



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A.)

CIVIL APPLICATION NO. 132 OF 2019

BETWEEN

**B. N. KOTECHA & SONS LIMITED .....APPLICANT**

AND

**UNITED MILLERS LIMITED..... RESPONDENT**

*(Application for stay of execution pending the determination of an intended appeal from the ruling and order made by the*

*High Court of Kenya at Kisumu (F. Ochieng, J) dated 8th October, 2019*

in

**KSM HC INSOLVENCY CAUSE NO. 1 OF 2018)**

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**RULING OF THE COURT**

[1] On 8th October, 2019 the High Court (Ochieng, J) delivered a ruling in regard to two applications dated 28th May, 2018 and 21st January, 2019 in which **B. N. Kotecha & Sons Limited**, who is now the applicant before us, had sought orders *inter alia*, for setting aside or varying orders that had been made by the High Court, (Cherere, J) on 11th April, 2018 adopting a consent that had been agreed upon by the parties, that the applicant would pay the respondent **United Millers Limited** Kshs.5,000,000 every month. [2] The learned Judge rejected the applicant's assertion that the consent order was unenforceable as it was illegal, void and null *abinitio*, and found that the applicant had approved the terms of the consent, and that there was no reason to set aside the order.

[3] Being aggrieved the applicant has filed an appeal against the ruling of the learned Judge. The applicant has also filed a notice of motion dated 16th October, 2019 before this Court in which it is seeking an order for stay of execution of the order of 8th October, 2019 and urges the Court to issue such further directions and/or orders as it may deem just and expedient.

[4] The application is anchored on grounds that the consent for the payment of Kshs. 5,000,000 was obtained through force, blackmail and duress exerted on one of the applicant's directors, and that the advocates of the applicant did not have any instructions to enter into the consent. The applicant also urged that the amount which is subject of insolvency cause No. 1 of 2018, arises from questionable LPO's and delivery notes and that the matters are subject of investigations by the Criminal Investigations Department.

[5] In addition, the applicant contends that if the order of stay of execution is not issued, the appeal against the ruling of the learned Judge will be a mere academic exercise as damages cannot compensate the applicant. The applicant maintained that it has a good appeal with high chances of success.

[6] The respondent has replied to the applicant's motion through a replying affidavit sworn by its Managing Director, **Sunil Narshi Shah** in which it is deposed *inter alia*, that the respondent entered into a consent with the applicant in open court before Cherere, J on the 11th April, 2018 in the presence of **Henel Kishor Kotecha**, a director of the applicant; that the allegations that the consent was obtained through coercion, blackmail or duress were untrue; that the applicant is guilty of material non-disclosure, as its advocate **Mitchell B. Menezes** filed an affidavit showing that he had instructions; and that the application is vexatious, scandalous, an abuse of the Court process, and geared towards embarrassing the Court.

[7] We have carefully considered the motion before us, and the contending affidavits. As was stated by this Court in: *Stanley Kang'ethe -vs-*

***Tony Keter & 5 Others [2013] eKLR***, this Court has original and discretionary jurisdiction in considering an application under **Rule 5(2)(b)** of the **Court Rules**. In order to succeed in such an application, an applicant must first satisfy the Court that he has an arguable appeal and it is sufficient if the appeal raises a single *bona fide* issue. Secondly, the applicant must satisfy the Court that unless the order of stay is granted, the appeal even if successful would be rendered nugatory.

[8] It is evident that the consent allegedly entered into by the parties and which was adopted by the High Court is highly contentious. This raises an arguable issue in the appeal. Secondly, the amount of money that the applicant is required to pay monthly, that is, a sum of Kenya Shillings Five Million (Kshs.5,000,000.00) is a colossal amount which may render the appeal a mere academic exercise if the money cannot be recovered.

[9] In the circumstances, we find it expedient and just that we allow the application and issue an order staying any further payments in regard to the consent, pending the hearing and determination of the appeal. Costs of this application shall be in the appeal. In view of the circumstances of this appeal we direct that the hearing of the appeal be fast-tracked.

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

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**