passport and a United Kingdom Passport. He also holds an African Union Passport. ***Pinnacle (K) Travel & Safaris Limited*** hereinafter referred to as the respondent filed High Court Civil Suit No.528 of 2015 at Milimani Commercial Court.

[4] A copy of the plaint was not availed to us, but it is evident from the defence that forms part of the record of appeal, and the replying affidavit sworn by ***Elizabeth Mbugua***, a director of the respondent, that the respondent in the suit has sued the applicant who is the Secretary General to the Eastern Africa Journalist Association together with 5 other officials of the Association, and that the suit concerns a debt arising from temporary credit facilities extended to the Association by the respondent for purposes of holding a Conference at Laico Regency in Nairobi, and for which debt the applicant allegedly received monies from a donor but appropriated it to his own use.

[5] The record of appeal shows that on 30th October, 2015 following an application made by the respondent, the High Court made an order for the arrest of the applicant, and for him to be produced in court to show cause as to why he should not be ordered to furnish security for his appearance. A further order was made on 26th February, 2016 directing the Principal Immigration Officer to assist in the execution of the warrant of arrest against the applicant.

[6] Following the orders made on 30th October and 26th February, 2016, the applicant was arrested on 1st May, 2016 while on transit from Addis Ababa to Morocco through Jomo Kenyatta International Airport. The applicant was thereafter produced in court on 3rd May, 2016, when he was ordered to deposit all his three passports into court and also Kshs.1.8 million as security by 17th May, 2016.

[7] On 6th May, 2016, the applicant filed an application urging the Court to review and set aside its orders and allow him to travel out of the country and defend the suit unconditionally, upon signing a recognizance to appear in court as and when needed. On 17th May, 2016, the parties appeared before the High Court for hearing of the application dated 6th May, 2016. The learned judge noted that the applicant had not complied with the orders made by the High Court and that his application dated 6th May, 2016 related to his failure or inability to comply. The matter was adjourned to 18th May, 2016 during which the respondent raised a preliminary objection to the hearing of the applicant’s motion dated 6th May, 2016 on the grounds that the applicant’s passport had not been deposited in Court despite an undertaking having previously been made to do so.

[8] On 20th May, 2016, the Court noting that there had been no compliance of the previous court orders declined to hear the applicant's motion dated 6th May, 2016, and reiterated the order that the applicant's three passports be deposited and the court orders be complied with.

[9] The applicant is now before us on a certificate of urgency. The applicant has filed a notice of appeal dated 23rd May, 2016, indicating that he wishes to appeal against the order of 20th May, 2016. In support of the motion it is contended that the applicant enjoys immunity against civil suits because of his position as an official of African Union. The applicant further contends that the monies subject of the claim were obtained and utilized by the Association. He denies having been on the run and contends that the respondent's application for furnishing security was based on falsehood.

[10] Learned counsel Mr. Simiyu who appeared for the applicant submitted that the applicant has good grounds of appeal, as he cannot be held responsible for a debt for which the organization is liable; that it would be prejudicial and discriminative to order the applicant to personally shoulder responsibility for the debt; that the applicant was not given a hearing before the order for security was made; that the amount of security is unreasonably high; and that unless the order for stay of proceedings is granted, the applicant may be held to be in contempt thus rendering the applicant's intended appeal nugatory.

[11] In response to the motion, a replying affidavit has been sworn by **Elizabeth Mbugua**, a director of the respondent. In a nutshell, the respondent maintains that the applicant has been properly sued in regard to a debt owed to the respondent; that the applicant who is a foreign national was arrested after going underground; that upon being produced in court on 3rd May, 2016, the applicant offered to surrender his African Union Passport to the court, but that the passport was never produced in court; and that there has been blatant disobedience of the court order and the applicant's application filed on 6th May, 2016 was merely seeking endorsement of his contempt of the orders of the High Court.

[12] Learned counsel Mr. Muriithi who appeared for the respondent, pointed out that the original order for security was made on 3rd May, 2016; that the applicant has not filed a notice of appeal against that order but has instead filed a notice of appeal against the order made on 20th May, 2016; that the order of 20th May, 2016 has not even been extracted; and that the applicant has not come to the court with clean hands. As regards the issue of immunity, counsel maintained that no certificate was availed to justify the alleged immunity; that in any case the diplomatic passport relied upon is expired; and that the application for stay of proceedings ought to have been made in the High Court in the first instance. The Court was therefore urged to dismiss the application.

[13] We have considered the motion before us. It is clear to us that the applicant is not coming to this Court with clean hands. The applicant did not file any appeal against the initial orders made by the High Court requiring him to deposit security. Instead, he opted to file an application for review. Although the High Court did not explicitly so state, it is evident that it declined to hear the applicant's motion for review before compliance with the orders for deposit of security specifically the deposits of the passport in regard to which an undertaking had been made. It is apparent that the applicant has not attempted to comply with those orders. The orders for security was for deposit of the applicant's three passports, in addition to deposit of a sum of Kshs.1.8 million. While we appreciate that the applicant may have difficulties raising the money, there is nothing that prevents the applicant from depositing the passports. As was stated by this Court in Civil Appeal No.33 of 2012, Shimmers Plaza Limited vs National Bank of Kenya Limited eKLR:

“Obedience of court order is not optional rather it is mandatory and a person does not choose whether to obey a court order or not.

[14] In our view, staying the proceedings of the superior court would have the effect of aiding the applicant to run away from his obligation of complying with a court order that has not been set aside and this would be inimical to the proper administration of justice that requires respect for the rule of law. We find persuasion in this view by what was stated by Romer L. J. in ***Hadkinson vs Hadkinson [1952] 2 All ER at p.567***; that:

“It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction, to obey it unless and until, that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

[15] Moreover, the applicant has not appealed against the initial orders made on 30th October, 2015 and 26th February, 2016. Those are the orders upon which the order of 20th May, 2016 is anchored. Without an appeal against the orders of 30th

October, 2015 and 26th February, 2016, the applicant’s appeal cannot really be said to be arguable. Therefore, it cannot be said that he has an arguable appeal with regard to the order of 20th May, 2016.

[16] As has been stated time and again, an order for stay of proceedings pending appeal under Rule 5(2) (b) of the Court Rules, can only issue where an applicant has satisfied the twin principles: that he has an arguable appeal, and that if the order of stay of proceedings is not granted, the intended appeal would be rendered nugatory. ***Ismael Kagunyi Kande vs Housing Finance Company Ltd (Civil Appeal No.156 of 2006). Reliance Bank Ltd vs Norlake Investment Ltd [2002] 1 EA 227.***

[17] Given the circumstances of this case, the applicant’s intended appeal would not be rendered nugatory if the order of stay of proceedings is not granted. The applicant has therefore not satisfied the twin principles upon which an order of stay of proceedings can be granted. Under those circumstances, it would not be proper nor just for this Court to interfere with the proceedings before the High Court. Accordingly, we dismiss the applicant’s motion with costs.

Dated and Delivered at Nairobi this 25th day of November, 2016.

H. M. OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR