



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E 469 OF 2019

DARI LIMITED..... 1ST APPLICANT

RAPHAEL TUJU.....2ND APPLICANT

MANO TUJU..... 3RD APPLICANT

ALMA TUJU.....4TH APPLICANT

YMA TUJU.....5TH APPLICANT

S.A.M COMPANY LIMITED.....6TH APPLICANT

- VERSUS -

EAST AFRICAN DEVELOPMENT BANK.....1ST RESPONDENT

MUNIU THOITHI.....2ND RESPONDENT

GEORGE WERU.....3RD RESPONDENT

RULING

1. By this Ruling I am invited to determine whether this matter alongside Insolvency Nos 1 to 4 of 2020 are stayed by the Ruling of the court of appeal in Civil Application No. 49 of 2020 (hereinafter the Ruling).

BACKGROUND

2. **DARI LIMITED** (hereinafter Dari) obtained a facility from the **EAST AFRICAN DEVELOPMENT BANK** (hereinafter the Bank). Raphael Tuju, Mano Tuju, Alma Tuju, Yma Tuju and S.M. Company Limited (combined, the guarantors) guaranteed that facility.

3. The Bank filed a suit in the United Kingdom (UK) against Dari and the guarantors and by the judgment of 19th June 2019 (hereinafter UK judgment) before the High Court of Justice Business and Property Courts of England and Wales, Queen's Bench Division Commercial Court, judgment was entered on an application for summary judgment against the defendants (guarantors) jointly and severally, in favour of the Bank, for USD 15,162,320.95.

4. That UK judgment was recognized by the High Court of Kenya on 7th January 2020 as provided under the Foreign Judgment (Reciprocal Enforcement) Act. On being recognized the High Court granted leave to the Bank to execute that UK judgment.

5. Dari and the guarantors sought by a chamber summons application dated 13th January 2020 the following prayers:

“That there be a stay of execution of the ruling of this Honourable court in these proceedings and any subsequent decree issued by this honourable court on 7th January 2020 pending the hearing and determination of this application.

c) That the ruling of this honourable court issued on 7th January 2020 issuing orders of recognition and registration of the judgment delivered on 19th June, 2019 and the order issued pursuant thereto by the High Court of Justice Business and Property

Courts of England and Wales, Queens Bench Division Commercial Court by Daniel Toledano QC sitting as a Deputy Judge of the High Court of England and Wales in claim number CL-2018-000720 and all consequential orders be set aside.

That in the alternative, this honourable court do declare that the judgment delivered on 19th June, 2019 and the order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division Commercial Court by Daniel Toledano QC sitting as a Deputy Judge of the High Court of England and Wales in claim number CL-2018-000720 is unenforceable as it was obtained in a manner that violates the Article 50 of the Constitution of Kenya and the rules of natural justice.”

6. By the Ruling of 13th February 2020 **Justice W. A. Okwany** declined to grant the above prayers and dismissed that Chamber Summons dated 13th January 2020.

7. Dari and the guarantors filed a Notice of Appeal to the Court of Appeal against **Justice W. A. Okwany’s** decision of 13th February 2020. Before the court of appeal Dari and the guarantors filed an application and sought the following order:

“This Honourable Court be pleased to issue a stay of execution of the Ruling of the High Court of Kenya in High Court Commercial Cause No. 1 of 2020 (OS) East African Development Bank –v- Dari Limited & 5 Others of 13th February, 2020 upholding the ruling of the court of 7th January, 2020 issuing orders or recognition and enforcement of the Judgement delivered on 19th June, 2019 and the Order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division, Commercial Court by Mr. Daniel Toledano, QC sitting as a Deputy Judge of the High Court aforesaid in claim number CL-2018-000720 [hereinafter the United Kingdom Judgement], and all consequential orders, pending the hearing and determination of this application [and] ... appeal.”

8. The court of appeal by its Ruling dated 19th June 2020 (the Ruling) granted conditional stay of execution as follows:

“1) That the applicants do deposit a sum of KShs.50,000,000 in the joint names of both Advocates in an interest earning account, with a reputable Bank within the next 30 days, failure of which, the stay orders shall lapse and the application shall stand as dismissed.

(2) Costs of the application will be in the intended appeal.”

PLAINTIFF’S ARGUMENTS

9. Dari and the guarantors argued that the stay granted by the court of appeal applies to this matter and to insolvencies filed by the Bank against the guarantors.

10. The plaintiff submitted that the Bank, before the court of appeal, brought to the attention of the court of appeal several matters related to this matter which were discussed in the court of appeal’s Ruling as follows:

“The respondent catalogues the conduct and actions of the applicants since the date of delivery of the United Kingdom judgment, the institution of High Court Commercial Cause No. 1 of 2020 (OS), the proceedings subsequent thereto and in proceedings in other matters before the High Court of Kenya which the former deems disqualified the applicants from this court’s exercise of discretion in their favour. The respondent further urges this Court to consider the pleadings filed in Dari Limited (In Receivership), Raphael Tuju, Yma Tuju, Alma Tuju, Mano Tuju and S. A. M. Company Limited vs. East African Development Bank, George Weru and Muniu Thoithi HCCC No. E469 of 2019, proceedings brought in the High Court by the applicants herein against the respondent and the receiver managers; and the conduct of the applicants herein in that regard, in considering whether to exercise its discretion in favour of the applicants. In the main they state:

(i) That following the applicants’ continued default under the Facility Agreement of 10th April, 2015, the respondent vide Notice of Appointment dated 23rd December, 2019 appointed receiver managers of the 1st applicant and despite the 2nd-5th applicants herein being informed of the appointment, they have, and continue to ignore, neglect, refuse and/or otherwise fail to cooperate with the Receivers and Managers and allow the take-over of the effective control and management of the 1st applicant.

(ii) That the 2nd applicant herein informed the respondent vide letter dated 20th December, 2019 that some of the units in the properties charged to the respondent had been disposed by way of sale to third parties. The respondent asserts that such sales were done without its knowledge and/or consent and that the proceedings from the sales were not deposited in escrow as per the obligation under the Facility Agreement of 10th April, 2015.

(iii) The applicants herein have ignored, refused and/or otherwise refused to comply with the orders by Hon. Lady Justice Grace Nzioka of 2nd March, 2020 and Hon. Lady Justice Mary Kasango on 23rd March, 2020 both issued in Dari Limited (In Receivership), Raphael Tuju, Yma Tuju, Alma Tuju, Mano Tuju and S. A. M. Company vs. East African Development Bank, George Weru and Muniu Thoithi HCCC No. E469 of 2019. The latter issued orders as follows:

“I. An Order is issued that the 2nd to the 5th Plaintiffs [the 2nd to 5th Applicants herein] do immediately grant the receivers full, complete and effective access to the 1st Plaintiff’s [the 1st Applicant herein] premises in accordance with the notice of Appointment and recovers letter to the director of 23rd December, 2019 and in accordance with the court order of 2nd March, 2020.

2. The 2nd to 5th Plaintiffs shall provide the receivers with the 1st Plaintiff's statement of affair, financial returns and company records, cash book as from the 23rd December, 2019 to date, the management accounts, the debtors and creditors listings as at 4th February, 2020 and the 1st Plaintiff's staff payroll for the last three months.

3. A Notice to Show cause to issue for Raphael Tuju, Yma Tuju, Alma Tuju, and Mano Tuju to show cause why they should not be committed to civil jail for disobedience of this court's order to allow the Receivers resume their duties at the 1st Plaintiff's premises ...”

(iv) That the applicants deceptively depleted funds that had been deposited in an escrow account and Debt Service Deposit account held with Bank of Africa pursuant to the security agreements with the respondent. These withdrawals, the respondent alleges, were effected by unauthorized parties and without the knowledge and consent of the respondent contrary to the security agreements.”

11. It is the submissions of Dari and the guarantors that the court of appeal by its aforesaid Ruling “**restrained the proceedings**” before **Justice W.A. Okwany** pending appeal and other “**off shoots in the lower court.**”

12. It further argued that the key term is enforcement and that the challenge to Receivership, in this matter, was an enforcement and that enforcement was restrained by the court of appeal. That the challenge or Receivership, hereof, was based on the facility agreement which facility agreement is the subject of appeal and that it is on that basis stay was granted by the court of appeal.

13. Learned counsels emphasized that it is the Bank that invited the court of appeal to consider this present matter while it considered stay of the Ruling by **Justice W. A. Okwany**.

14. The learned counsel for Dari and the guarantors further submitted that the advocates for the Bank, before the court of appeal, while discussing the order to be extracted following the court of appeal's Ruling of 19th June 2020 suggested that words “**arising therefrom**” be added to ensure the order of stay only related to the matter before the court of appeal.

DEFENDANTS SUBMISSIONS

15. The Bank's learned counsel submitted that this court's sole responsibility is to see if the court of appeal expressly stayed all other proceedings but that it is not this court's responsibility to interpret the court of appeal's Ruling. In saying so counsel submitted that this court should consider what was before court of appeal, that is, it was an application to stay **Justice W. A. Okwany's** Ruling that was before Court of Appeal. That that was the narrow matter before court of appeal.

ANALYSIS

16. The task before court is simple. It is to determine whether the court of appeal, by its Ruling of 19th June 2020, stayed this and other matters between the parties. The court in the case **JACKSON LUKALI IGWETA V DAVID MWENDA MAINGI & 2 OTHERS [2019] eKLR** quoted a passage of **Halbury's Law of England 4th Edition volume 37 on pages 330 and 332** which is useful to consider here thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt, ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

17. This case was filed by Dari and all guarantors on 24th December 2019. They seek prayers of permanent injunction restraining the Bank and the Bank's appointed Receivers from selling their moveable and immovable properties; for a declaration that the Bank persistent frustration of Dari's effort to redeem the facility was a clog to Dari's right to redeem and; a declaration that the Notice of Appointment issued by the Bank appointing the 2nd and 3rd defendants as Receiver and Managers is invalid.

18. The Bank filed its Originating Summons dated 31st December 2019 seeking recognition of the UK judgment. That matter as stated before was argued before **Justice Okwany** and the learned Judge delivered her Ruling on 7th January 2020. I have perused that Ruling and there is nothing in it which shows that Dari argued that this case and that matter before **Justice Okwany** were related or that the cause of action is one and the same. When Dari appealed against **Justice Okwany's** refusal to set aside the recognition of the UK judgment it did not then indicate to the court to appeal that this matter is of the same cause of action as that before **Justice Okwany**. Even the Bank's reference of this case and the conduct of Daris and the guarantors before the court of appeal left no impression on the court of appeal. If it did the court of appeal would have made mention of it in the Ruling of 19th June 2020. The court of appeal made no connection to this case and the matter that was before it in the analysis of the parties arguments.

19. The attempt to have this court look at the email exchange between the lawyers as they considered extraction of the order of that Ruling of 19th June 2020 as a basis of saying that the stay order also related to this matter is in my view stretching the point. It is indeed speculative on the plaintiffs' part to say that the court of appeal stay order was so extensive.

20. I have perused the Ruling of 19th June 2020, of the court of appeal, and I find no indication of any kind that the learned judges of the court of appeal intended the stay of the Foreign judgment extended to stay of this suit or any other.

21. It is worth noting that the plaintiffs are seeking that the court of appeal's Ruling be considered to apply to this case and stay this case, yet this is a case filed by the plaintiffs themselves. One would expect that having filed it the plaintiffs would be more than eager to proceed with the same.

22. Finally, I have noted that the stay granted by the court of appeal was conditional on the plaintiffs depositing Ksh 50 million in the joint account of the advocates within 30 days. The plaintiff did not address their intent to comply with that condition and it therefore is unclear whether indeed the stay will subsist beyond the 30 days given by the court of appeal.

23. That notwithstanding I find and I hold that this case, HCC E 469 of 2019 and Insolvency No. 1 to 4 of 2020 were not stayed by the court of appeal Ruling of 19th July 2020 in civil application No 49 of 2020. The defendants are awarded costs hereof. These matters will therefore proceed for hearing on 9th July 2020 a date fixed by consent of all the learned counsels.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiffs:

For the Defendants:

ORDER

This decision is hereby virtually delivered this 8th day of **July, 2020.**

MARY KASANGO

JUDGE