Dooba Enterprises Limited v Mpeke Hauliers Limited (Civil Appeal (Application) E186 of 2023) [2024] KECA 1921 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1921 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E186 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 11, 2024

BETWEEN

DOOBA ENTERPRISES LIMITED ..... APPLICANT

AND

MPEKE HAULIERS LIMITED ..... RESPONDENT

(Being an application for stay of execution pending appeal from the judgment of the High Court of Kenya at Mombasa (D. Magare, J.) delivered on 20th September 2023 and the ruling delivered on 7th February 2024inHCCC No. 51 of 2015)

RULING

1. On 15th April 2015, the respondent, Mpeke Hauliers Limited, filed suit vide a plaint dated 14th April 2015 against the appellant in which it was alleged that the respondent and the applicant enjoyed a principal-agent relationship in which the respondent was the agent in clearing and transporting, by road, consignments on behalf of the applicant to Uganda; that the applicant would make periodic payments to the respondent on invoices raised in consideration of clearing and forwarding of the goods; that, in May 2013, the applicant instructed the respondent to clear and forward 39 containers from Mombasa to the applicant's destination at Maina Freight in Uganda; that it was an implied or express term that the respondent would enter into contracts and pay port charges and incidental costs on behalf of the applicant, which the applicant would reimburse after delivery of the consignment to Uganda; that the respondent entered into a guarantee agreement for the release of the containers to the respondent on behalf of the applicant in which demurrage and incidental costs were guaranteed by the respondent and paid to Maersk Line (K) Ltd/Safmarine Ltd upon demand; and that, after delivering the consignment, the applicant caused delay by failing to offload the goods and pay import taxes on the consignment leading to penalty and demurrage charges as a consequence of which the respondent was blacklisted as an agent from the shipping line causing loss of 90% of its revenue given that Maersk Line (K) Ltd/Safmarine Ltd controls 90% of the market in Kenya.

2. By reason of the matters aforesaid, the respondent' claimed US$ 351,945.60 payable to the shipping line and arising from the guarantee agreement; and the respondent's haulage cost of US $ 94,243, making a total claim of US$ 446,188 together with costs and interests.

3. In its defence dated 13th July 2015 filed on 14th July 2015, the applicant pleaded that, on executing the guarantee agreement, it was the respondent's responsibility to ensure that cargo is cleared at the port and transported to its destination in Uganda within a reasonable time; that demurrage was caused by the respondent's delay to clear and forward cargo from Mombasa to Kampala despite having been given the necessary documents in time as well as its delay to pick and return empty containers despite having been handed to their appointed Inland Container Depot in Kakajo, Kampala, in good time; that the respondent failed to forward demurrage invoices, if any, which were only delivered to the applicant on 5th May 2015; that some demurrage expenses of US$ 11,220 were paid to the Damco Logistics Uganda Ltd as instructed and the empty containers were supposed to be dropped at Maersk Line in Kampala, which the respondent refused to oblige and kept the containers for more than 100 days, hence further demurrage was unwarranted; and that the claim by the respondent had been settled in excess of US $ 105,581 and that following a reconciliation of accounts done in April 2014 when it was confirmed that the respondent owed the applicant US$ 105,581, which sum the applicant claimed by way of a counterclaim with interest, loss of business and costs.

4. At the conclusion of the hearing, the learned Judge entered judgement for the respondent against the applicant on 20th September 2023 in the sum of US$ 434,968 and dismissed the counterclaim with costs of US$2508 to the respondent. He also awarded costs and interests from the date of filing suit till payment in full.

5. Subsequently, on 7th February 2024, the learned Judge determined an application filed by the respondent dated 10th January 2024 and directed that the respondent's goods and containers on transit to Uganda that were proclaimed by the respondent to be detained in Kenya pending the necessary application to the relevant parties for their conversion into local imports or forceful transfer, auction or sale to settle the decretal sum. In the alternative, it was directed that the applicant be at liberty, upon payment of the entire decretal sum and auctioneer's costs and any expenses incurred but before auction, to have the goods released subject to providing full indemnity on all taxes paid or payable as a result of the attachment. The applicant was directed to bear the costs, execution costs, other costs that may accrue together with taxes, port and shipping charges and incidental costs.

6. Dissatisfied with the judgement and the ruling, the applicant filed Mombasa Civil Appeal No. E186 of 2023- Dooba Enterprises Limited v Mupeke Hauliers Limited.

7. The subject of this ruling is an application brought by way of Notice of Motion dated 22nd March 2024 in which the applicant seeks:

    a. stay of execution of the judgement and decree of dated 20th September 2023 in High Court Civil Suit No 51 of 2015 (Mpeke Hauliers Limited v Dooba Enterprises Limited) pending hearing of this application and the appeal in COACA E186 of 2023 (Dooba Enterprises Limited v Mupeke Hauliers Limited).

    b. stay of execution of the order of 7th February 2024 in High Court Civil Suit No 51 of 2015 (Mpeke Hauliers Limited v Dooba Enterprises Limited) pending hearing of this application and the intended appeal.

    c. stay of execution of the order of 20th February 2024 of the High Court in Misc. Application No E005 of 2024 (Urbanus K. Musyoki t/a Alfajiri Auctioneers v Kenya Revenue Authority,

Kenya Ports Authority, PIL Kenya Limited & Blue Funnel Limited) pending hearing of this application and the appeal in COACA E186 OF 2023 – Dooba Enterprises Limited v Mupeke Hauliers Limited)

8. In support of the motion, the applicant relied on the affidavit sworn by one of its directors, Nazeba Charles, on 22nd March 2024 in which it was deposed that the applicant being aggrieved by the said judgement and ruling filed the said appeal; that the applicant also filed a Notice of Appeal against the ruling of 7th February 2024; that amongst the grounds the applicant intend to argue in the appeal include the fact that the court erroneously found that there was an implied contract between the parties, and in not finding that it was the responsibility of the respondent to return the empty containers to the port, but penalized the applicant for the delays in doing so; that the learned Judge further erred in awarding the respondent demurrage/detention charges, yet there was no proof that the respondent had paid the said charges to the shipping company and that the award of demurrage was way over and above the value of the containers contrary to known international practice; that the execution proceedings commenced by the respondent is likely to lead to the applicant's goods being sold in execution of the decree before the appeal is heard and determined by this Court; that the respondent, through its agents, moved to the High Court vide Misc. Application No E005 of 2024 and obtained orders directing change of the manifest from the original consignee, the applicant, to the respondent; that the applicant is ready and willing to abide by any condition imposed by this Court for stay; and that it is in the interest of justice that the orders sought be granted.

9. In opposition to the application, the respondent relied on the affidavit sworn by its director, Peter Mulei, on 3rd April 2024 in which he deposed that, immediately after the judgement, the applicant filed an application dated 10th November 2023 for stay pending appeal before the trial court but that, instead of pursuing that application, withdrew it; that, on 17th November 2023, the applicant filed another application for stay pending appeal before this Court and that, on the hearing day, the applicant likewise withdrew the application on the ground that execution had commenced by way of proclamation; that, this being the third application by the applicant seeking stay of execution of the monetary decree on the allegation that the respondent has moved to perfect the execution proceedings, the applicant is guilty of forum shopping; that the applicant is employing this method to delay and refuse to pay the decretal sum in order to frustrate the respondent from realizing the fruits of the judgement; that the grounds of appeal are not merited since the respondent cleared, handed and delivered all his assignments; that the decretal sum as at 19th December 2023 was Kshs 169,643,575 and continues to accrue interest and costs, and the applicant is a foreign company with no fixed assets and its ability to satisfy the decretal sum is doubtful; that it would be imperative that the applicant deposits the entire sum in a joint interest earning account should the Court deem it fit to grant stay of execution; that the applicant is conniving and sly in that it has managed to convince the shippers to file objection proceedings against execution by claiming that they owned the goods until delivery in Kampala and that, therefore, the attachment should be lifted; that if the objectors are the owners of the goods and the applicant cannot satisfy the objectors' demands, then it means that the applicant is not trustworthy to pay the decretal sum; and that the application should be dismissed with costs.

10. When the matter was called out for virtual hearing before us on 8th May 2024, learned counsel, Mr. Lukorito appeared for the applicant while learned counsel, Mr. Matheka, appeared for the respondent. Both counsel relied on their written submissions with minimal highlighting.

11. In its submissions dated 3rd April 2024 filed by Lukorito & Co Advocates, the applicant cited the case of Appollo Insurance Limited v Arapon Wood & Equipment Supplies Ltd CA No.142 of 2003, highlighting the principles to be satisfied in an application for stay of execution. It was submitted that, on the basis of the grounds of appeal set out in the memorandum of appeal, the applicant

has demonstrated arguable grounds to be considered by the Court. Regarding the second limb, it was submitted that, should the respondent proceed with the execution, this appeal will remain an academic exercise if it were to succeed since it would be impractical to recover the amount in excess of Kshs 145,000,000 from the respondent, as the same would have been paid to the third party. While appreciating the Supreme Court's position in Westmont Holdings SDN BHD v Central Bank of Kenya & Another SCOK Pet No. 16 [E023] that the decision whether or not to grant stay is discretionary and meant to balance the overarching objectives in the administration of justice, the applicant contended that it had demonstrated and satisfied the two limbs to be satisfied in granting the stay of execution and prayed that the orders sought be granted on favourable terms.

12. On behalf of the respondent, reliance was placed on brief submissions dated 9th April 2024 filed by Wandai Matheka & Co Advocates. Mr. Matheka in in his oral address conceded that the applicants had demonstrated that its appeal is arguable. However, it was submitted that, since what is sought to be stayed is a monetary decree, the applicant had failed to demonstrate that it is in a position to satisfy the decree, hence the stay ought not to be granted; that, although this is the third application seeking stay, the applicant has not bothered to either open a joint interest earning account or deposit any money in court as a condition for grant of stay pending appeal; that, the applicant being a foreign registered company domiciled in Uganda with no known assets within the jurisdiction of this Court that would easily be available for attachment, to grant the stay would be condemning the respondent to undue hardship since it may never recover and/or realise its fruits of judgement; and that it is imperative that the applicant be compelled to deposit the entire decretal sum in a joint interest earning account in the names of both advocates as a condition for stay pending appeal.

13. We have considered the application, the submissions both written and oral, the cited authorities and the law.

14. For an applicant to succeed in the applications of this nature, apart from bringing itself within the jurisdiction of this Court by filing the appeal or the Notice of Appeal, it should demonstrate that the appeal or intended appeal, as the case may be, is arguable, or as is often said, not frivolous; and, secondly, that the appeal or intended appeal would be rendered nugatory absent stay. The rationale for the twin principles was explained by this Court in Peter Gathecha Gachiri v Attorney General and 4 Others Civil Application Nai 24 of 2014 (unreported) where it was held that:

> " Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

15. Regarding the first condition, this Court in Stanley Kang'ethe v Tony Keter & 5 others [2013] eKLR emphasised that it is sufficient if a single bonafide arguable ground of appeal is raised. See also Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004. Further, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

16. In this case, the respondent conceded, and rightly so in our view, that the applicant's appeal is arguable. Therefore, in this application, we will only concern ourselves with the second limb of the application. The term 'nugatory', as has been held, has to be given its full meaning since it does not only mean worthless, futile or invalid, but also means trifling. In addition, as held in Stanley Kangethe Kinyanjui v Tony Ketter and 5 others (supra):

> " Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

17. In this regard, this Court in Reliance Bank Limited v Norlake Investments Ltd [2002] 1 E.A. 227 held that:

> " ... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

18. As to what amounts to trifling, this Court in the case of Permanent Secretary Ministry of Roads & another v Fleur Investments Limited [2014] eKLR held that:

> " A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law."

19. In this case, the applicants' argument in the supporting affidavit is that the execution proceedings commenced by the respondent is likely to lead to the applicant's goods being sold in execution of the decree before the appeal is heard and determined by this Court. Of course, the respondent being the successful party in the court below is entitled to execute the said judgement. There is nothing wrong in a successful party executing the decree issued in its favour notwithstanding the fact that the other party intends to or may have even lodged the appeal as the applicant has done in this case since the mere fact that the unsuccessful party files appeal does not stay the execution. The fact that the process of execution has been put in motion, or is likely to be put in motion, does not of itself satisfy the second condition since execution does not ipso facto render an appeal or intended appeal nugatory. Even when execution has been levied and completed, nothing bars the applicant, upon successfully prosecuting its appeal, from seeking an order of restitution. It is only where the applicant shows that restitution will not be possible, either because by the nature of the execution the substratum of the appeal will have been eroded, or that the respondent will not be in a position to refund the decretal sum, that the intervention of this Court will be justified.

20. It must be appreciated that execution is a lawful process and this Court will not intervene merely because it has been commenced or is likely to be commenced. For this Court to intervene, the applicant must demonstrate that there exist other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the result of the appeal should it succeed. In other words, the applicant ought to prove that, unless the order of stay is granted, the

subject matter of the appeal or intended appeal is likely to be destroyed; or that the execution is likely to foist upon the Court a situation of complete hopelessness or render nugatory any order of the Court, or paralyse, in one way or another the exercise by the litigant of his constitutional right to appeal the decision; or that it will generally provide a situation in which whatever happens to the case and, in particular, even if the appeal succeeds, there would be no return to the status quo.

21. The instant application is based on mere apprehension that execution which had already commenced is likely to be completed. Although it was alleged in the submission that should the respondent proceed with the execution, this appeal will remain an academic exercise if it were to succeed since it would be impractical to recover the amount in excess of Kshs 145,000,000 from the respondent as the same would have been paid to the third party, no basis was laid for that robust submission. In an application of this nature, in which the applicant seeks to deny the respondent the enjoyment of the fruits of its judgement albeit temporarily during the pendency of the appeal or intended appeal, it is for the applicant to place before the Court material on the basis of which the Court would justify that action. Bare allegation that the respondent will be unable to refund the sum in question does not meet the threshold for exercising discretion in favour of the applicant.

22. In this case, it was contended, which contention was not rebutted, that the applicant is a foreign company with no assets within the jurisdiction of the Court. The order that it seeks to stay gave it the option of paying the decretal sum together with the auctioneer's costs as a condition for the release of its goods. The position, as was held in Kenafric Matches Ltd v Match Masters Limited & Another Civil Application No. E902 of 2021 (UR), is that, in deciding whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and that each case has to be considered on its own merits. This is in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of proportionality ought to be taken into account. This position was restated in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR where this Court held that:

> " ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

23. In the absence of the basis for alleging that the respondent will not be able to refund the decretal sum if paid over to it, we are not persuaded that the intended appeal, if successful, will be rendered nugatory. As the applicant has failed to surmount the second hurdle, this Motion fails and is hereby dismissed with costs.

24. It is so ordered.

DATED AND DELIVERED AT THIS 11TH DAY OF OCTOBER, 2024.

A. K. MURGOR

JUDGE OF APPEAL

.....

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

JUDGE OF APPEAL

.....

G.V. ODUNGA

**JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR