IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 297 OF 2008 (UR 198/2008)

GOVERNORS BALLOON SAFARIS LIMITED …….…… APPLICANT

AND

SKYSHIP COMPANY LIMITED …….. 1ST RESPONDENT

COUNTY COUNCIL OF TRANSMARA …….. 2ND RESPONDENT

(Application for an injunction pending the hearing and determination of an intended appeal from a ruling and order of the High Court of Kenya at Milimani Commercial Courts (Lesiit) dated 24th October, 2008

in

H.C.C.C No. 461 of 2008)

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RULING OF THE COURT

We have before us a notice of motion dated 7th November 2008 brought pursuant to **rule 5(2) (b)** of this Court' Rules (**the Rules**) and filed on 10th November 2008, in which the applicant, **Governors Balloon Safaris Limited**, is seeking mainly two orders against the first and second respondents, **Skyship Company Limited and County Council of Transmara**, respectively, as follows:

"1. That an injunction be granted pending the hearing and determination of the intended appeal against the order of the High Court of Kenya at Milimani Commercial Courts, Nairobi, made on 24th October 2008 in the High Court Civil Case No. 461 of 2008, restraining the second respondent from breaching the terms of the contract dated 1st August 2000 between the applicant and the second respondent by allowing or permitting the first respondent to operate hot air balloon safaris business within the exclusive zone as defined in the contract.

2. That an injunction be granted pending the hearing and determination of the intended appeal against the order of the High Court of Kenya at Milimani Commercial Courts, Nairobi made on 24th October 2008 in the High Court Civil Case No. 461 of 2008, restraining the first respondent from procuring a breach of the contract dated 1st August 2000 between the applicant and the second respondent by inducing the second respondent to allow or permit the first respondent to operate hot air balloon safaris business within the exclusive zone defined in the said contract".

Two main grounds are advanced by the applicant company in support of the application. These are that the applicant has an arguable appeal with overwhelming chances of success and that if the application is not granted and the intended appeal eventually succeeds, that success will be rendered nugatory. To buttress the first ground, the applicant states in brief that the second respondent is in clear breach of the contract entered into between itself and the applicant and which contract did not allow the second respondent to allow or license a third party to operate a hot air balloon business from a base within the zone defined in the said contract; that the first respondent, fully aware of the said contractual obligation between the applicant and the second respondent is procuring a breach of the same contract by the second respondent; that the applicant is a party to that contract and the respondents, through their action in filing applications in court against the applicant, are, in law, estopped from claiming that the applicant is not a party to the subject contract; that the learned Judge erred in allowing the respondents to claim that the applicant was not a party to the subject contract despite a ruling made on 11th September 2008 in which the superior court had made a finding that the applicant was a party to the subject agreement; that the learned Judge failed to address himself to the principles applicable to the grant of interlocutory injunctions where there is a plain breach of an express negative stipulation in a contract. In support of the allegation that the intended appeal would be rendered nugatory were it to succeed after this application is refused, the applicant's grounds are that it's business would be denied the benefit of the protection granted under the said contract; that the bargain made by the applicant under the subject contract will be defeated and/or lost; that the applicant will lose exclusive right to operate its business in accordance with its business plan which was prepared on the basis of the contract; and thus, it will be unable to meet its financial commitments which had been made relying on the said business plan. The application was supported by an affidavit sworn by Aris Grammaticas, the Managing Director of the applicant company and several annextures to that affidavit. Both respondents opposed the application through replying affidavits sworn by one Adi Vinner, the Chairman and Chief Executive Officer of the first respondent, and Wilberforce Wambulwa, the Clerk to the County Council of Transmara, the second respondent.

The genesis of the entire saga is that the applicant is in hot-air balloon business in Transmara area. The second respondent is a local authority charged with the control of Transmara area. The first respondent is also in hot-air balloon business. In a plaint dated 14th August 2008 and later amended on 17th September 2008, the applicant sued both respondents claiming, as against the second respondent, that it breached a contract between it and the applicant which stipulated, *inter alia*, that it (the second respondent) would not permit the establishment of any additional hot air ballooning base within a 15 kilometres radius of the applicant's camp such that the only bases within that limit are only that of the applicant and one other operator namely Transworld Safaris Limited, and as against the first respondent that it procured the second respondent to breach the contract and further or in the alternative, as against both that the two respondents entered into a contract on 1st March 2007 the object of which was to violate or infringe the applicant's rights. The applicant sought in the amended plaint judgment against the respondents jointly and severally for two permanent injunction orders, a mandatory injunction order; a declaration that the contract entered into between the respondents on 1st March 2007 is null and void and damages. In both the original and the amended plaint, the applicant stated at paragraph 11 as follows:

"11. By reason of the said breaches and matters aforesaid, the plaintiff stands to lose the benefit of the said contract and profit it would otherwise have made and the plaintiff will be greatly injured in its business and will thereby suffer huge losses and damages.

PARTICULARS

(a) Estimated loss of profit for the remainder of the contract term Kshs. 700 million.

(b) Estimated loss of profit for the renewal period over Kshs. 800 million.

(c) Total minimum loss Kshs. 1.5 billion."

The original plaint was filed on 14th August 2008. On the same date, the applicant also filed chamber summons dated 14th August 2008 in which it sought three main injunctive reliefs – the first relief was to restrain the first respondent from interfering with or causing the second respondent to breach the applicant's contractual rights in the agreement dated 1st August 2000. The second order sought was an order for temporary injunction restraining the second respondent from licensing or in any way authorising the first respondent to set up a hot air balloon safaris business or operation in the exclusive zone contained in the contract dated 1st August 2000 between the applicant and the second respondent. The last relief was for a mandatory injunction to be issued compelling the second respondent to remove the first respondent's hot air balloon establishment from the exclusive zone in the contract dated 1st August, 2000 between the applicant and the second respondent. The grounds in support of that application were annexed to it. That application came up for hearing before Lesiit J. who, after full hearing, in a ruling dated 24th October 2008, dismissed it on grounds that the agreement upon which the applicant relied for its case against the respondents was not executed by the applicant and although later the applicant's name was substituted for that other name, that substitution of the applicant for the original signatory to the agreement was not approved by the second respondent in writing and the agreement was not endorsed with that important change so that that substitution was not incorporated into the contract. The learned Judge dismissed that application on that score stating:

"The plaintiff has not demonstrated that it could claim any rights or privileges under the said contract. In the circumstances, the plaintiff cannot benefit from the provisions of clause 5, upon which the injunctive reliefs sought herein lie. I am also not satisfied that the plaintiff has demonstrated, on a *prima facie* basis, that it was deserving of the injunctive reliefs sought."

The learned Judge of the superior court also considered other aspects as spelt out in the well known case of **Giella vs. Cassman Brown & another 1973 EA 358** and was of the opinion that even if the aspect of wrong party to the agreement did not affect the rights of the applicant, she would still have dismissed the application for injunction on grounds that the applicant had not demonstrated that it would suffer irreparable loss incapable of compensation by an award of damages.

The applicant felt aggrieved by that decision. It is intending to appeal against it. It filed a notice of appeal dated and filed on the same day, 24th October 2008. In the meantime, it brought this application as stated above.

Mr. Oyatsi, learned counsel for the applicant, in his submission raised several issues to demonstrate that the intended appeal is arguable. He contended that the learned Judge failed to consider that apart from the substitution of the applicant's name from the original signatory to the agreement, the second respondent dealt with the applicant on several occasions and through several correspondences such that the second respondent was by the doctrine of estoppel, stopped from claiming that the applicant was not a party to the subject agreement dated 1st August 2000. He also submitted that the contract covered the entire area upon which the second respondent had jurisdiction and not only a small area.

