



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)

CIVIL APPLICATION NO. E366 OF 2020

BETWEEN

ELITE INTELLIGENT TRANSPORT SYSTEMS LIMITED.....APPLICANT

AND

GULF AFRICAN BANK LIMITED.....1ST RESPONDENT

GARAM AUCTIONEERS.....2ND RESPONDENT

(An application for stay of execution pending appeal from the Ruling of the High Court of Kenya

at Nairobi (D.S. Majanja, J.) dated 20th November, 2020

in

H.C.C.C. No. E240 OF 2020)

RULING OF THE COURT

We are asked in the Motion brought under **rule 5(2) (b)** of the **rules of this Court** amongst other provisions of law to order an injunction restraining the respondents (**Gulf African Bank Limited** and **Garam Auctioneers**) from in any manner dealing with, advertising, auctioning, transferring, disposing of or in any other manner interfering with the applicants' (**Elite Intelligent Transport Systems Limited**) equipment, motor vehicle, machines and the applicant's property known as **L.R. No. 1160/339 (Original Number 1160/178/3)** pending hearing and determination of the application and of an intended appeal.

In grounds in support of the Motion and in a supporting affidavit of **Patrick Kibaiya**, a director of the applicant, it is said, *inter alia*, that the High Court had dismissed an application where an injunction had been sought; that the respondents had thereafter issued a statutory notice to attach the applicant's assets which were the applicant's tools of trade; that if tools of trade were attached the intended appeal would be rendered nugatory; that there was also a notification to sell the suit property **L.R. No. 1160/339**; that the intended appeal has high chances of success. It is said that the applicant and the 1st respondent were partners in a joint venture to construct a road where the 1st respondent's equity or share would be reduced by proceeds from the contract but that the 1st respondent had converted the relationship between itself and the applicant into that of lender and borrower.

When the Motion came up for hearing before us on 10th February, 2021 through "Go-to-Meeting" platform submissions were made for the applicant by learned counsel **Miss Stella Muraguri** who referred to written submissions and a Case Digest. According to counsel the loan advanced by the 1st respondent to the applicant would be reduced as the contract was being performed and as payments were being received from Kenya Rural Roads Authority. This, to counsel, was an arguable point in the intended appeal. Counsel further submitted that if attachment of tools of trade took place it would cripple the road project and render the intended appeal nugatory.

In opposing the Motion, learned counsel for the respondents Mr. **Ogunde** submitted that the applicant had been granted a conditional stay by the High Court where it was ordered to pay a sum of **Ksh.20,000,000** as a condition for stay, a condition it had not met. According to counsel the applicant had filed suit at the High Court asking to be allowed a period up to October, 2020 to pay the debt owing to the 1st respondent. For this counsel thought that the intended appeal was not arguable, that period (October, 2020) now past and the loan had not been repaid. Counsel concluded by submitting that the 1st respondent was a reputable bank capable of repaying to the applicant, the amount remitted if the intended appeal succeeded.

In a brief rejoinder Miss Muraguri reminded us that our jurisdiction is original in an application of this nature and we should not be influenced by what had happened at the High Court.

The principles that apply in an application of this nature are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay - *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR*.

We have considered the record of the Motion and the submissions made. The suit at the High Court is pending and the intended appeal is from a ruling in an interlocutory application for injunction.

In the draft Memorandum of Appeal, it is taken as a ground of appeal that the Judge erred in fact and law by failing to find that it was the express and implied term of the agreement between the applicant and the 1st respondent that the facility offered by the 1st respondent would be serviced by the proceeds of Kenya Rural Road Authority contract assigned by the 1st respondent. It is also intended to be argued on appeal that the facility offered was subject to principles of Islamic banking – a facility called Musharakah partnership where the bank’s equity in a project is rendered by a method proposed by the bank. We find these not to be idle but arguable points and this Court has held that a single arguable point will suffice – See the case of *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Limited, Civil Application No. Nai. 345 of 2004*. It is also true that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court – *Joseph Gitahi Gachau & Anor v Pioneer Holdings (A) Limited & 2 Others, Civil Application No. 124 of 2008*.

What about the nugatory aspect which an applicant must also satisfy to succeed?

Counsel for the respondent submits that the applicant went to the High Court asking to be allowed upto to October, 2020 to pay the debt. Further, that the High Court, upon application, granted a conditional stay to the applicant, a condition which it had not met.

In the plaint filed at the High Court the applicant pleaded at paragraph 32

“That the Plaintiff expects Ksh.203,916,252.80 in October from KeRRA as per the valuation of the works done to date on the subject road, and which amount will satisfy the settlement demand from the Bank.”

The submission by counsel for the respondent that no payment was made in October, 2020 or even after that date has not been challenged by the applicant, neither has the fact that the conditional stay granted by the High Court has not been met.

The 1st respondent is a bank which is able to pay back the value of the assets offered as security for the loan advanced to the applicant and in those circumstances we are not satisfied that the intended appeal would be rendered nugatory in the absence of stay of execution of the ruling of the High Court.

The applicant has not satisfied the second limb of the principles applicable in an application of this nature and the Motion fails and is dismissed with costs.

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

R.N. NAMBUYE

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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