



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, ASIKE-MAKHANDIA & MUSINGA, J.J.A.)

CIVIL APPLICATION NO. 66 OF 2020

BETWEEN

EVERGREEN MARINE (SINGAPORE) PTE LIMITED.....1<sup>ST</sup> APPLICANT

GULF BADAR GROUP (KENYA) LIMITED.....2<sup>ND</sup> APPLICANT

AND

PETRA DEVELOPMENT SERVICES LIMITED.....RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of an intended appeal against the ruling of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 24<sup>th</sup> July, 2019 in H.C.C.C No. 65 of 2014)

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RULING OF THE COURT

1. The Notice of Motion dated 1<sup>st</sup> September, 2020 is taken out by the 1<sup>st</sup> and 2<sup>nd</sup> applicants. They are seeking an order staying proceedings in **Mombasa HCCC No. 65** of 2014 (the suit), pending the hearing and determination of the intended appeal. The orders they intend to appeal against arose from the Ruling delivered on 24<sup>th</sup> July, 2019 by **Chepkwony, J.** The gist of the said Ruling was that the Judge allowed an application made by **Petra Development Services Ltd** (the respondent) who was the Plaintiff, granting it leave to amend the plaint but the Judge denied the applicants corresponding leave to respond to the amended plaint.
2. The motion is supported by the grounds stated thereunder and further expounded by the matters deposed to in the supporting affidavit sworn by **Mr. Job Weloba, the applicants' advocate**, on 1<sup>st</sup> September, 2020. Both pleadings give a brief highlight of the proceedings that culminated with the order made on 24<sup>th</sup> July, 2019. It is pleaded that the respondent commenced the suit before the High Court Mombasa, seeking *inter alia*, orders of injunction to restrain the applicants from breaching a contract of carriage as contained in a Bill of Lading and damages for USD 3,750,000 which was the value of the contract. The applicants did not file a defence, so the respondent applied for an interlocutory judgment, which was entered against the applicants.
3. The applicants were unsuccessful in all their attempts to set aside the interlocutory judgment both at the High Court and the Court of Appeal, therefore the suit proceeded to formal proof. It is in the course of the formal proof that the respondent brought in an application to amend the plaint from seeking damages of USD 3,750,000 being the value of the contract to one seeking loss of profit of USD 2,44,501, which application was allowed. Aggrieved by the said ruling, the applicants immediately applied to stay the proceedings which application was also denied. The applicants being aggrieved by the said ruling filed a Notice of appeal on 5<sup>th</sup> August, 2019 and subsequently a record of appeal being **Civil Appeal No. EOO6 of 2020** in Mombasa.
4. In the instant application, the applicants contend that the intended appeal is arguable; that by the court denying them an opportunity to file a response to the amendment was tantamount to being denied a fair hearing which goes against the basic tenets of **Article 50** of the Constitution and the rules of natural justice. In the written submissions, the applicants have cited the case of **Coffee Board of Kenya vs. Thika Coffee Mills Ltd & 2 Others [2014] eKLR**, among others, to underscore the argument that once the court allowed the amendment, it was necessary that the applicants be granted co-responding leave to reply to those amendments. On the appeal being rendered nugatory, the applicants posited that once they were denied a right to defend the amended claim, they were likely to suffer permanent and irreparable loss by being condemned unheard.
5. This application was opposed by the respondent vide a replying affidavit sworn by **Mr. Sanjeev Khagram** on its behalf. According to the respondent, the reason why the applicants were seeking to stay the proceedings has been overtaken by events as both parties proceeded to

highlight their respective submissions on 29<sup>th</sup> September, 2020 and the judgment was reserved for 24<sup>th</sup> November, 2020. It was further stated that the interlocutory judgment was entered in July, 2014 and since then the applicants have made every effort to frustrate and delay the conclusion of the matter. In this regard, counsel pointed at various portions of rulings where the judges who have dealt with the matter faulted the applicants for dexterity and dilatoriness for using every tactic to delay and derail the court process.

6. Responding on the issue that the applicants were denied a fair hearing, it blamed them for their own misfortunes given their conduct in not only refusing to file a defence, but also for capitalizing on an amendment whose sole intent was to contextualize the damages sought and reduce it from the earlier claim of USD 3,750,000 being the value of the contract to USD 2,476,611 being the loss sustained by the respondent as a result of the applicants' wrongful conduct for which the applicant extensively cross-examined the respondent. It was the respondent's view that the appeal was not arguable as the applicants were denied leave to defend the suit by the Court of Appeal. The interlocutory judgment was upheld and in the absence of a defence, the applicants had no right to file any further pleadings in the form of a reply to the defence. According to counsel for the respondent, in the event the proceedings were stayed, he urged the applicants be ordered to provide security for the decretal amount of USD 2,476,611 as indeed what they are seeking is in anticipation of a stay of execution.

7. We have considered this application, the submissions and replying affidavit by the respondent. This matter was considered without appearance of the parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID -19 Pandemic. The orders sought by the applicant to stay the proceedings fall within the realm of Rule 5(2)(b) of this Court Rules which provides as follows;

**“...The Court may –**

**....**

**b. In civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings as the Court may think just.”**

8. We acknowledge at the outset, that a court may sparingly, and only in exceptional circumstances, grant an order to stay proceedings which essentially is an interruption of the other parties' right to conduct the hearing. That said, the principles that guide the Court under the aforesaid rule are now an old hat; that is for the applicants to succeed, they must establish that, the appeal is arguable and not frivolous and that if the stay order of the proceedings sought is not granted, the appeal will be rendered nugatory. See the case of Ismael Kagunji Thande vs. Housing Finance Kenya Ltd Civil Application No. Nai. 157 of 2006

(unreported).

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that 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 that appeal will be rendered nugatory. (see also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [198] KLR 838.)”**

9. The learned authors of; Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

**“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”**

**“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”**

**“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”**

10. Is the appeal arguable? The applicants' case is that by the Judge denying them a right to respond to the amended plaint that altered the sum claimed as general damages amounted to denial of their right to a fair hearing. The respondent on the other hand was emphatic that the applicants, who never defended the suit, and their appeal to set aside the interlocutory judgment having been dismissed by this Court, had no right to file any defence. We think at this stage our view on whether the appeal is arguable is purely prima facie, but based on the two divergent views adopted by both parties, we think the appeal appears arguable. This is with the usual caution that an arguable ground(s), does not necessarily mean one that ought to succeed, but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. In Dennis Mogambi Mang'are vs. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011) this Court held that: -

**“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”**

11. On whether the intended appeal will be rendered nugatory, we were told that the proceedings closed and judgment was reserved for 24<sup>th</sup> November, 2010. In the event, there is nothing to stay as the application has been overtaken by events. Besides that, these are interlocutory matters that arose in the course of the proceedings and the applicants always retain a right of appeal even after the final judgement.

12. That being our view of the matter, we find no merit in this application and we order it dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of March, 2021.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**