Mr. Amoko, learned counsel for the first respondent, on the other hand submitted that the application should not be granted as the applicant had not demonstrated that its intended appeal was arguable, as the first respondent had been granted licence to conduct its business by the Civil Aviation Authority and a business permit had also been granted. Further, he averred that the applicant was operating from a

private land. That being the case, Mr. Amoko's contention was that there was nothing more to be injuncted. On the nugatory aspect, Mr. Amoko submitted that the applicant had quantified its losses at Ksh.1.5 billion and the first respondent would be able to meet that payment should the applicant succeed in its intended appeal after this application is refused.

Mr. Kemboi, learned counsel for the second respondent, likewise, felt the intended appeal will not see the light of the day as the licensing authority for the business namely Kenya Civil Aviation had licensed the first respondent's business which was being carried out in a private land and, further, the applicant's losses, if any, had been quantified by the applicant such that if the applicant succeeded in its appeal after the application is refused, the second respondent would be ready to meet the same.

The law as regards the principles that guide the Court in such an application brought pursuant to **rule 5(2) (b)** of the Rules are now settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal, or intended appeal, is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application such as this application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs above and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb - See this Court's decisions in the cases of **Reliance Bank Ltd. vs. Norlake Investments Ltd. (2002) IEA 227**; **Githunguri vs. Jimba Credit Corporation Ltd. & others (No. 2) [1988] KLR 838**. In **Githunguri's Case**, this Court held, *inter alia*, as follows:

"The general principles on which the Court would base its unfettered discretion were first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the Court should ensure that the appeal, if successful, should not be nugatory."

We have anxiously considered the notice of motion before us, the affidavits, the exhibits annexed to the same affidavits, the ruling of the superior court, the rival submissions by the learned counsel and the law, with the above legal principles as our guide. Without going into details for fear of prejudicing the hearing of the intended appeal, we are prepared to accept that the intended appeal is arguable, at least on whether or not the learned Judge of the superior court was right in her decision that the alleged substitution of the original signatories to the agreement dated 1st August 2000, which was the basis of the application, did not authorize the applicant to benefit from the provisions of the agreement.

That clears the first hurdle. However, as to the second limb which is whether the success of the intended appeal would be rendered nugatory if we refuse this application, we have some difficulties. Mr. Oyatsi submits that as the respondents are in breach of the contract between the applicant and the second respondent, the Court should step in and immediately stop the breach. We are told that the alleged breach, if any, has taken place. That is supported by the fact that mandatory injunction was also sought in the superior court. Further, we are told, and it is not challenged, that the licensing authority, in this case the Kenya Civil Aviation Authority, had given licence to the first respondent to operate its business and that the same business is being operated from a private land. Further, although Mr. Oyatsi, when asked, said at the bar that the loss that the applicant would suffer is not quantifiable, that cannot, with respect, be true as indeed in the plaint and in the amended plaint, part of which we have reproduced above, the applicant quantifies its losses at Ksh.1.5 billion. The respondents say they are capable of paying that to the applicant. All these, in our view, suggest that, at the heart of the matter, is a business competition in which a breach of contract would lead to one party losing business and thus suffering loss of profit. In such a case, the party losing would be able to ascertain its losses. The

applicant has done so in the plaint. To accede to Mr. Oyatsi's request would mean dismantling everything that has taken place including the issue of licenses by a party not before us. That would not, in our view, be fair. Mr. Oyatsi has not disputed the respondents' statement that they are each capable of meeting the losses should the applicant eventually succeed in the intended appeal.

In the circumstances, the second limb has not been demonstrated by the applicant to our satisfaction. That being our view of the matter, the application cannot succeed as both limbs have to be satisfied before the applicant can benefit from the provisions of **rule 5(2) (b)** of the Rules. In the result, the application is dismissed. The respondents will have the costs of the notice of motion. Order accordingly.

Dated and delivered at Nairobi this 19th day of December, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR