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| Case Number: | Civil Application 322 of 2006 |
| Date Delivered: | 20 Dec 2019 |
| Case Class: | Civil |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Ruling |
| Judge: | Martha Karambu Koome, Roselyn Naliaka Nambuye, Hannah Magondi Okwengu |
| Citation: | Willesden Investments Limited v Kenya Hotel Properties Limited [2019] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KOOME & OKWENGU -JJA)**

**CIVIL APPLICATION NO. 322 OF 2006**

**WILLESDEN INVESTMENTS LIMITED.....APPLICANT**

**VERSUS**

**KENYA HOTEL PROPERTIES LIMITED..... RESPONDENT**

**(Application for the release of Bank Guarantee No. DBK/200/030 under rule 47 of Court of Appeal Rules 2010, Rule 4 Appellate Jurisdiction Act in H.C.CC No. 367 of 2000)**

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**AS CONSOLIDATED WITH**

**CIVIL APPLICATION NO. 332 OF 2006**

BETWEEN

**WILLESDEN INVESTMENTS LIMITED.....RESPONDENT**

**VERSUS**

**KENYA HOTEL PROPERTIES LIMITED.....APPLICANT**

**Application to stay the Release of Bank Guarantee No. DBK/200/030 pending the hearing and determination of Civil Appeal No. 404 of 2018- Kenya Hotels Properties Limited versus The Attorney General & 5 others and review application in Nairobi Civil Appeal No. 149 of 2007 Kenya Hotels Properties Vs. Willesden Investments Ltd and have it heard de novo by the Court of Appeal)**

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**RULING OF THE COURT**

Before us are two applications, the first one is dated 7th March, 2018 and filed on 8th March, 2018 by **Willesden Investments Limited (Willesden**) against **Kenya Hotel Properties Limited (Kenya Hotel**). It is brought under Rules 4 and 47 of the Court of Appeal Rules 2010, and all other enabling provisions of the law. **Rule 47** makes provision for presentation of urgent applications, while 4 deals with extention of time which we find misplaced. The application substantively seeks an order that, the Deputy Registrar of this Honourable Court of Appeal at Nairobi be pleased to release the original security Bond/Bank Guarantee No. DBK2007/030, to enable Development Bank pay out the amount due to **Willesden**.

It is supported by grounds stated in its body and a supporting affidavit of **Ben Muli** together with annextures thereto. In summary, **Willesden** contends that, it was the successful party in the Judgment delivered by **Hon. Justice Njagi** on 10th November, 2010 in HCCC No. 367 of 2000 against which **Kenya Hotel** filed appeal No. 184 of 2013 in this Court, on the basis of which, they were granted an order for stay of execution of the High Court Judgment pending hearing and determination of the appeal. The appeal was subsequently heard and dismissed on 16th February, 2018. Following the above success, **Willesden** wrote to the Registrar of the Court seeking the release of the above mentioned original bank guarantee to facilitate the release of funds by Development Bank to **Willesden**. The Registrar responded to **Willesden's** request advising them to seek a formal Court order for the release of the said bank guarantee, hence the filing of the application under consideration. The applicant therefore contends that in the absence of any impediment to the execution of the High Court decree, sufficient basis has been laid for the release of the above mentioned bank Guarantee to enable **Willesden** enjoy the fruits of its judgement.

The application has been opposed firstly, by a replying affidavit deposed by one **Olga Leila Sechero** on 12th June, 2018 on behalf of Development Bank of Kenya Limited. In summary, it is deposed that it is only fair that the grievances raised by **Kenya Hotels** in Petition Number 438 of 2015 which has now given rise to Civil Appeal No. 404 of 2018 be determined prior to the release of the guarantee to **Willesden**; that the title to the subject property LR 209/12748 (IR 66986) is questionable. There is therefore necessity for the relevant authorities to investigate the issue of the authenticity of the said title first before the guarantee is released; that if the guarantee is released to **Willesden** now Development Bank stands to suffer a great loss in the event that **Willesden** title is later found to be invalid especially when Willesden has not controverted **Kenya Hotel's** assertions that it has no known assets to compensate Development Bank. Secondly, the application is opposed by an affidavit sworn by **Kieran Day**, on 6th November, 2018 and filed on 7th November, 2018 on behalf of **Kenya Hotel**. In summary, it is **Kenya Hotel** contention that **Willesden** is incapable of refunding any money as it has no assets; that they filed High Court Petition No.438 of 2015 **Kenya Hotel Properties Limited versus the Attorney General & others**, seeking various reliefs; that the High Court declined jurisdiction citing want of jurisdiction to nullify a Court of Appeal Judgement prompting **Kenya Hotel** to file an application in the Court of Appeal on 11th October, 2018 dated 9th October, 2018 seeking review and setting aside of the judgement in Nairobi Civil Appeal No. 149 of 2007 **Kenya Hotel Properties Limited versus Willesden Investments Limited,** citing various grounds as specified in the replying affidavit; that the review application raises pertinent constitutional and jurisprudential issues touching on the property subject matter of the suit whose decree **Willesden** now seeks to execute; that in light of the above, it is not only prudent but also fair and just for the court to exercise its inherent power to preserve the *status quo* as at 2nd April, 2009, restraining **Willesden** from calling up the Guarantee issued by Development Bank of Kenya Limited and or executing the decree in any manner.

During the pendency of the hearing of **Willesden's** application dated 7th March, 2018, **Kenya Hotel** filed a notice of motion on 27th April, 2018 dated 23rd April, 2018. It is brought under **Articles 40, 50** & **159 (2) (b)** of the Constitution, **Sections 3A** and **3B** of the Appellate Jurisdiction Act and **Rule 5(2) (b)** and **Rule 1 (2**) of the Court of Appeal Rules (CAR). Due to the nature of reliefs sought

by the applicant in this application, we shall not delve into the interrogation of the applicability or otherwise of **Rule 5(2) (d) Articles 40** and **50** of the Kenya Constitution 2010, in the determination of this application. Five reliefs were initially sought. Prayer 3 was subsequently abandoned. Prayers 1 and 2 were amended through an oral application in Court to which no objection was raised against it by the opposite party. Vide the said oral application to amend the application **Kenya Hotel** sought and substituted Nairobi Civil Petition No. 438 of 2015 with Civil Appeal No. 404 of 2018. The prayers subject of the determination of the application read as follows:

***1. A stay of execution be granted restraining the appellant/respondent, its servants or agents from executing the decree in any manner whatsoever in Civil Appeal No. 149 of 2007- Kenya Hotel Properties Limited versus Willesden Investments Limited & 6 others and/or calling up the Bank Guarantee issued by Development Bank of Kenya Limited pending the hearing and determination of CA. 404 OF 2018 - Kenya Hotel Properties Limited versus The Attorney General & 5 others.***

***2. The status quo ante prior to 2nd April, 2009 in Civil Appeal No. 149 of 2007-Kenya Hotel Properties Limited versus Willesden Investments Limited & 6 others be maintained pending the hearing and determination of CA 404 OF 2018 -Kenya Hotel Properties Limited versus The Attorney General & 5 others.***

***3. Abandoned.***

***4. The Court be at Liberty to make any further orders in the interests of justice.***

***5. Costs be in the cause."***

The application is supported by grounds in its body and a supporting affidavit deposed by **Kieran Day.** In summary, it is contended that the Notice of Motion was triggered by **Willesden's** application dated 7th March, 2018 seeking the release of the original security Bond/Bank Guarantee No. DBK/2007/030 to enable Development Bank pay the amount due to **Willesden;** that **Willesden's** application was filed after the Court of Appeal rendered its judgement in civil Appeal No. 184 of 2013 **Kenya Hotel Properties Limited versus Willesden Investment Limited & 6 others**, which *inter alia* upheld the High Court decision; that **Willesden** failed to disclose to the Court in their said application under consideration that there is **Nairobi High Court Petition No. 438 of 2015 Kenya Hotel Properties Limited versus the Attorney General & 5 others** then pending trial at the High Court, but which had as at the time of the trial of the consolidated applications been heard giving rise to Civil Appeal No. 404 of 2018 in which **Kenya Hotel** seek various reliefs; that the substratum of the appeal No. 404 of 2018 is land and therefore the doctrine of *lis pendens* applies. Also falling for determination are weighty issues set to be determined in the application for review of the Court of Appeal Judgment in CA No. 149 of 2007; that in light of the above, it was only fair and just that *status quo* be maintained pending the hearing and determination of the review application in CA No. 149 of 2007 and CA No. 404 of 2018.

We have not traced a replying affidavit by **Willesden** in opposition to K**enya Hotel's** application of 23rd April, 2018. We however, take it the same is opposed through oral representations on points of law. On 26th April, 2018, an order of the Court was endorsed in civil Application No. 322 of 2006 that both applications be heard together. The applications were jointly canvassed on 11th July, 2019 by way of written submissions filed by learned counsel for the respective opposing parties and orally highlighted. Learned counsel **Mr. David Oyatta** appeared for **Willesden.** Learned counsel **Allan Gichuhi** for **Kenya Hotel**, while learned counsel **Aldrin Ojiambo** appeared for the guarantor.

In his highlights of submissions both in support of the application by **Willesden** and opposition to the application by **Kenya Hotel, Mr. Oyatta** submitted that **Willesden** has a judgement in its favour and since there is no impediment to its execution, it is only fair and just that it be allowed to enjoy the fruits of the judgement granted in its favour, through the release of the above mentioned

guarantee.

Relying on the case of **Giella versus Cassman Brown [1973] EA 358** and **Gatirau Peter Munya versus Dickson Kithinji & 2 others [2014] eKLR**, **Mr. Oyatta** submitted that **Kenya Hotel**'s request for restraint orders to restrain **Willesden** from enjoying the fruits of the decree issued in its favour does not meet the threshold in the above cited cases for granting conservatory orders, especially when **Kenya Hotel** has not proven that it has a *prima facie* appeals with a probability of success in its application for review in CA No. 149 of 2007 or Civil Appeal No. 404 of 2018. Nor that it would suffer irreparable harm or loss if the guarantee were to be released to the applicant as requested for. On that account, we were urged to hold that **Kenya Hotel's** action is merely aimed at delaying the execution of the decree lawfully issued in favour of **Willesden**.

Relying on the case of **Kenya Anti-Corruption Commission versus Willesden Investment Limited & 7 others CA No. 325 of 2013**, **Mr. Oyatta** submitted that **Kenya Hotel's** application is an abuse of the due process of court as it is simply a replication of its past conduct of variously filing numerous applications whenever it lost in a matter.

Relying on the case of **Abdalla Omar Nabhan versus the Executor** of the Estate of **Saad Bin Abdalla Aboud & another [2013] eKLR** and **Masisi Muvita versus Damaris Wanjiku Njeri [2006] eKLR,** counsel submitted that the doctrine of *lis pendens* does not apply as the litigation in respect of which **Willesden** intends to execute the decree is already determined. Secondly, there is no demonstration that the proceedings of the guarantee is likely to change hands as soon as released to **Willesden.**

Learned counsel **Allen Gichuhi** who appeared **Kenya Hotel** argued for also in opposition to the application filed by **Willesden** and in support of their own application submitted that **Willesden** failed to disclose material particulars in its application, that **Kenya Hotel** has filed a review of the Court of Appeal Judgment in CA No. 149 of 2007; and secondly, filed CA No. 404 of 2018 arising from the determination of High Court Petition No. 438 of 2015, both of which have a bearing on the Bank guarantee sought to be released to **Willesden** and both of which were pending hearing as at the time the consolidated applications were heard. It is counsel's contention that the outcome of both cases that are pending will have an impact on the guarantee sought to be released; that it is only fair and just that conservatory orders be granted staying the release of the guarantee until the above mentioned matters are determined and their outcomes known. It is counsel's view that the Court has inherent power in addition to the overriding objective principles of the Court as well as the non-technicality principle in the Kenya Constitution, 2010 to grant conservatory orders to restrain the release of the guarantee pending the determination of the above mentioned court matters.

To buttress the above submissions, counsel relied on the case of **Jasbir Singh Rai** & **3 others versus Tarlochan Singh Rai Estate & 3 others [2013] eKLR** for the holding *inter alia*, that a party aggrieved by the decision of a Judge removed through the vetting process on account of that decision may file a constitutional petition to claim breach of fundamental right. The case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR** for the submissions that this Court has jurisdiction in the exercise of its inherent power to grant conservatory orders sought on the grounds advanced by them and supported by the guarantor. Also cited is the case of **Kenya Hotel Properties Limited versus Willesden Investment Limited & 6 others [2013] eKLR** in support of their submissions that **Willesden** has no known assets and will therefore not be in a position to refund any money should **Kenya Hotel** succeed in their application for review in CA No. 149 of 2007 and CA No. 404 of 2018 after the guarantee has already been released to them.

**Mr. Aldrin Ojiambo** for the guarantor on the other hand associated himself fully with the submissions of **Mr. Allen Gichuhi.** He

also relied on their replying affidavit and submitted that they were brought into the proceedings at the execution stage; that in their view, the ends of justice to all parties participating in the joint applications would best be served if the security were to be detained until the determination of **Kenya Hotel's** application for review in CA No. 149 of 2007 and CA No. 404 of 2018 especially when it is not disputed that **Willesden** had not controverted their assertions and those of **Kenya Hotel** that they have no known assets from which the bank can get a refund should **Kenya Hotel** succeed in the above pending matters.

In reply to **Kenya Hotel** and the guarantor's submissions, **Mr. Oyatta** submitted that no new issue arises to be decided by the intended review application in CA No. 149of 2007 and CA No. 404 of 2018 as matters resulting in those Court processes were decided on merit and are therefore *res judicata*.

We have considered the record in light of the rival pleadings, submissions and principles of law relied upon by the respective parties in support of their opposing positions herein. Our invitation to intervene on behalf of the applicant's in the opposing applications is for us to exercise judicial discretion in respect of the two applications. The principles that guides the court in the exercise of this jurisdiction have now been crystalized by case law enunciated by the court itself. The law is that such a discretion has to be exercised judicially, meaning that it has to be based on sound reason rather than whim, caprice or sympathy. See **Githiaka versus Nduriri [2004] 2KLR67**.

Starting with the application dated 7th March, 2018, it is not disputed that **Willesden** has a judgment in its favour granted by the High Court in HCCC No. 367 of 2000; that **Kenya Hotel** filed Civil Appeal No. 184 of 2013 against that Judgment and on the basis of which they secured stay orders. The appeal was subsequently dismissed on 16th February, 2018 by reason of which the stay orders granted in favour of **Kenya Hotel** stood discharged. This is what prompted **Willesden** to apply to the Registrar of the Court to have the guarantee released to them. The Registrar declined **Willesden's** request but with advise to them that they should obtain a formal Court order for the release of the guarantee to them, hence the application under consideration dated 7th March, 2018.

**Kenya Hotel** and the guarantor of the guarantee **Willesden** who seeks to have the Bank Guarantee released to them do not dispute that CA No. 184 of 2013 was determined in favour of **Willesden**. They are however opposed to the release of the guarantee as requested for by **Willesden** because, according to them, the substratum in Civil Appeal No. 184 of 213 and those in CA No. 149 of 2007 and now CA 404 of 2018 are interrelated. The outcome of the review application filed in CA No. 149 of 2007 and the determination of appeal number 404 of 2018 is likely to impact on the guarantee sought to be released.

It is our observation as already highlighted above, that the guarantor filed a replying affidavit in **Willesden's** application of 7th March, 2018 expressing the above concerns to which **Willesden** filed no rejoinder. **Kenya Hotel** also filed a replying affidavit in opposition to **Willesden's** application of 7th March, 2018 and a supporting affidavit to their application of 23rd April, 2018 expressing the same concerns as those expressed by the guarantor of which **Willesden** also filed no rejoinder.

It is on the basis of the above uncontroverted position, that both the guarantor and **Kenya Hotel** have invited the Court to invoke its inherent power to disallow **Willesden's** application and instead grant conservatory orders staying the release of the bank guarantee requested for by **Willesden** until the outcome of the review application in CA No. 149 of 2007 and the hearing and determination of CA No. 404 of 2018, which they contend will have an impact on the guarantee.

The inherent jurisdiction of the court invoked by **Kenya Hotel** is enshrined in **Rule 1(2)** of the CAR. It provides:

"***Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court."***

The principles that guide the application of this principles have now been crystalized by case law.

In the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR**, **Musinga, JA** had this to say about the inherent powers of the Court:

***"Inherent power is the authority possessed by a court implicitly without its being derived from the constitution or statute....."***

In **Kenya power & Lighting Company Limited versus Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, the Court stated *inter alia* that:

***The jurisdiction of the court which is comprised within the term inherent" is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding features of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over the process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process.....In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.***

**.....**

***This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice."***

In light of the above principles, inherent jurisdiction is invoked not only cautiously but also sparingly and only when ends of justice to both parties dictate so.

Also relied upon by **Kenya Hotel** is **sections 3A** and **3B** of the Court of Appeal Act Cap 9 Laws of Kenya. These enshrine the overriding objective principles of the Court. In summary, the principal aim of this principle is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act by inter alia, efficiently using the available judicial and administrative resources to discharge its mandate while at the same time, bearing in mind the need for the timely disposal of the proceedings at a costs affordable by the respective parties seeking justice before court.

See the case of **City Chemist (NBI) Mohamed Kasabuli** suing for and on behalf of the Estate of **Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008,** and **Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**, in which it was stated that the purpose of the overriding objective principle is firstly, to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

Also relied upon is **Article 159 (2) (d)** of the Kenya Constitution 2010, which enjoins courts of law to render substantial justice as opposed to upholding technicalities. In the case of **Jaldesa Tuke Dabelo versus IEBC & Another** [2015] eKLR, the Court held inter alia that:

***"Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was not aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action".***

In **Raila Odinga and 5 others versus IEBC & 3 Others** [2013] eKLR, the Supreme Court stated that:

***"The essence of Article 159 of the Constitution is that, a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case".***

In **Lemaken Arata versus Harum Meita Lempaka & 2 others eKLR**, it was stated that:

***"the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice".***

Lastly in **Patricia Cherotich Sawe versus IEBC & 4 others [2015] eKLR,** it was stated that:

***"Article 159 (2) (d) of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it."***

Bearing in mind the guiding principles on the exercise of the court's inherent power, application of the overriding objective principle of the Court and the non-technicality principle in **Article 159(2) (d)** of the Constitution, it is our finding that both the interests and concerns raised by the guarantor and **Kenya Hotel** cannot be ignored especially when they were not controverted by **Willesden.** It is therefore our view that, taking the totality of both the assessment and reasoning advanced above on both applications, the interests of justice to all parties to the joint applications would demand that **Willesden's** application be denied pending the outcome of the determination of **Kenya Hotel's** application for review in CA No. 149 of 2007 and the hearing and determination of CA No. 404 of 2018, our reasons for taking this stand is because **Willesden** did not controvert the guarantors and **Kenya Hotel's** assertions that the above pending court processes are related to CA No. 184 of 2012 and the outcome of those Court processes will impact on the guarantee sought to be released to Willesden.

Turning to **Kenya Hotel's** application, we reiterate what we have stated above when disposing of **Willesden**'s application. We also rely on the case of **Butt versus Rent Restriction Tribunal [1982] KLR 417**, where in it was held *inter alia* that the Court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirement of each case.

The unique and special circumstances in this application are that, the substratum in appeal number 149 of 2007 sought to be

reviewed by **Kenya Hotel** as well as appeal number 404 of 2018 pending hearing and determination has a link to the guarantee sought to be released by **Willesden.** The outcome of the determination of those court processes will therefore impact on the release of the guarantee sought to be released by **Willesden**. As already observed above, the concerns raised by both the guarantor and **Kenya Hotel** in their replying affidavits to **Willesden's** application and the affidavit in support of their own application both of which were in favour of declining the order seeking the release of the guarantee requested for by **Willesden,** were not controverted by **Willesden**, especially the issue of inability to meet a refund of the value of the guarantee to the guarantor should the two pending courts processes succeed and also allegation that the title to the suit property was questionable.

In the result, the orders that commend themselves for us to make in the disposal of the consolidated applications are as follows:

(1) Application dated 7th March, 2018 is dismissed.

(2) An order be and is hereby granted that the release of the original security Bond/Bank guarantee No DBK2007/030 be and is hereby stayed pending hearing and determination of application for review in CA No. 149 of 2007 and the hearing and determination of CA No. 404 of 2018.

(3) Due to the nature of the applications under consideration, each party to bear own costs.

**Dated and Delivered at Nairobi this 20th day of December, 2019.**

**R.N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**M.K. KOOME**

**.....**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**