



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, KARANJA & MUSINGA J.J.A.)

CIVIL APPLICATION NO. E018 OF 2020

BETWEEN

CONSOLBASE LIMITED.....APPLICANT/APPELLANT

AND

OMAR SHARRIF T/A KEMCO AUTO.....1ST RESPONDENT

FREIGHT FORWARDERS KENYA LIMITED.....2ND RESPONDENT

(Being an application for stay of execution pending hearing and determination of intended appeal from the judgment/order of the High Court of Kenya at Mombasa (Hon. P.J. Otieno, J.) dated 20th May 2019 and Ruling dated 17th November 2020,

in

Mombasa HCCA No. 226 of 2003)

RULING OF THE COURT

Before us is a Notice of Motion dated 22nd December, 2020 under **sections 3A and 3B** of the **Appellate Jurisdiction Act, Cap 9** of the Laws of Kenya and **Rules 1(2) and 5(2)(b)** of the **Court of Appeal Rules 2010**.

It is supported by grounds on its body and a supporting affidavit of **Asgherali Molu**, described as a Director of the applicant herein together with annexures thereto. It has been opposed by a replying affidavit of **Omar Shariff**, the 1st respondent, sworn on 24th February, 2021 together with annexures thereto. It was canvassed virtually through rival pleadings filed by the respective parties herein, written submissions and legal authorities filed by the applicant in support of the application under consideration, in the absence of the respective parties' advocates and without oral highlighting.

The background to the application albeit in a summary form is that the 1st respondent filed a suit in the High Court against the applicant and the 2nd respondent jointly and severally over the recovery of the sum of USD 85, 246.50 said to have been the loss suffered by the 1st respondent when part of the goods he had entrusted for clearance and custody jointly to the appellant and 2nd respondent were lost or stolen, thus occasioning loss to the 1st respondent. The trial court ruled in favour of the 1st respondent.

On 12th June, 2019, the applicant applied to the High Court for a stay of execution of the judgment pending the outcome of its appeal and on 21st August, 2019 the 1st respondent also applied seeking payment of a substantial part of the decretal sum. Both applications were determined in a ruling dated 17th November, 2020 whereby the applicant was granted a stay which was conditional upon payment of half the decretal sum (USD 40,000) to the 1st respondent while the other USD 40,000 together with interest calculated from November 2003 at court rates of 14% p.a (amounting to at least USD 100,000) was to be deposited in a joint interest earning account within thirty (30) days of the date of the ruling, failing which the stay order would lapse. Aggrieved by the judgment dated 20th May, 2019, the applicant timeously filed a notice of appeal dated 22nd May, 2019 intending to appeal against the whole of the said decision and in addition, the ruling dated 17th November, 2020.

Supporting the application, the applicant contends they have an arguable appeal which will be rendered nugatory if the prayers sought are not granted. Issues intended to be raised on appeal are these nine (9) ground of appeal forming the draft memorandum of appeal. In summary, the applicant intends to fault the trial Judge for the failure to appreciate that the award of damages claimed by the 1st respondent as compensation for the alleged stolen goods were in respect of goods illegally imported at a gross under value to deliberately avoid payment of

customs duty and not only inflated, but also the loss allegedly sustained was never proved to the required threshold; the dismissal of the applicant's well substantiated counterclaim for unpaid storage charges was unjustified, the interest awarded and the period over which it was ordered to cover was not only unreasonable but highly punitive, the requirement to pay the sum of USD 180,000 is not only highly punitive but also highly prejudicial as it will cripple the applicant's operations and put them out of business altogether.

Further that the learned Judge also failed to properly appreciate that the 1st respondent failed to demonstrate that in the event this appeal is successful, they will be able to repay the amounts paid to them as there is nothing in the 1st respondent's replying affidavits either before the High Court or this Court to demonstrate existence of resources at their disposal which they can employ to refund the decretal sum or any portion of the decretal sum if paid over to them and the appeal succeeds either in whole or in part; matters peculiarly within the 1st respondent's knowledge, and whose obligation in the peculiar circumstances of this application was to satisfy the Court of his ability to refund either the whole or part of the decretal sum that may have been paid out to him and which demonstration according to the applicant has not been discharged especially when the respondent in his replying affidavit before the High Court not only requested to access part of the decretal amount but also admitted that he was in dire need of money.

To buttress their submissions, the applicant relied on the following authorities, **Reliance Bank Ltd vs. Norlake Investments Ltd (2002) 1EA 227** and **Kenya Hotel Properties Ltd vs. Willesden Investments Ltd [2007] eKLR**; **Royal Media Services Limited vs. Veronica Chepkemoi [2015] eKLR**, **Oliver Collins Wanyama vs. Engineers Board of Kenya [2019] eKLR**, **African Safari Club Ltd vs. Safe Rentals Ltd [2010] eKLR** and **New Kenya Co-operative Creameries Ltd vs. Olga Ouma Adede [2015] eKLR**, all on the parameters for the exercise of the court's mandate under **Rule 5(2)(b)** of the Court's Rules in support of their submissions that the intended appeal will be rendered nugatory were it to succeed after the decretal sum is paid out and applied as deemed fit by the 1st respondent.

The applicant also relied on the case of **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR** and urged that after averring in their supporting documents that the appeal would be rendered nugatory should it succeed after the decretal sum has been paid out to the respondent and applied by him as deemed fit, the evidentiary burden shifted to the 1st respondent to show what resources he has at his disposal to meet any subsequent need to refund whatever amount forming either whole or part of the decretal sum he may have received which he failed to demonstrate hence the applicant's well-founded fear of 1st respondent's likelihood of failure to refund either the whole or any part of the decretal sum if paid out to them before the appeal is heard and determined and should therefore be sustained.

In rebuttal, the 1st respondent avers that he is the decree holder of a money decree and in the absence of demonstration of exceptional reason as to why he should be withheld from the enjoyment of the amount forming the decree which according to him is lacking in the applicant's supporting facts, his right to execute and enjoy the fruits of the judgment delivered in his favour should not be curtailed. It is also his averments that the applicant has on numerous occasions employed the tactics of obtaining numerous stay of execution of the judgment orders to his detriment. At some point the applicant offered to deposit the entire decretal sum in a joint interest earning account in the joint names of advocates for the respective parties herein only for him to fail to do so.

Turning to his alleged inability to refund either the entire decretal sum or any portion of it if any was to be paid out to him, he asserts that this arises from applicant's misconception that just because he sought an advance payment of the decretal sum to assist him meet overseas medical expenses for a family member did not of itself mean that he was poor. To substantiate this assertion, the 1st respondent contends that after the applicant failed to yield to a request for advance payment of part of the decretal sum towards the said purpose, he went ahead and met those expenses on his own. It is also his apprehension that applicant's motive in urging the numerous stay applications granted in his favour is to create room to relocate outside the jurisdiction of the Court thereby putting his assets out of reach of the 1st respondent for purposes of execution. Lastly, that on the supporting papers before the Court, he has sufficiently demonstrated that he is in a position to refund the decretal sum should the appeal succeed. The application should therefore be declined especially when according to him there is no demonstration that the intended appeal is arguable and that it will be rendered nugatory should it ultimately succeed.

We have considered the record in light of the rival pleadings and submissions. Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited in the heading of the application. **Rule 1(2)** of the Rules of this Court enshrines the inherent power of the Court whose parameters for invocation and application have been stated numerous in decision of the Court. See **Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints [2016] eKLR** for the holding *inter alia* that the Court's inherent power is a residual intrinsic authority which it may resort to in order to put right that which would otherwise be an injustice. **Section 3** enshrines the general mandate of the Court, while **section 3A** and its twin sister **3B** enshrines the overriding objective of the Court. It is sufficient for us to state of this principle that it gives greater latitude to the Court in the discharge of its mandate under the **Act**.

This being an application for stay of execution, the substantive rule for accessing this relief is **Rule 5(2)(b)** of the Court's **Rule** under its procedures. The applicant has to satisfy the twin requirements of **Rule 5(2)(b)** of the **Court of Appeal Rules** and which we fully adopt are as restated in **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others (2013) eKLR**. The requirements are that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.

In satisfaction of the first requirement under this Rule, the applicant relies on the annexed draft memorandum of appeal intending to raise nine (9) grounds of appeal already summarized above. In law an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Applying the above threshold to the rival positions herein on this issue, we are satisfied that the grounds of appeal raised in the draft memorandum of appeal and summarized above are arguable, their ultimate success or otherwise notwithstanding.

Turning to the second requirement, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

In satisfaction of this requirement, the applicant argues that the payment of the decretal sum of USD 180,000 will cripple its operations and put them out of business and secondly, that the 1st respondent has failed to demonstrate that in the event the appeal is successful, he will be able to repay the amounts paid to him.

In Kenya Shell Ltd vs. Kibiru & Another (1986 -1989) EA 266 the Court underscored the fact that it is not enough to merely allege substantial loss, rather, the same must be demonstrated to the satisfaction of the court. In Kenya Hotel Properties Ltd vs. Willesden Investments Ltd [2007] eKLR (supra) it was held that to convince the court to follow the decision in Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227 (supra), the applicant needs to do more than merely say that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to “*put on the table*” its financial position and how the same would be affected. See also Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd. – Civil Application No. Nai. 358 of 1999 (unreported) for execution of a money decree to be withheld there has to be demonstration that if an applicant was compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable.

Applying the above threshold to the rival positions herein, it is our view that in considering the question as to whether the success of the intended appeal will be rendered nugatory were we to refuse the application for stay of execution, with sole purpose of ensuring justice to the rival parties bearing in mind that relief of withholding enjoyment of money decree is only available in exceptional cases where the decretal amount is not only acceptably large but also that its recovery would either be impossible or involve great expense to the detriment of the judgment debtor.

In the instant application, the applicant a licensed warehouse operator, has offered to pay to the 1st respondent one half of the decretal sum (USD 40,000) while the other half together with interest accrued is to be deposited into an interest earning account in the joint names of the advocates for the respective parties. Interest on the award was ordered to start from the date of filing the suit bringing the total amount due and payable to the 1st respondent to be in excess of USD 180,000 which in our view is a large amount. We cannot however ignore apprehension and/or fear expressed in applicant’s averment at paragraph 18 of its supporting affidavit that if it is compelled to pay over to the 1st respondent the amount forming the decretal sum, its business may be crippled. The 1st respondent’s response in rebuttal already highlighted above is that only half of the amount forming the decree was to be paid to him and the balance invested in an interest earning account.

In resolving the above rival position, the approach that commends itself to us to take is that taken by the Court in Kenya Hotel Properties Ltd vs. Willesden Investments Ltd (supra) case which in our view would ensure that the applicant’s business is not seriously affected while at the same time the 1st respondent is also assured that the money forming the decretal amount and decreed in his favour will be readily accessible should the intended appeal not succeed. Likewise, the applicant if successful in its intended appeal, will not have difficulty accessing the above funds.

The upshot of the totality of the above assessment and reasoning is that the application is allowed on the following terms:

- 1) **The applicant does pay to the 1st respondent USD 40,000.00 within thirty (30) days of the date of the delivery of the ruling.**
- 2) **The balance of USD. 140,000.00 is to be deposited in a joint interest earning account in the joint names of advocates for the respective parties herein also within thirty (30) days of the date of the delivery of the ruling.**
- 3) **In default of any of items 1, and 2 above the stay of execution order granted herein to stand lapsed.**
- 4) **Costs of the application to abide the outcome of the intended appeal.**

DATED and DELIVERED at NAIROBI this 23rd day of April, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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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