



IN THE COURT OF APPEAL

IN NAIROBI

CORAM: W. KARANJA, SICHALE & J. MOHAMMED, J.J.A

CIVIL APPEAL (APPLICATION) NO. 593 OF 2019

BETWEEN

BERLIN EQUIPMENT LIMITED1ST APPLICANT

KWALE INTERNATIONAL SUGAR COMPANY LTD.....2ND APPLICANT

AND

TATA AFRICA HOLDINGS (K) LIMITED.....RESPONDENT

(Being an application for stay of execution of the ruling of the

High Court of Kenya at Nairobi pending the hearing and determination of the Appeal from the ruling of (**Okwany, J.**) delivered on the 21st November, 2019).

In

H. C. C. No. E104 of 2019

RULING OF THE COURT

Background

1) By way of a Notice of Motion dated 29th November, 2019, **Berlin Equipment Limited** (the 1st applicant) and **Kwale International Sugar Company Ltd** (the 2nd applicant) urge this Court to exercise its discretion under **Rule 5(2)(b)** of the **Court of Appeal Rules** (this Court's Rules) and grant them orders in the main:

- a) That there be a temporary stay of execution of the ruling and order issued by **Okwany, J.** on 21st November, 2019, pending the hearing and determination of this application *inter partes*;
- b) That there be a temporary stay of execution of the ruling and order issued by the learned Judge pending the hearing of the appeal filed by the applicants; and
- c) That costs of this application be provided for.

2) A brief background of the application is that on 8th July, 2019 the applicants filed an application in the High Court to set aside judgment in default of defence which was entered in favour of the respondent on 17th June, 2019; the applicants had failed to file their defence and counter-claim for the sum of Ksh. 612,464,265.44 against the respondent by 29 days. In the impugned ruling delivered on 21st November, 2019, the learned Judge found *inter alia* that the applicants' defence and counter-claim raised triable issues and that the same would be deemed as duly filed. The learned Judge allowed the application dated 8th July, 2019 and set aside the default judgment on the following terms:

“i. That the defendants shall within 30 days from today's date deposit the decretal sum of Kshs 22,396,115.22 in the joint interest earning account to be held in a reputable bank in the names of counsel for the plaintiff and the defendants.

ii. That the defence and counterclaim filed on 21st June 2019 be deemed as duly filed.

iii. That the event of failure (sic), by the defendants to comply with Order No.(i) herein above, the parties shall revert to their position before this ruling, which means, the default judgment shall be reinstated so that plaintiff can proceed with the execution.

iv. The costs of this application shall abide the outcome of the main suit.”

3) Aggrieved by that decision, the applicants filed a Notice of Appeal, the instant application and **Civil Appeal No 593 of 2019** which was filed on 2nd December, 2019. In the written submissions filed on behalf of the applicants, learned counsel, **M/S Lloyd & Partners Advocates**, LLP submitted that the appeal is arguable on the grounds, *inter alia*, that the learned Judge erred in law and fact: in granting onerous and drastic conditions for the setting aside of the *ex-parte* judgment, *to wit*, that the entire decretal sum of Kshs 22,396,115.22 be deposited in an interest bearing account in the joint names of counsel for the applicants and the respondent; in failing to appreciate that the decretal sum of Kshs 22,396,115.22 was contested and that there was a counterclaim for a substantial amount, *to wit*, Kshs 612,462,265.44 raised by the applicants against the respondent, thereby making it prejudicial for the court to order that the entire decretal sum be deposited in court without first hearing the parties; in failing to appreciate the fact that having set aside the *ex-parte* judgment and decree, the court was *functus officio* in respect of that decree and that there was no decretal amount to be deposited in court; and in failing to appreciate the principles for setting aside *ex-parte* judgments, *to wit*, that where there is even one triable issue, the court is bound to order that the *ex parte* judgment be set aside without imposing any conditions.

4) On the nugatory aspect, counsel submitted that the respondent in its replying affidavit admitted that they have commenced execution against the applicants and if stay is not granted, the respondent will proceed with attachment and sale of the applicants’ business assets thereby rendering the appeal an academic exercise; that there is no evidence that the respondent will be in a position to refund the monies paid to the respondent if stay is not granted and the appeal succeeds; that the financial ability and resources of the respondent is information that is within the special knowledge of the respondents and they ought to have placed evidence before the Court to demonstrate that they will be in a position to refund the monies paid if the appeal succeeds.

5) The application was opposed by way of written submissions filed by **Muma Nyagaka & Company Advocates**, learned counsel for the respondent. Counsel submitted that this Court has no jurisdiction to hear and determine the instant application and the appeal as its jurisdiction has not been properly invoked; that the applicant filed a memorandum of appearance before the High Court but failed to file a statement of defence within the statutory period; that the applicants applied to set aside the default judgment which application was allowed with conditions; that the applicant failed to apply for leave or obtain leave of the High Court to lodge the notice of appeal; and that without a valid notice of appeal, this Court has no jurisdiction to hear and determine this application or the appeal.

6) Counsel further submitted that the appeal is not arguable on the grounds that: the jurisdiction of this Court has not been properly invoked as the right of appeal ought to have been preceded with the leave of the court; that the substratum of the appeal has been settled based on a verbal agreement between the parties that the principal sum be paid by way of instalments; that the applicant issued a number of post-dated cheques which were honoured on presentation; that the applicant stopped payment of subsequent cheques which was done in bad faith and is therefore undeserving of the discretion of this Court; and that the appeal is therefore frivolous.

7) On the nugatory aspect, counsel submitted that the appeal will be rendered nugatory if the instant application is dismissed and the appeal succeeds; that the respondent’s claim before the High Court was based on a liquidated sum which is capable of being quantified and restored in the event that the appeal succeeds; that the applicants have not demonstrated that the respondent lacks the capacity to restore and/or pay damages when so required; that the applicants’ delay in filing the counter-claim was inordinate; that the order from which the appeal arises is a discretionary one; and that the applicant has not demonstrated that the High Court misapprehended the facts or took into account considerations of which it should not have taken into account or failed to take into account such considerations which it should have or that the court was wrong. Counsel urged us to dismiss the application with costs.

Determination.

8) We have considered the application, the rival submissions, the authorities cited and the law. It is trite that in an application under **Rule 5(2)(b)** of this Court’s Rules, the applicant must establish that there is an arguable appeal and secondly, that the appeal or intended appeal would be rendered nugatory if stay of execution is not granted – See **Ishmael Kagunyi Thande v Housing Finance Company Limited Civil Application No 156 of 2006 (UR)** where these principles were restated thus:-

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

9) On the limb of arguability, counsel for the applicant contended that the appeal is arguable on various grounds, *inter alia*, whether the grant of conditions for the setting aside of the *ex-parte* judgment including the deposit of the entire decretal sum was onerous in the circumstances; whether the principles for setting aside an *ex parte* judgment, that where there was even one triable issue the court is bound to order that the *ex parte* judgment be set aside without imposing any conditions; and whether this Court has jurisdiction to hear and determine the appeal in the absence of leave to appeal. Taking caution not to make determinations that would otherwise prejudice the hearing of the intended appeal, we find that the appeal is arguable.

10) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR** this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not 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.

xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s impecunity, the onus shifts to the latter to rebut the allegation.”

11) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the respondent in the replying affidavit has admitted that they have already commenced execution against the applicant. In the circumstances we find that the appeal will be rendered nugatory if the orders sought are denied and the appeal succeeds.

12) In the circumstances, the applicants have satisfied both limbs of the requirements under **Rule 5(2)(b)** of this Court’s Rules. The Notice of Motion dated 29th November, 2019 is hereby allowed. We grant a stay of execution of the judgment and decree of the High Court dated 21st November, 2019 on the following conditions:

- a) That counsel for the applicants’ deposits Kenya Shillings Ten Million (Kshs. 10,000,000/ in a joint interest-bearing account with counsel for the respondent within 45 days from the date of delivery of this ruling pending the hearing and determination of the appeal;
- b) That in default, the order of stay granted shall stand vacated; and
- c) That costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR