IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 49 OF 2020

BETWEEN

DARI LIMITED..1ST APPLICANT

RAPHAEL TUJU...2ND APPLICANT

MANO TUJU..3RD APPLICANT

ALMA TUJU..4TH APPLICANT

YMA TUJU...5TH APPLICANT

S. A. M. COMPANY LIMITED..6TH APPLICANT

AND

EAST AFRICAN DEVELOPMENT BANK.................................RESPONDENT

(Being an Application for Stay of Execution of the Ruling and Orders of the High Court of Kenya at Nairobi (Hon. Lady Justice Wilfrida A. Okwany) dated 13th February, 2020

in

H.C.C.C. No. 1 of 2020

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RULING OF THE COURT

1. The High Court (Okwany, J.) rendered a ruling on 13th February, 2020 in which the court dismissed with costs an application by the applicants herein for *inter alia*, a stay of execution and setting aside of the ruling and orders of that court made on 7th January, 2020. In its ruling dated 7th January, 2020, the High Court ordered:

> ***"THAT that the Judgement delivered on 19th June, 2019 and the Order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division, Commercial Court by Mr. Daniel Toledano, QC sitting as a Deputy Judge of the High Court aforesaid in claim number CL-2018-000720 be and is hereby recognized and registered as a Judgement of this Honourable Court, the judgement and order aforesaid be and is hereby enforced within the jurisdiction of this Honourable Court, and that the Applicant be at liberty to enforce the Order aforesaid within the jurisdiction of this Honourable Court.***
>
> ***THAT leave be and is hereby granted to the Applicant to execute the Judgement of 19th June, 2019 and the Order issued pursuant thereto both recognized and registered by this Honourable Court.***
>
> **…**
>
> ***THAT I also award the costs of the application to the Judgement Creditor and direct that the notice of registration of the***

Judgment be served on the Judgement debtors as provided under Section 5(3) of the Act."

2. The gravamen of the judgment and orders in the United Kingdom judgment was that the applicants herein jointly and severally pay the respondent the sum of USD 15,162,320.95 under the Facility Agreement dated 10th April, 2015 and the Guarantee and Indemnity of the same date; that the applicants jointly and severally pay the respondent interest from 20th June, 2019 until payment as provided under the Facility Agreement; that the applicants pay the respondent's costs of the proceedings; and that the applicants make an interim payment of GBP 100,000 on account of the respondent's costs within 28 days.

3. Dissatisfied with the ruling of the High Court dated 7th January, 2020 and the order ensuing therefrom, the applicants herein filed an application in the High Court through an amended chamber summons dated 13th January, 2020 seeking, *inter alia*, the settling aside of the impugned ruling. That application was premised on grounds that, *inter alia;*

> **"…**
>
> ***(a) The United Kingdom judgment was entered in circumstances that are contrary to the rules of natural justice, are against public policy in Kenya contrary to Article 50 of the Constitution.***
>
> ***(b) The enforcement of the United Kingdom judgement would be manifestly contrary to public policy in Kenya and would be a violation of the applicants' absolute right to a fair hearing as guaranteed by Article 50 of the Constitution.***
>
> ***(c) The United Kingdom judgement was obtained by fraudulent means."***

4. Being aggrieved by the Ruling of the High Court on 13th February, 2020 dismissing the application and the orders pursuant thereto, the applicants herein filed a Notice of Appeal dated 14th February, 2020 challenging the said ruling. That Notice of Appeal is the basis of the Notice of Motion dated 20th February, 2020 filed pursuant to **Sections 3A** and **3B** of the Appellate Jurisdiction Act and **Rules 1, 5 (2) (b), 41** and **47** of the Rules of this Court, under certificate of urgency, which is now the subject of this Ruling.

5. In the said Notice of Motion, the applicants seek in the main orders as follows, that:

> ***"This Honourable Court be pleased to issue a stay of execution of the Ruling of the High Court of Kenya in High Court Commercial Cause No. 1 of 2020 (OS) East African Development Bank –v- Dari Limited & 5 Others of 13th February, 2020 upholding the ruling of the court of 7th January, 2020 issuing orders or recognition and enforcement of the Judgement delivered on 19th June, 2019 and the Order issued pursuant thereto by the High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division, Commercial Court by Mr. Daniel Toledano, QC sitting as a Deputy Judge of the High Court aforesaid in claim number CL-2018-000720 [hereinafter the United Kingdom Judgement], and all consequential orders, pending the hearing and determination of this application [and] … appeal."***

6. The application was canvassed by way of written submissions. Those for the applicants were dated 24th April, 2020 while those of the respondent were dated 28th April, 2020.

7. According to the applicants, they have an arguable appeal which shall, if successful, be rendered nugatory if the orders sought are not granted. They further assert that no prejudice would be occasioned upon the respondent should the orders sought be granted.

8. On whether the appeal is arguable, the applicants have deposed that in its ruling dated 13th February, 2020 declining to set aside its ruling of 7th January, 2020 issuing orders of the recognition, registration and enforcement of the United Kingdom Judgment and the orders issued pursuant thereto, the High Court erroneously interpreted its jurisdiction under **Section 10 (2)** of the **Foreign Judgments (Reciprocal Enforcement) Act.** The applicants argue that such interpretation;

> ***"… reduced the role of the High Court in the discharge of its mandate under Section 10 of the Act to that of a mere bridesmaid …",***

that it

> ***"… offend[ed] the Constitution of Kenya, Kenya's private international law and [was] inimical to Kenya's public policy …"***

9. The applicants submit that:

> ***"… the Learned Judge's postulation of automatic enforceability in Kenya of foreign judgments emanating from reciprocal countries and her failure to properly exercise the jurisdiction vested in the High Court by Section 10 of the Act led to manifestly erroneous findings."***

They argue that having misconceived the jurisdiction of the court, the Judge subsequently failed to make substantive findings on the issue raised by the applicants in regard to the constitutionality of the United Kingdom judgment, its consistency with public policy under **Section 10 (2) (n)** of the **Foreign Judgment (Reciprocal Enforcement) Act**, and Kenya's private international law.

10. On the nugatory aspect, the applicants argue that the decretal sum in the United Kingdom judgment, which the respondent is at liberty to

execute, is less than the value of the security held by the respondent vide legal charges over two properties (LR No. 1055/165 and LR No. 11320/3). Hence, should stay not be granted, the applicants will be gravely prejudiced in the event the respondents execute the impugned judgment against them whilst still holding substantial security in that they will be compelled to pay the decretal amount in respect of which the respondent holds security.

11. They further argue that the respondent has thus far acted in bad faith and the applicants are apprehensive that should the decretal amount be paid and the intended appeal succeeds, the respondent would not refund the said monies. They further argue that should the decretal amount be paid and the intended appeal is successful, the applicants will not be able to recover the monies paid *"… without considerable difficulty, in view of the nature of the respondent, being a development bank, established by a Treaty between the East African states and enjoying immunity from legal proceedings under the said Treaty."*

12. The respondent opposed the application relying on the averments in the replying affidavit sworn by Loise Muigai, the Acting Head of Business, Kenya at the East African Development Bank along with the written submissions dated 28th April, 2020 and the list of authorities. The respondent submits that due to the applicants' disregard of court orders, illegal activities, and deceptive conduct, they are not entitled to this Court's discretion under **Rule 5 (2) (b)** of the **Court of Appeal Rules, 2010**. The respondent further submits that the applicants have failed to meet/fulfil the requirements under the twin principles of **Rule 5 (2) (b)** namely; that the applicant has an arguable appeal, and secondly that the appeal will be rendered nugatory if an injunction and stay of proceedings are not granted.

13. The respondent asserted that the appeal failed to disclose a single issue upon which the Court should pronounce itself. On the nugatory aspect the respondent submitted that particularly in light of the substantial default in payment of the sums advanced under the facility agreement, the applicants ought not to be allowed to perpetuate an illegality and benefit from defiance of court orders or to extend their illegal control of duly charged assets through a stay of execution. They further asserted that the applicants could be adequately compensated through damages in case of execution by the respondent as the latter are an international bank with adequate financial capacity and resources.

14. The respondent catalogues the conduct and actions of the applicants since the date of delivery of the United Kingdom judgment, the institution of High Court Commercial Cause No. 1 of 2020 (OS), the proceedings subsequent thereto and in proceedings in other matters before the High Court of Kenya which the former deems disqualified the applicants from this court's exercise of discretion in their favour. The respondent further urges this Court to consider the pleadings filed in ***Dari Limited (In Receivership), Raphael Tuju, Yma Tuju, Alma Tuju, Mano Tuju and S. A. M. Company Limited vs. East African Development Bank, George Weru*** and ***Muniu Thoithi HCCC No. E469 of 2019***, proceedings brought in the High Court by the applicants herein against the respondent and the receiver managers; and the conduct of the applicants herein in that regard, in considering whether to exercise its discretion in favour of the applicants. In the main they state:

> *(i) That following the applicants' continued default under the Facility Agreement of 10th April, 2015, the respondent vide Notice of Appointment dated 23rd December, 2019 appointed receiver managers of the 1st applicant and despite the 2nd-5th applicants herein being informed of the appointment, they have, and continue to ignore, neglect, refuse and/or otherwise fail to cooperate with the Receivers and Managers and allow the take-over of the effective control and management of the 1st applicant.*
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> *(ii) That the 2nd applicant herein informed the respondent vide letter dated 20th December, 2019 that some of the units in the properties charged to the respondent had been disposed by way of sale to third parties. The respondent asserts that such sales were done without its knowledge and/or consent and that the proceedings from the sales were not deposited in escrow as per the obligation under the Facility Agreement of 10th April, 2015.*
>
> *(iii) The applicants herein have ignored, refused and/or otherwise refused to comply with the orders by Hon. Lady Justice Grace Nzioka of 2nd March, 2020 and Hon. Lady Justice Mary Kasango on 23rd March, 2020 both issued in **Dari Limited (In Receivership), Raphael Tuju, Yma Tuju, Alma Tuju, Mano Tuju and S. A. M. Company vs. East African Development Bank, George Weru** and **Muniu Thoithi HCCC No. E469 of 2019**. The latter issued orders as follows:*
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> ***"I. An Order is issued that the 2nd to the 5th Plaintiffs [the 2nd to 5th Applicants herein] do immediately grant the receivers full, complete and effective access to the 1st Plaintiff's [the 1st Applicant herein] premises in accordance with the notice of Appointment and recovers letter to the director of 23rd December, 2019 and in accordance with the court order of 2nd March, 2020.***
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> ***2. The 2nd to 5th Plaintiffs shall provide the receivers with the 1st Plaintiff's statement of affair, financial returns and company records, cash book as from the 23rd December, 2019 to date, the management accounts, the debtors and creditors listings as at 4th February, 2020 and the 1st Plaintiff's staff payroll for the last three months.***
>
> ***3. A Notice to Show cause to issue for Raphael Tuju, Yma Tuju, Alma Tuju, and Mano Tuju to show cause why they should not be committed to civil jail for disobedience of this court's order to allow the Receivers resume their duties at the 1st Plaintiff's premises …"***
>
> *(iv) That the applicants deceptively depleted funds that had been deposited in an escrow account and Debt Service Deposit account held with Bank of Africa pursuant to the security agreements with the respondent. These withdrawals, the respondent alleges, were effected by unauthorized parties and without the knowledge and consent of the respondent contrary to the security agreements.*

15. We have considered the application along with the rival affidavits and written submissions by learned counsel. We have also considered the law, particularly as espoused in the authorities cited to us. It is settled that for an applicant to succeed in an application such as the one before us they must establish the twin principles of arguability and nugatory aspect. These principles were well summarized in the case of ***Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.*** (See also ***Reliance Banks Ltd (in liquidkation) vs. Norlake Investments Ltd., Civil Appl. No. Nai. 93/02 (UR)*** 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.

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

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

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

v. An applicant must satisfy the Court on both of the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.

vii. 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.

viii. 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.

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

x. Whether or not an appeal will be rendered nugatory 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."

16. It is also incumbent on the applicant to establish both limbs and proving only one of them will not justify granting of the orders. On the aspect of arguability, this matter raises the issue of the jurisdiction of the High Court under **Section 10** of the **Foreign Judgments (Reciprocal Enforcement) Act** particularly in regard to the fair trial provisions under **Article 50 of the Constitution of Kenya 2010**. We find that issue arguable and one calling for determination by the Court that will be seized of the appeal. We are therefore satisfied that the applicants have established the first principle on arguability.

17. On the issue of as to whether the intended appeal stands to be rendered nugatory if an order for stay of execution is not granted, this Court in ***Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 Others*** ***(CA No. 256 of 2013)*** held as follows:

"to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."

18. We observe that the respondent holds security being legal charges over LR No. 1055/165 and LR No. 11320/3 under the Facility Agreement dated 10th April, 2015 and the Guarantee and Indemnity of the same date and are satisfied that the applicants would suffer substantial loss if the impugned judgment is executed. We are also cognizant of the significant concerns raised by the respondent to wit, the conduct of the applicants does not commend itself to the orders sought of this Court. With this in mind, and considering the rival positions and considering the application in its entirety, and balancing the interests of the parties, the order that commends itself to us is one allowing the application and giving a conditional stay owing to the colossal amount of money that is owning in view of the default on the part of the applicant.

19. Accordingly, pending the hearing and determination of the intended appeal, this application is allowed on the following conditions:

(1) That the applicants do deposit a sum of KShs.50,000,000 in the joint names of both Advocates in an interest earning account, with a reputable Bank within the next 30 days, failure of which, the stay orders shall lapse and the application shall stand as dismissed.

(2) Costs of the application will be in the intended appeal.

Dated and Delivered at Nairobi this 19th day of June, 2020.

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

……………………………….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR