



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & MURGOR, JJA)

CIVIL APPLICATION NO. E039 OF 2021

BETWEEN

SPECTRE INTERNATIONAL LIMITED.....APPLICANT

AND

M/S JONDU ENTERPRISES LIMITED.....RESPONDENT

(Being an Application for Stay of Execution from the Ruling and Order of the High Court of Kenya, Commercial & Tax Division in Nairobi (Margaret Muigai, J.) delivered on 26th January, 2021 pending the lodging, hearing and determination of an intended Appeal

in

HCCC NO. 52 OF 2018

RULING OF THE COURT

1. This is an application for stay of execution pending appeal against the Ruling and Order of Margaret Muigai J. delivered in Nairobi at the High Court Commercial & Tax Division.

2. **M/S Jondu Enterprises Limited** (the respondent) on 5th February, 2018 filed Civil Suit No 52 of 2018 against **Spectre international Limited** (the Applicant) in which it claimed close to Ksh. 30 million from the applicant. Summons to enter appearance were duly served on the applicant who nonetheless failed to enter appearance or file a defence within the prescribed time prompting the respondent to file an application seeking orders as follows:-

a) That Judgment on admission be entered for the Respondent in the amount of Ksh 24,474,229.86.

b) That the costs of this application be borne by the Applicant.

3. The gist of the grounds on which the application was predicated and expounded in the depositions contained in the supporting affidavit, are as follows: Vide an email dated 5th December, 2018, the respondent received a letter from the applicant indicating that the applicant's auditors had confirmed that the amount owed to the respondent as at that date was Ksh 24,474,229.86 and the said auditors wanted the respondent to confirm to it if the respondent was in agreement with the said figures. The respondent averred that it signed a note in response to the applicant's letter indicating in writing the actual amount owed as Ksh 29,808,888.00

4. According to the respondent herein, the said letter amounted to an admission of the debt hence the request for entry of judgment on admission for the amount indicated in the letter with the balance going to trial.

5. The application was opposed *vide* an affidavit sworn by Jacob Agoch, the applicant's Acting Director. He deposed that one of the key defences to the suit was fraud and illegality that if proved would unravel the respondent's entire claim; that the letter dated 29th November, 2018 allegedly authored by Eric Tambo was of questionable legality as the said person was not an employee of the company when he authored the said letter; that *vide* a redundancy notice the said Eric Tambo's employment with the applicant terminated effective 7th January, 2018 thus he had no mandate in law to author any document binding the company; that together with other employees of the company affected by the said redundancy, the said Eric Tambo was currently a party to proceedings in **ELRC No. 67 of 2019 Duncan Obonyo & 165 Others** where Eric Tambo was the 113th Claimant in the Cause.

6. The applicant contended that it was not ordinary accounting/auditing practice for any person to specifically write to a creditor in a leading manner as was allegedly done by Mr. Eric Tambo to the respondent; that the bonafide and probative value of the said letter was a substantive issue that ought to be tested at a full hearing, that it was uncontroverted that the respondent was not licensed to deal in petroleum products or to carry out petroleum business.

7. In rebuttal, the respondent filed a supplementary affidavit averring that before the suit was filed, the applicant had been purchasing the furnace oil and making payments for the same and could not now claim that the transactions were based on illegal contracts; that the issue of one Eric Tambo not being an employee of the applicant had never been raised in any of the applicant's pleadings and that the issue of redundancy was an afterthought.

8. Having considered the application, the rival affidavits and submissions filed by the parties, the learned Judge found this to be a clear and unequivocal admission of debt of Ksh 24,474,229.96 by the applicant to the respondent as confirmed by applicant's Auditors Mawji Sennik & Co Ltd. The Applicant did not controvert the Auditors finding or the Auditors appointment and/or assignment or conduct of normal audit procedures on the applicant Company.

9. The court noted that the applicant's assertion that Mr. Eric Tambo, author of letter of 29th November, 2018, was redundant as at 29th November, 2018 was not borne out by any evidence on record and found that the said letter was lawfully written by Mr. Eric Tambo, who was then an employee of the applicant and bound the applicant on the admission of Ksh 24,474,229.86.

10. With regard to the issue that the respondent engaged in an illegal business/trade/transaction as the respondent company was not registered with Energy Regulatory Commission now Energy & Petroleum Regulatory Authority; the court found that since the respondent had already supplied the applicant with furnace oil for which it claims payment, then if the transaction was illegal due to non-licensing by the Regulatory body, then to revert to *status quo ante*, would require that the furnace oil products supplied to the applicant ought to be returned to the respondent. In the absence of which, the applicant would draw double benefit of the Furnace oil products if it retained the purchase price which would amount to unjust enrichment.

11. The Court found that the applicant did not contest delivery of goods and/or purchase price to be paid and the issues canvassed generally did not controvert the question of outstanding debt. The court allowed the application for judgment on admission and entered judgment on the admitted sum of Kshs. 24,474,229.86. and ordered that the balance of the claim would be subject to hearing and determination.

12. Being aggrieved, the applicant filed an appeal against the said judgement and contemporaneously filed the instant application seeking stay of execution of the impugned orders. In the application, the applicant avers that the appeal has more than a reasonable chance of success and the applicant is apprehensive that unless the orders sought are urgently granted, the respondent will move to execute at any time including realizing the security for judgment deposited in court amounting to Kshs. 3 Million, hence render the appeal nugatory.

13. The applicant further deposes that the judgment sum is hefty and the respondent has neither any known physical address nor assets from which sums paid to it may be recovered in the event the appeal succeeds.

14. The respondent filed a replying affidavit deposing *inter alia*, that a money decree would not be rendered nugatory even if the appeal was to succeed; that the respondent was not a man of straw and has the financial capacity to repay the decretal amount plus interest in the event the applicant succeeds in the appeal and that the applicant does not have an arguable appeal as shown in the draft memorandum of appeal.

15. Both parties filed submissions reiterating the respective grounds in their respective affidavits. The application was heard by way of video link in the absence of counsel based on the record and submissions placed before the Court.

16. We have carefully considered the application, the rival affidavits and the said submissions. This being an application under **rule 5(2) (b)** of this Court's Rules, it is upon the applicant to satisfy the Court not only that the intended appeal is arguable, and is not frivolous but also that the same if successful, will be rendered nugatory if stay orders are not granted at this stage. See **Ishmael Kagunyi Thande Vs Housing Finance Company of Kenya Ltd, Civil Application No. Nai 157 of 2006** (unreported).

17. In support of the limb on arguability, the applicant relies on the 6 grounds in the draft memorandum of appeal. Among the issues proffered as arguable is whether the learned Judge erred in law and fact in ignoring prima facie evidence that the letter upon which the application for judgment on admission was founded was authored by an employee who was declared redundant a year before the said letter was authored. This in our view is a germane point which calls for the consideration of this Court on appeal. We are therefore persuaded that the applicant has succeeded in demonstrating the limb on arguability.

18. On the nugatory aspect, we appreciate that this is a money decree. This Court discussed at length the issue as to whether a money decree or liquidated claim would render the success of an appeal nugatory in the case of **Kenya Hotel Properties Limited -v- Willestden Properties Ltd., Civil Application No. Nai 322of 2006 UR** where the Court stated:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long the court ascertains that the respondent is not “man of straw” but is a person who on success of appeal would be able to repay the decretal sum plus any interest to the applicant. However with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is not ordered purely on grounds that the decree is a money decree. The court was however emphatic that in considering such matters as hardship a 3rd principle of law was not being established at all.” (Emphasis ours)

19. The Applicant contends that the judgment is hefty and the respondent has no known physical address nor assets from which any such sums if paid to it may be recovered in the event the appeal succeeds.

20. In response to that assertion, the respondent has annexed several title documents as proof that it owns several parcels of land. They are not accompanied by current certificates of search or valuation reports in support of the current value and status of the said properties. We are not persuaded that if the entire amount is paid out and the appeal succeeds, the respondent will be in a position to dispose of the said properties and refund the money promptly and without much hardship.

21. However, we also appreciate that the respondent has judgment in its favour which could at the end of the day be found to be a regular judgment. In order to balance both sides, we find that a conditional stay would be fair and just in the circumstances of this case. Accordingly, we grant orders of stay of execution on condition that the applicant deposits 50% of the decretal amount in the joint names of counsel for both parties within 30 days from the date hereof failing which the stay orders will automatically lapse. Costs of the application will be in the appeal.

Dated and delivered at Nairobi this 21st day of May, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR