



**Great Rift Drilling Limited v Cluff Geothermal Limited (Civil Application
E061 of 2023) [2023] KECA 855 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 855 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E061 OF 2023
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
JULY 7, 2023**

BETWEEN

GREAT RIFT DRILLING LIMITED APPLICANT

AND

CLUFF GEOTHERMAL LIMITED RESPONDENT

(Being an application brought under rule 5(2) (b) of the Court of Appeal Rules, 2022 for an order of injunction pending the determination of an appeal against the Ruling of the High Court of Kenya at Nairobi (Mwita, J.) dated 20th of January 2023 in HCCC No. E394 of 2022)

RULING

1. The applicant, Great Rift Drilling Limited, filed suit against the respondent, Cluff Geothermal Limited, a foreign entity registered in the United Kingdom, at the High Court Commercial and Tax division at Nairobi in HCCC Number E394 of 2022, seeking to recover USD 2,853,177 with interest at USD 463.23 per day from June 3, 2019 until payment in full, and costs in a number of suits. Simultaneous with the plaint, the applicant filed a motion application seeking interim orders to attach the respondent's drilling equipment, and to restrain the respondent from disposing of, or removing the equipment from the jurisdiction of the trial court.
2. The respondent filed a Notice of Preliminary Objection and Notice of Motion dated October 12, 2022 challenging the jurisdiction of the court, contending that an exclusivity clause in a Deed of Control invoked the jurisdiction of the courts in the United Kingdom.
3. On being served, the respondent filed the application dated October 12, 2022 seeking to have the suit struck out for want of jurisdiction. The respondent also filed a Notice of preliminary objection raising the same issue of jurisdiction to the effect that the suit and application by the applicant offended section 5 of the [Civil Procedure Act](#) as the trial court had no jurisdiction to adjudicate on the matter as parties



had chosen the courts of England and Wales as the forum for adjudicating disputes arising from a Deed of Settlement dated December 21, 2016 (the Deed).

4. In response, the applicant filed an application to strike out the Deed of Control on grounds that it had been rescinded for reason of fraudulent misrepresentation.
5. On January 20, 2023, the High Court Commercial and Tax Division at Nairobi rendered its ruling on the preliminary objection in HCCC No E394 of 2022 holding that, from the terms of the Deed, the parties opted for the jurisdiction of the courts of England and Wales for resolving disputes in relation to interpretation, enforcement, termination or even questions on validity of the Deed; that parties are bound by the terms of their contract, and that it is not the business of the court to rewrite the contract for the parties; that, when parties chose the forum where their dispute should be resolved, the court should ordinarily give effect to that wish, unless there are strong reasons for not doing so; and that, in that instance, the applicant having failed to prove that the Deed of Control was vitiated by fraudulent misrepresentation, then the trial court lacked Jurisdiction.
6. Aggrieved by the entire ruling of the trial court, the applicant, intends to appeal against it and has by a notice of motion dated February 24, 2023, sought grant of a temporary injunction restraining the respondent and/or their assignees, lessees, agents, servants, representatives, employees or any other person from disposing, assigning, transferring, leasing, charging and or dealing with the property known as Atlas Copco Predator Self Propelled Drilling Rig S/N 50126, Vin No 1 Cykxxxx69t049052 and all accessories (Hereinafter 'Drilling Equipment') belonging to the respondent, and currently stored in a plot located near Corner Baridi, Champagne Ridge Road, Kajiado County, pending the hearing and determination of the intended appeal against the ruling delivered on January 20, 2023 in Nairobi HCCC E394 of 2023. The Motion is supported by the affidavit of even date sworn by David James Stewart Coulson.
7. The applicant describes the intended appeal as raising serious arguable grounds which include: that the learned Judge misapprehended and misapplied the law of contract in relation to the Deed of Assignment, concluding that it granted jurisdiction to courts in England and Wales, leading to the trial court not dealing with the application which had been filed; and that the learned Judge ignored the illegal retention of VAT by the respondent, paid to it by Geothermal Development Company and awarded to the applicant and the respondent; in the London International Court of Arbitration. The applicant contends that the impugned decision is silent on the strong reason relating to fraudulent misrepresentation advanced by the appellant as a basis to vitiate the exclusive jurisdiction clause set in the Deed of Control, arguing that even if the trial court was of the view that the appellant failed to show strong reasons, it was under a judicial duty to address its mind to the applicant's arguments, taking into account the Strong Reason test enunciated in *United India Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR*. On arguability limb, the applicant refers to the case of *Attorney General vs Okiya Omtata & Anor Court [2019] eKLR*, which identifies arguability of an appeal as one of the two principles upon which rule 5(2) (b) orders may be granted.
8. On the nugatory aspect, the applicant points out that the drilling rig is situated in Kenya, and yet, at the time of filing suit in HCCC No E394 of 2022, the respondent had begun preparations to move it to an unknown location in Tanzania outside the Court's jurisdiction, that, in the event the appeal succeeds, the applicant will be denied the fruits of their victory as the suit property would have been transferred outside the jurisdiction of this Court or otherwise placed beyond the reach of the applicant; and that it would be difficult to realise the fruits of their judgment.
9. The applicant contends that it will suffer a greater hardship to access the funds should the Court allow the appeal, pointing out that if the Predator Rig, which is the sole remaining asset of the respondent



in Kenya, remains in situ within the jurisdiction of the Kenyan Courts, the respondent will not experiencing as much hardship because work for the rig can be found. On the other hand, if the orders are not granted, the applicant will experience difficulties in the recovery of the respondent's company assets once the said Rig leaves the jurisdiction of the Court, should the appellant's appeal succeed. In support of this argument, the applicant draws from the decision in *Patricia Njeri & 3 Others vs National Museum of Kenya [2004] eKLR*, which provided a test for the issuance of an injunction pending appeal to include taking into consideration which party would suffer greater hardship if the order is not granted.

10. In the replying affidavit sworn on March 31, 2023 by Thomas Elliot, the respondent opposes the application stating that the applicants, deliberately intending to mislead the trial court, failed to disclose the existence of the Deed Agreement which was freely entered into, and containing clauses relating to dispute resolution mechanisms to be used by the parties (including the contested issue on rescission of the Deed), and that, therefore, the issue relating to jurisdiction of Kenyan courts in the matter is a non-starter which cannot form an arguable ground of appeal for grant of an injunction. In support of this position, the respondent refers to the judicial decisions in *Equity Bank Ltd vs West Link Mbo Ltd [2013] eKLR* and *Luziki Holdings Ltd vs Elijensons Investments Ltd and Another [2021] eKLR*. It was also submitted that there are no exceptional circumstances demonstrated that would meet the test contemplated in *United India Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1985]*. It was also submitted that, even if the rig goes to Tanzania as is alleged, Kenya has a reciprocal agreement with Tanzania, and that, the fears raised have no basis; and that, in any event, since there is no arguable appeal, the nugatory question aspect does not arise, bearing in mind that the basic pleading did not contain a prayer for injunction.
11. We have considered the submissions made by the parties. Our invitation to intervene on behalf of the applicant has been invoked under rule 5(2)(b) of the *Court of Appeal Rules, 2022* which provides:

' 5(2) (b) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.'
12. The principles that guide the Court in discharge of its mandate under the above rule, and which we fully adopt, were aptly articulated by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR*. First, an applicant must demonstrate that the appeal or the intended appeal is arguable and, secondly, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.
13. We are also guided by the decision in *Eric Makokha & 4 Others vs Lawrence Sagini & 2 Others [1994] eKLR* where this Court in an application under rule 5 (2) (b) stated:

' An application for injunction under Rule 5(2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity.'
14. On the first principle as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR* where this Court described an arguable appeal in the following terms:

' vii). 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.



viii). In considering an application brought under Rule 5(2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.'

15. We have also considered the draft memorandum of appeal and are conscious that, in the application before us, we are not required to make definitive findings on the proposed grounds of appeal, as that is the function of the Court that will hear the appeal. In law, an arguable appeal is not one which must necessarily succeed, but one which is not frivolous, but raises a bona fide issue that, ought to be argued fully before the Court. Being conscious of the risk of embarrassing the Court that will eventually hear the appeal should we delve in detail on the grounds of appeal, all we can say at this point is that, having looked at the grounds of appeal, we are unable to identify any arguable point.
16. In law the position as to whether an appeal will be rendered nugatory, depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See *Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 EA 227*.
17. We have considered the above threshold, in light of the applicant's positions herein on this prerequisite. The applicant is apprehensive that if the rig leaves the jurisdiction of this country, there would be nothing else to attach, yet fails to demonstrate that actually even such departure is reversible by way of reciprocity, or that damages would not adequately compensate such loss. We thus find that the applicant has not satisfied the twin principles to warrant grant of the orders sought. The application lacks merit, and is dismissed. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

