Yalfa Cargo Handling Limited v Sinoven International Group Limited & another (Civil Appeal (Application) E113 of 2023) [2024] KECA 731 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 731 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E113 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 21, 2024

BETWEEN

YALFA CARGO HANDLING LIMITED ..... APPLICANT

AND

SINOVEN INTERNATIONAL GROUP LIMITED ..... 1ST RESPONDENT

KEYUN INTERNATIONAL LOGISTICS CO. LTD ..... 2ND RESPONDENT

(An application for Stay of Execution of the Judgment and Orders of the High Court of Kenya at Mombasa (Kizito Magare, J.) delivered on 24th October 2023 in Mombasa HCCC No. 57 of 2015)

RULING

1. The subject Notice of motion dated 6th December 2023 is brought pursuant to Articles 47(1) and (2), 50(1), (2) (k) & (q), and 159 of *the Constitution*, sections 3A and 3B of the *Appellate Jurisdiction Act*, rule 5(2) (b) of the Court of Appeal Rules, 2022 and in which the applicant, Yalfa Cargo Handling Limited, seeks orders that:

   (i) the implementation/execution of the impugned Judgment dated 23rd October 2023 be stayed pending filing, service, hearing and determination of the applicant's intended appeal;

   (ii) the proceedings in Mombasa HCCC No. 57 of 2015 be stayed pending filing, service, hearing and determination of the intended appeal; and that

   (iii) costs in this application abide the outcome of the intended appeal.

2. As a brief background, the respondents filed suit against the applicant, Yalfa Cargo Handling Limited for breach of contract and for payment of USD 948,626.40 together with interest at 21% per annum from 1st October 2014 until payment in full, as well as costs. They claimed that they entered into five commercial contracts with the applicant between October 2013 and October 2014 for the supply of

various items comprising tractors and tubeless tyres; and that the applicant was contractually liable to pay USD 1,200,825 on or before 1st October 2014, but only paid USD 252,150.45 leaving a balance of USD 948,625.40. The applicant denied that it had breached the agreements and claimed that only a sum of USD 179,952.79 was owed to the respondents.

3. On 8th May 2020, the trial court entered partial judgment and issued a decree in favour of the respondents totaling USD 570, 346.63, being Judgment on admission for USD 179,952.79 and, further, entered summary Judgment for USD 390,383.84, which amount the applicant alleged it paid on behalf of the respondents to a third party, that is, China Africa Total Logistics Limited, but which the court was not satisfied that it established a bonafide defense. In addition, the court directed that the balance of the claim proceeds to hearing. Pursuant to the court order, the hearing proceeded on 11th and 25th July 2023, whereupon a final judgment was entered against the applicant on 23rd October 2023 for USD 378,328.77 together with interest and costs. It is this Judgment against which the applicant seeks to appeal that forms the basis of the motion now before this Court.

4. The Notice is brought on the grounds set out on its face, and an affidavit in support sworn on 16th December 2023 by Nuuhu Ngoma Gyaza, the applicant's Head Accountant, in which he contended that the applicant was represented by the firm of M/s Oluga & Company Advocates LLP, but that it later instructed other counsel, namely M/s. Kaloki Ilia & Mbugua Advocates LLP; that thereafter, the newly appointed advocates obtained the files from the former advocates on 26th September 2023 and, upon perusal, their advocates established that it was in the best interest of justice for the High Court to re-open the applicant's case; that the applicant should be allowed to file additional evidence and recall the parties' witnesses for examination; that, for this reason, the applicant filed a motion dated 16th October 2023 seeking to arrest the High Court Judgment scheduled for delivery on 24th October 2023 pending hearing and determination of the application.

5. The deponent further contended that, when the application was placed before the learned Judge on 19th October 2023, the Judge ordered that the matter be mentioned on 27th November 2023; that, on 24th October 2023, the court entered Judgment against the applicant for USD 378,328.77, being the balance on final determination together with costs and interest at court rates; that the applicant was dissatisfied with the impugned Judgment and intends to file an appeal to this Court; that the intended appeal is arguable, and will be rendered nugatory unless this Court intervenes forthwith.

6. Furthermore, it was deponed that the respondents have proceeded to file their Bill of Costs dated 23rd February 2023 and was heard on 14th December 2023, and that the ruling fixed for 28th February 2023. The applicant averred that it stands to suffer enormous, irreparable and substantial loss if the respondents, which are foreign companies operating outside the jurisdiction of the Court and without known offices within the Republic of Kenya, are paid the decretal sum as it will be unable to recover the amounts paid were the intended appeal to succeed; and that, in addition, the applicant may be subjected to insolvency proceedings if compelled to pay the judgment debt.

7. Annexed to the application was a Notice of appeal dated 1st November 2023 and a draft Memorandum of appeal in which the applicant complained that: the learned Judge was in error in denying and violating the appellants' constitutional right to be heard and right to Fair Administrative Action as enshrined in Articles 50 and 47 of *the Constitution*; in entering a final Judgment whilst the applicants' application under certificate of urgency dated 16th October 2023 seeking to arrest the Judgment and re-open the case was pending hearing and determination; in finding that the applicant had not proved on a balance of probabilities that it had paid part of the outstanding debt to the respondent; in holding that there is no causal link between the payments made by the applicant and the respondents affiliate companies, Sinotruck Machinery Limited (USD 209,000) and Pan African Supply Chain

Limited (USD 130,000), whereas the payments were made to the order of the affiliate companies on instructions of the respondents, amongst other grounds.

8. In a replying affidavit dated 29th February 2024 sworn by Jackson Ngua, who described himself as the authorized Kenyan agent for the 1st and 2nd respondents, and in the Grounds of opposition, it was contended that there is no valid Notice of appeal which this Court can rely on to entertain an application for stay of execution or proceedings because the applicant was deemed to have withdrawn its Notice of appeal dated 1st November 2023 since neither the respondents nor their advocates were served with the Notice of appeal, and had also failed to institute an appeal within sixty (60) days from the filing of the Notice of appeal; that the 60 days had since lapsed, because the applicant failed to serve the respondents with a copy of the applicant's letter dated 20th February 2023 requesting for the proceedings, contrary to the requirements of rule 84 (2) of the *Court's rules*; and that, therefore, this Court does not have jurisdiction to hear the application as there is no competent appeal before it.

9. It was further contended that the intended appeal is not arguable, and neither would it be rendered nugatory since there are no proceedings to be stayed in view of the delivery of the partial judgment on 8th May 2020 and final Judgment on 24th October 2023, and that this Court cannot stay execution of the entire USD 948,675.50 because the judgment entered on 24th October 2023 was for Kshs. 378,328.77, and the partial judgment entered on 8th May 2020 is not the subject of this application; that, in any event, there is no threat of execution since the respondents are yet to tax their costs.

10. Both parties filed written submissions. Highlighting them during the hearing of the application on a virtual platform, learned counsel for the applicant, Ms. Wambua, reiterated the averments in the applicant's motion and the affidavit in support, and added that on the nugatory aspect, the respondent companies are registered in Hong Kong and do not have any local office or bank accounts in Kenya and that, therefore, are outside the jurisdiction of this Court; that the applicant will be unable to recover any amounts paid in the event that the appeal were to succeed.

11. In response to the allegation on the validity of the appeal, counsel submitted that the respondents' advocates were served via their email address with the Notice of appeal dated 1st November 2023 and that, therefore, the notice was properly on record, and that the intended appeal which is yet to be lodged is still within the time prescribed by law under rule 85(1) of the *Court of Appeal rules*.

12. In rebuttal, Mr. Karina, learned counsel for the respondents submitted that there is no valid Notice of appeal as it has never been served on them, and that they had failed to file the record of appeal contrary to rule 85, which requires an appeal to be filed within 60 days.

13. On the nugatory aspect, counsel submitted that there is no evidence before Court, that the company will be rendered insolvent, as no accounts or bank statements were produced to show the company's financial status; that there is already a partial judgment where execution was ongoing regardless of any stay orders because it had not been challenged in any way.

14. Before delving into the application under rule 5(2) (b), it is important that we first consider the status of the Notice of appeal as this informs our determination as to whether we have jurisdiction to hear this application. In this regard, this Court has severally expressed the view that rule 5(2) (b) does not make reference to "... where a valid notice of appeal ...." The rule simply provides that:

> " In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74 ...."

15. In the case of *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* CA No. Nai 238 of 2005, this Court faced with a similar objection held that:

> " The applicant filed its notice of appeal against the said decision on May 26, 2005; the court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohaga, learned counsel for the respondents ...tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore the court cannot grant the order of stay prayed for. We, however take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the court has repeatedly pointed out rule 5(2) (b) does not provide that '... where a valid notice of appeal ....' the rule simply provides that:
>
> > " In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74 ...."
> >
> > > Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5(2) (b) is being considered."

16. Declining to make a determination on the validity of a Notice of appeal in an application under rule 5(2) (b), this *Court in Peter Njuguna Njoroge vs. Zipporah Wangui Njuguna* [2013] eKLR held that:

> " We have anxiously considered the respondent's objection that there is no valid notice of appeal on record. In our view, we must avoid making a determination on that issue because the rules of this Court expressly provide the parties with solutions, which they are yet to invoke. The first is that a party who contends that a notice of appeal on record is invalid has a clear remedy under the rules how to deal with that notice. The second is that a party who has lodged a notice of appeal that is alleged to be invalid has an option under the rules to take steps to regularize any irregularity. As of now, neither the applicant nor the respondent has availed themselves of the remedies at their disposal under the rules."

17. The record shows that a Notice of appeal was filed and served on the respondents' counsel on 1st November 2023, and that it was filed within the timelines specified by the Court's rules. The respondents deny being served with the Notice. In view of the lean evidentiary material on the issue, it becomes a case of the applicant's word against the respondents' on a matter on which we are not being called upon to determine at this stage. What is of importance is that, since a Notice of appeal was filed within the prescribed timelines, we are satisfied that we have jurisdiction to hear and determine this application.

18. Having said that, the jurisdiction of the Court in so far as rule 5(2) (b) is concerned is original and discretionally and, to succeed, an applicant must demonstrate, firstly, that his appeal or intended appeal is arguable or, put another way, it is not frivolous; and, secondly, that unless he is granted a stay of the orders of the court below, the appeal or intended appeal, if successful, will be rendered nugatory. See *Chris Mungga N. Bichage vs. Richard Nyagaka Tongi & 2 Others* [2013] eKLR.

19. It is trite that an applicant need not establish a multiplicity of arguable issues. Neither is the applicant required to show that the point would succeed. What is of essence is that the issue raises a serious question worthy of consideration by this Court. See *Retreat Villas Limited vs. Equatorial Commercial*

Bank Limited & 2 others CA No 40 of 2006); and *University of Nairobi vs. Ricatti Business of East Africa* [2020] eKLR.

20. With respect to the issue as to whether the intended appeal is arguable, the applicant is aggrieved because the trial judge entered judgment on 24th October 2023 whilst its application dated 16th October 2023 was pending before the court and, by so doing, the court denied it the opportunity to be heard in respect of its application. We think that whether or not the trial court ought to have heard and determined the applicant's application prior to rendering its Judgment is an arguable issue for consideration by this Court.

21. On the nugatory aspect, the applicant contends that the motion seeks to stay the decretal sum of USD 378,328.77. It is apprehensive that if the orders sought are not granted, execution will ensue and, if the amount is paid, it will not be in a position to secure refund as the respondents are Hong Kong based companies with no offices or bank accounts within the jurisdiction of this Court. What the applicant is in effect saying is that, firstly, the respondents are offshore and that it will be unable to secure refund in the event that the decretal sums are paid; and, secondly, that they have no known resources within the country.

22. Addressing the ability of an applicant to obtain refund of decretal amounts paid, this Court in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another* (UR), Nairobi Civil Application No. 238 of 2005 had this to say:

> "This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden."

23. In this case, it is instructive that the respondents' reply was in the form of Grounds of opposition and a replying affidavit sworn by an agent in Kenya. Of significance to note is that, besides stating that he is the respondents authorized agent, nothing disclosed a direct connection between the agent and the respondents, or the scope of the agent's authority in so far as the respondent companies were concerned. There were also no averments or assurances by any authorized persons within the respondent companies either denying that they are located offshore, or that demonstrated their presence in the country, or that confirmed their ability to refund any amounts paid. Without any rebuttal to the applicant's assertions, we are not satisfied that the companies are within the reach of this Court's jurisdiction, or that the agent or the companies themselves have the capacity to refund the applicant if the sums are paid and the appeal were to succeed. No doubt, given these circumstances, if stay of execution and proceedings is not granted, the applicant will be placed in an unenviable position where it will be unable to obtain any refund of the decretal sums paid, which will in effect render the intended appeal nugatory.

24. In sum, the applicant has satisfied the threshold requirements necessary for grant of the orders of stay of execution under rule 5(2) (b) and, as a consequence, the Notice of motion dated 6th December 2023 is hereby allowed. Costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR