



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO 31 OF 2020

BETWEEN

SOS KINDERDOFF INTERNATIONAL.....APPLICANT

AND

AL WAKIL TRANSFERENCE &

GENERAL TRADINGCOMPANY..... RESPONDENT

(Application brought under Article 159, 164(3) of the Constitution of Kenya; Section 3A of the civil procedure Act section 3A and 3B of the Appellate Jurisdiction Act, Rules 5(2) (b), of the Court of Appeal Rules, 2010 and Order 42 Rule 6 of the civil Procedure Rules 2010 seeking stay of further proceedings of the High Court of Kenya at Nairobi (Tuiyott J.) dated 10th February 2020

in

H.C.C.C No. 2277 of 1998)

RULING OF THE COURT

The motion before us is dated 10th February, 2020 and is brought under Rule 5(2) (b) of the court of appeal rules. The main prayer falling for our consideration is framed thus:-

3. That pending the hearing and determination of the applicant’s intended appeal, this Honorable Court be pleased to grant a stay of proceedings in Nairobi High Court Civil Case Number 2277 between Al-Wakil Transference and General Trading Company Versus SOS Kinderdoff International.

The build up to this application is that during the hearing of the suit in the High court that has led to this application an objection was taken by the applicant to the production in evidence by the respondent of an alleged copy of an agreement between the applicant and the respondent on the grounds that it was secondary evidence which was not permissible in terms of section 69 of the Evidence Act. In countering the objection the respondent took the position that the document was admissible as the applicant had been duly served with notice to produce as required. The objection was nonetheless dismissed by the trial court (Tuiyott J) while observing that the copy of the agreement would be marked for identification (mfi22) until the court would hear the parties substantively before it could decide whether or not to admit it into evidence.

Aggrieved by the ruling the applicant wishes to challenge it by way of an interlocutory appeal in this court. However pending the lodgment of the intended appeal the applicant wishes to put on hold further hearing of the case. From the application, the grounds in support thereof, the supporting affidavit and the annexures thereto as well as the written submissions, the applicant’s case appears to be that its intended appeal is arguable. That the main ground that will be canvassed in the intended appeal is whether, in the circumstances of this application is whether the contents of a copy of the agreement are admissible and may be adduced in evidence at any stage of the proceedings, or whether the court should determine admissibility only after receipt of all evidence. It is further contended that whether under section 69 of the Evidence Act secondary evidence of a document is admissible where a notice to produce the original of such document is not proved to have been in the possession of the party against whom it is sought to prove the contents.

On the nugatory aspect, it is the position of the applicant that if the proceedings were allowed to continue the applicant will be prejudiced. Further that the respondent is an entity registered and resident in Somalia with no presence or assets in Kenya or jurisdiction of this or the trial court. The applicant relied on *University of Nairobi V Ricatti Business of East Africa [2020] eKLR* and *Kenya Power & Lighting Co. Ltd V Esther Wanjiru Wokebii Civil Appeal No. 326/2013* to buttress the above propositions.

In opposition to the motion a replying affidavit sworn by Ismail Abdullah, a director of the respondent posits that the application is not made in good faith but is calculated to delay justice, that no notice of appeal as envisaged under Rule 75 of the Court of Appeal Rules was filed. That being the case, the entire application is unworthy of the orders sought. That in any event the court did not allow the copy of the agreement to be produced in evidence but allowed it to be marked for identification purposes as the question as to whether it will be admitted into evidence would be answered by the court after hearing substantially the parties in the matter. It was thus argued that in the circumstances there was no arguable appeal, and nor would the intended appeal be rendered nugatory. Reliance was placed on the following authorities- **Moroo Polymers Limited V Wilfred Kasyoki Willis [2019] eKLR, Paul Kamura Kirungu V. John Peter Nganga 2019 eKLR and finally Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association(Interested Party) [2020] eKLR**

We have gone through all the materials that were placed before us for consideration by both parties and this is our take on the application:-

The Principles that guide this court in the exercise of its unfettered discretion under Rule 5(2) (b) of the court of appeal rules to grant an order of stay of proceedings are well settled. Firstly an applicant has to satisfy that he has an arguable appeal. However this is not in any way to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous or idle. Secondly, an applicant has to demonstrate that unless an order of stay of proceedings is granted the appeal or intended appeal would be rendered nugatory. These principles have been applied and explained in many decisions of this court. See for instance the case of **Multimedia University and Another Vs. Professor Gitile N. Naituli [2014] eKLR and Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 others (213) eKLR**

However we must state from the onset that the jurisdiction of this court is invoked by either the lodging of a notice of appeal or filing the appeal itself. See **Safaricom limited Vs. Ocean View Beach Hotel Limited & 2 others Civil Application No. 327 of 2009 UR 7**

Having said as much, we revert to the replying affidavit as well as written submissions of the respondent. In both documents it is claimed that the applicant did not file and serve on the respondent the notice of appeal. Although this fact was drawn to the applicant's attention through the said documents that were served on it, it did not bother to respond to the allegation. We have also not been able to trace the same from documents forwarded to us by email. The inescapable conclusion therefore is that the Notice of appeal may well have not have been filed. If that be the case then obviously the application has no legs to stand on and is thus incompetent.

However, it is also possible that the notice may have been filed but misplaced in our registry and therefore not forwarded to us. Accordingly and the foregoing notwithstanding we shall proceed to determine the motion on its merits. The applicant claims that it has an arguable appeal based on the intended grounds of appeal set out elsewhere in this ruling. To our mind whether under sections 68 and 69 of the Evidence Act, secondary evidence is admissible where notice to produce is served on a party and is not proved to have in possession of the said party is no brainer. The circumstances in which those provisions of law can be invoked are clearly circumscribed. Further following the service of the notice, it was open to applicant to indicate that the notice was served on the wrong party and thus its inability to comply. We note that the notice to produce was served on Messrs. Kaplan & Stratton Advocates, the same law firm appearing for the applicant.

On the question of whether a copy of the document is admissible and may be adduced at any stage of the proceedings or only after receipt of the entire evidence, the simple answer is that this ground questions the exercise of discretion and the conduct of the proceedings by the trial court. It is trite an appellate court will hardly interfere with such exercise as long as it was not injudiciously exercised. Further it is not up to the parties to micro manage the trial court in the conduct of its business. This cannot in our view be a valid ground of appeal. Lastly in its ruling the trial court did not make a definitive determination of the fate of the copy of the agreement. It merely marked it for identification and to be produced in future if need be. It may well be that at the end of the hearing the trial court may refuse to admit the same. Further it is also possible that even after admitting it, may not put a lot of weight on it. In the end the applicant's fears are at best speculative and unfounded. Speculation can never be a ground of appeal

In the end, we are satisfied that the intended appeal will not be arguable. However since for an applicant to succeed in an application of this nature he has to satisfy the twin principles of arguability and nugatory aspect, and having found that the intended appeal is not arguable, we need not go into the nugatory aspect.

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.

R. 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