



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: MURGOR, SICHALE & KANTAL, JJA]**

**CIVIL APPLICATION NO. E412 OF 2020**

VICTORY CONSTRUCTION LIMITED.....1<sup>ST</sup> APPLICANT

AVTER SINGH SURI.....2<sup>ND</sup> APPLICANT

AND

KIRPAL SINGH.....1<sup>ST</sup> RESPONDENT

AMRITPAL SINGH.....2<sup>ND</sup> RESPONDENT

TECHNO ASPHALT LIMITED.....3<sup>RD</sup> RESPONDENT

*(Being an application for injunction pending the hearing and determination of*

*an intended appeal from a ruling and decree of Okwany J*

*delivered on 22<sup>nd</sup> October 2020.)*

IN

(Nairobi High Court E405 of 2018)

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**RULING OF THE COURT**

Before us is a motion dated 21<sup>st</sup> December 2020, filed by Victory Construction Limited and Avter Singh Suri “the applicants” brought under the provisions of Rule 5 (2) (b), Rule 20 (2), Rule 42 and Rule 47 (1), (2) and (4) of the Court of Appeal Rules 2010, in which the applicants seek the following orders:

“1. Spent.

2. Pending the hearing and determination of the intended appeal, the 1<sup>st</sup> and 2<sup>nd</sup> respondents whether by themselves, their agents, servants and/or employees be restrained from accessing, transferring, disposing of or howsoever dealing with the following bank accounts:

- a. Bank of Baroda Account No. [xxxx], Sarit Centre Branch.
- b. CFC Stanbic Bank Account No. [xxxx], [xxxx], [xxxx], Garden City Mall Branch;
- c. I & M Bank Account No. [xxxx], [xxxx], Garden City Mall Branch;
- d. Family Bank Account No. [xxxx] Banana Branch;

*e. Any other accounts.*

**3. Pending the hearing and determination of the intended appeal, the respondents whether by themselves, their agents, servants and/or employees be restrained from accessing, transferring, assigning, diminishing, disposing of or howsoever dealing with the 1<sup>st</sup> applicant's assets in particular the equipment found in Thogoto, Kipeto, Njoro, Marigat and Kisii as particularized therein.**

**4. Pending the hearing and determination of the intended appeal, a mandatory injunction do issue compelling the respondents either by each one of them or jointly whether by themselves, their employees, servants' agents or nominees or any other person claiming through them to deliver up of all the 1<sup>st</sup> applicant's assets to the Company warehouse.**

**5. Alternatively that the Court be at liberty to make any further orders in the interest of justice.**

**6. That the costs of this application be provided for”.**

The motion is supported by the grounds on the face of the motion and an affidavit sworn by **Avter Singh Suri** who deponed *inter alia* that the 1<sup>st</sup> applicant is a limited liability company dealing in large scale construction and that he founded the Company in **August 1972** and awarded shares to his sons as follows:

- a. Jasbir Singh Suri-16%.
- b. Kirpal Singh Suri-16%.
- c. Amritpal Singh Suri-16%.
- d. Hardev Singh Suri-16%.

That, in 2010, his wife fell ill and he accompanied her to the United Kingdom for treatment and that during his absence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents colluded to change the signing mandate of the 1<sup>st</sup> applicant's bank account and withdrew all the monies found in Account No. [xxxx], Bank of Baroda, Sarit Centre Branch; that the respondents opened parallel company accounts with I&M Bank, CFC Bank and Family Bank without the consent of the other directors and that of the company; that during the period of his absence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents actively engaged in unauthorized leasing and sale of the 1<sup>st</sup> applicant's assets with the proceeds thereof being pocketed for their personal use.

It was further contended that the applicants had filed a notice of motion dated **27<sup>th</sup> November 2018**, seeking *inter alia*, restraining and mandatory reliefs which was dismissed on **22<sup>nd</sup> October 2020**, by **Okwany J**, pursuant to which they filed a notice of appeal on **27<sup>th</sup> October 2020**, contending that they had an arguable appeal and unless a stay of execution or injunction is granted, the same will be rendered nugatory as the 1<sup>st</sup> and 2<sup>nd</sup> respondents may proceed to dispose of and waste the assets of the 1<sup>st</sup> applicant.

It was submitted for the applicants that a perusal of the supporting affidavit shows that the respondents grossly mismanaged the affairs of the 1<sup>st</sup> applicant and that the applicants had demonstrated that there are special and exceptional circumstances that warrant the granting of the orders of mandatory injunction and that the applicants had an arguable appeal which was not frivolous but one deserving consideration by this court.

The respondents did not file a response to the application nor submissions.

We have carefully considered the motion, the grounds thereof, the supporting affidavit and the cited authorities.

The applicant's motion is brought *inter alia*, under **Rule (5) (2) (b)** of this Court's Rules. **Rule 5 (2) (b)** of the Rules which guides the court in applications of this nature provides:

**“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:**

**(a)...**

**(b) in any 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 on such terms as the Court may think just.”**

The principles for our consideration in the exercise of our unfettered discretion under **Rule 5 (2) (b)** to grant an order of stay of execution or injunction are now well settled. Firstly, an applicant has to satisfy the Court that he/she has an arguable appeal. However, this is not 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 and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of **Stanley Kangethe Kinyanjui vs.**

Tony Ketter & Others [2103] eKLR as follows:

*i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.*

*v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.*

*vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*

*vii In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*

*viii. An applicant must satisfy the Court on both the twin principles.*

*ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*

*x. 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.*

*xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

*xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

*xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”*

In our considered opinion, a cursory perusal of the pleadings herein does not show that the applicants have an arguable appeal. We note that all the parties herein are directors of the 1<sup>st</sup> applicant, albeit father and sons. In the event of a dispute in the management of the 1<sup>st</sup> applicant’s affairs, recourse can be sought under the provisions of the Companies Act, 2015 (the Act). We are not sure why the applicants have not pursued the available remedies under the Act. Of course we are mindful of the fact that we should not say more regarding this aspect lest we embarrass the bench that will be seized of the suit at the High Court which has not been heard or determined.

As to whether the appeal will be rendered nugatory, we are not satisfied that the appeal will be rendered nugatory if an order of injunction is not granted since, it has not been demonstrated which loss (or otherwise), the applicants would suffer if an order of injunction is not granted. Furthermore, were we to make a determination on that issue at this point, the same would be tantamount to disposing of the appeal on its merit before the suit is fully heard, yet the matter is not before us.

In view of the above, we have come to the conclusion that the applicants have not established the twin principles for consideration in an application under Rule 5(2) (b) of the rules of this Court to grant an order of stay of execution or an injunction for that matter.

The upshot of the foregoing is that the motion dated 21<sup>st</sup> December, 2020 is without merit and the same is hereby dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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**