



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, ASIKE-MAKHANDIA & KANTAI J.J.A)

CIVIL APPLICATION NO. E217 OF 2020

BETWEEN

BLUE NILE (EAST AFRICA) LIMITED.....APPLICANT

AND

ASE METAL N.V BELGIUM.....RESPONDENT

(Being an application for stay of execution of the ruling of the High Court of Kenya

at Nairobi (Lady Justice Grace Nzioka, J) dated and delivered on the 13th July 2020

and order dated 22nd July 2020 in HCCC No. 300 of 2017)

RULING OF THE COURT

The applicant, Blue Nile (East Africa) Limited, has filed a notice of motion application under Rules 5(2) (b) of the Court of Appeal Rules. It seeks to stay the execution of the ruling and order of the High Court (**G. Nzioka, J**) dated 13th July 2020 until the appeal is heard and determined.

The applicant was sued in the High Court by the respondent for a sum of USD 505,490.85 being the balance of the purchase price for goods sold and services rendered to the applicant by the respondent. On or about the 10th December 2014 and 19th January 2015 the applicant purchased from the respondent pieces of metal worth USD 610,490.85. The applicant made part payment of USD 105,000/= leaving a balance of USD 505,490.85 which was never cleared. In its defence, the applicant denied owing any money and having any direct business relationship with the respondent, and that if there was, then the same was fraudulent. Not amused by the defence and based on acknowledgment and other documents in its possession the respondent filed an application for judgment on admission. Upon hearing the application inter partes Nzioka J. allowed the application and entered judgment for the respondent for USD 505,490.85. Aggrieved by the ruling and order the applicant filed a notice of appeal signaling its intention to appeal. Fearing that the respondent may proceed to execute the decree, the applicant filed the instant application.

The grounds in support of the application are that there was no formal business transaction entered into between the parties; that the initial proforma invoice read “Blue Nile Wire Products Ltd.” and the same had been fraudulently changed under unclear circumstances to read the applicant’s name; that the changes made were not genuine but fraudulent and therefore the ruling was based on fraudulent and disputed documents; that the appeal is arguable and that it shall suffer irreparable damage thereby rendering the appeal nugatory.

The supporting affidavit sworn by **Mohamed Said Chute**, a director merely reiterated and expounded on the above grounds. Suffice to add that an allegation of fraud can only be determined after a full hearing. That the court should not allow the criminal scheme used by the directors of Blue Nile Wire Products Limited to transfer liability to it.

The respondent through its director, **Yvan Castelein** filed replying affidavit dated 31st August 2020. He deposed that the applicant had bought metal materials from it valued at USD 610,490.85/= and made part payment of USD 105,000/= leaving a balance of Ksh. 505,490.85, a sum admitted by the applicant in several documents produced in court. That it was not in any way involved in any irregularity as alleged or in any internal mismanagement of the applicant. The applicant did not prove fraud and that the court properly entered judgment on admission.

In its written submissions the applicant maintained that it had not made an order of goods from the respondent. That its former employees had formed another company that had been supplied with the goods, and then fraudulently raised pro forma invoice against it.

In addition, it was submitted that the court had failed to apply the principles on judgment on admissions.

It was further submitted that the respondent was a foreign company and if execution was to issue, the funds may be transferred to a foreign account, which shall make it difficult to recover if the appeal succeeds. The applicant further submitted that its business shall be greatly affected if execution was to be effected. We were therefore urged to allow the application in-order to preserve the substratum.

The respondent on its part urged us to find that the application does not meet the requirements of rule 5(2)(b) of the Court of Appeal rules. It is the applicant's burden to show that it has an arguable appeal and that the same would be rendered nugatory if the order is not granted. To the respondent the applicant had not satisfied the two limbs so as to benefit from the discretion of the court to grant stay of execution as held in **Export Processing Zone Authority v. Charles Kipkorir Misik & 11 Others [2020]** eKLR. The respondent reiterated that it was an international company with a local branch so that the issue of the money being stashed in a foreign country making it hard to recover does not arise. Further that the applicant had not demonstrated how its business would be adversely affected if the stay sought was denied. We were therefore urged to dismiss the application with costs.

We have considered the application, the rival affidavits, the submissions by both parties and the authorities cited.

The application is premised on rule 5(2)(b) of this courts' rules.

In **Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others (2013)** eKLR, this Court laid down the guiding principles for the grant stay of execution. Most important being that the applicant must demonstrate that the appeal is arguable and secondly, should the stay not be granted the intended appeal shall be rendered nugatory.

The grounds raised in the draft memorandum of appeal hinge on allegations of fraud, the principles of entering judgment on admission, and the authenticity of the documents tendered in evidence by the parties upon which judgment on admission was entered. The issue of fraud was first raised when the applicant sought to join in the suit, **Blue Nile Wire Products Limited** and its directors, who according to the applicant, were the masterminds of fraud. The application was however, dismissed. The issue ended there and was never raised again in the subsequent proceedings. The principles of entering judgment on admission are settled and nothing much really turns on this. The fact that the respondent was an international company with a local branch in the country was not discounted. Further the respondents did not demonstrate how its business would be affected if the decretal sum was to be paid other than just making the assertion. More important however is the fact that judgment on admission was entered based on the documents filed in court by the parties with no challenge mounted on grounds of fraud. Given the foregoing we are not satisfied that the appeal will be arguable.

It is worth repeating that it is a requirement that both limbs of arguability and the nugatory aspect be satisfied before this court can grant the orders sought. The applicant having failed to convince us that the intended appeal is arguable, we need not consider the nugatory aspect. In the result the application is bereft of merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR