



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & MURGOR, J.J.A)

CIVIL APPLICATION NO. 131 OF 2020

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....APPLICANT

AND

EPCO BUILDERS LIMITED.....1ST RESPONDENT

CATHOLIC ARCHDIOCESE OF MOMBASA.....2ND RESPONDENT

SOUTHERN ENGINEERING COMPANY LIMITED.....3RD RESPONDENT

(Being an Application for Stay of Proceedings in Nairobi High Court Insolvency Petition No. 7 of 2019 pending the determination of Civil Appeal No. 206 of 2020 being an appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Hon. Lady Justice Wilfrida A. Okwany) dated 23rd April, 2020)

RULING OF THE COURT

1. The High Court (Okwany, J.) rendered a ruling on 23rd April, 2020 in which it dismissed an application by the applicant seeking orders, *inter alia*, that:

“2. The statutory demand from the respondent dated 7th June, 2019 and served upon the applicant on 12th June, 2019 be set aside.

3. A declaration be issued that Nairobi Insolvency Petition No. 07 of 2019 is null and void ab initio, and hence be struck out and/or dismissed with costs to the applicant.

4. The Honourable court be pleased and do hereby grant an order of mandatory injunction compelling the respondent to recall the malicious advertisement of the purported illegal insolvency Petition, Nairobi Insolvency Petition No. 07 of 2019 published in the

Daily Nation Newspaper of 8th July, 2018 at page 44 and republished on the same Daily Nation Newspaper of 22nd October, 2019 at page 27 and publish an apology in the same manner in which it published the malicious advertisement of the purported Insolvency Petition.”

2. Dissatisfied with the Ruling of the superior Court, the applicant herein has approached this Court by way of a motion of notice under certificate of urgency dated 3rd May, 2020 and brought under **Rule 5 (2)(b)** of the **Court of Appeal Rules** for orders, *inter alia*, that there be a stay of proceedings in Nairobi High Court Insolvency Petition No. 07 of 2019 pending the hearing and determination of Civil Appeal No. 208 of 2020, ***Kwale International Sugar Company Limited vs. EPCO Builders Limited & Others***. The application is supported by an affidavit sworn by **Harshil Kishore Kotecha**, one of the directors and a shareholder in the applicant company setting out, at length, the background to the matter and the matters in controversy.

3. Citing this Court's decision in Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others [2013] eKLR and Manilal Jamnanda Ramji Gohil vs. Director of Public Prosecution [2014] eKLR, counsel for the applicant has submitted that this is a proper case for this Court to exercise its discretion under Rule 5 (2)(b) of the Court of Appeal Rules and grant the orders sought. He asserted that the intended appeal is arguable as the judgment of the High Court:

“...bequeathed the Court with the jurisdiction to hear a matter that was not ripe to be before the court as the arbitration mechanism provided in the contract documents had not been initiated and exhausted; ... ignored the set-off/gross demand which ought to have been determined through arbitration; ...failed to hold that the Insolvency Petition was premature since the actual indebtedness, if any was yet to be determined by arbitration; failed to find and hold that an Insolvency petition must be preceded by a Statutory Demand; [and] failed to find and hold that a Statutory demand must be filed and endorsed by the Registrar of the High Court.”

4. Counsel for the applicant argued that unless the orders of stay of proceedings are granted, the intended appeal would be rendered nugatory and the applicant would be compelled to participate in an insolvency petition proceeding that was tainted with irregularities.

5. In opposition to the application counsel for the 1st respondent submitted that the prerequisites for the grant of the orders sought have not been met. Asserting that the applicant failed to satisfy the requisite two limbs for the Counsel for the 1st respondent submitted, highlighted and analysed the grounds of appeal raised by the applicant concluding that it was clear that they were frivolous and inarguable as they had been substantively and correctly determined by the High Court. On the nugatory aspect, counsel submitted that if the stay orders sought were not granted by this Court, the appeal would not be rendered moot as, contrary to the applicant's attempts to portray the dismissal of its application as an order of liquidation, it was not and the applicant had every opportunity to be heard during the insolvency petition negating any allegation that they would suffer prejudice if the order of the High Court was not stayed or set aside.

6. Counsel for the 3rd respondent supported the prayers for stay of proceedings in the insolvency petition No. 07 of 2019. Counsel submitted that the insolvency suit was a public suit and citing the decision by **Mativo, J.** in R vs. Kenya Roads Authority & 3 Others ex parte Cytton Investments Management Limited [2018] eKLR, urged that this Court ought to consider the public interest in deciding whether to grant the stay orders prayed for by the applicant. Counsel for the 3rd respondent argued that as the applicant had undertaken to pay the debt it owed to the 3rd respondent, *“...it would be in the public interest, just and fair, that the applicant not be declared insolvent before it can repay the 3rd Respondent ...which would be the likely outcome if the Insolvency Cause now pending in the High Court is allowed to proceed to hearing.”* Counsel for the 3rd respondent thus prayed for the stay of proceedings in the insolvency petition until its debt was fully paid.

7. 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 he/she 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 Bank Ltd. (in liquidation) vs. Norlake Investments Ltd., Civil Application No. Nai. 93/02 (UR).

8. On the aspect of arguability, it is trite that an arguable appeal need not be one with high chances of success but one that raises issues that deserve the consideration and determination by this Court on appeal. The grounds raised by the appeal against the impugned ruling include what constitutes a dispute, the arbitration clause in the contract, the import of determination of indebtedness, the interpretation of the provisions of **Regulations 16 and 17** of the **Insolvency Regulations 2016**, matters of form of statutory declaration and procedural technicality and the issue of recall of an insolvency petition advertisement. We are satisfied that these are indeed arguable points and intended appeal is not frivolous.

9. On the issue as to whether the intended appeal stand 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 that an order of stay or injunction pending appeal is granted:-

“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.”

A central aspect of the impugned ruling was the court's jurisdiction to entertain and proceed with the insolvency petition. We do believe that the appeal would be rendered nugatory unless those proceedings are first stayed pending the determination of the appeal by this Court.

10. With this in mind, and considering the application in entirety, balancing the interests of the parties, the order that commends itself to us is one allowing the application. We accordingly allow the application dated 3rd May, 2020 and hereby order that there shall be a stay of the Ruling and Order of the High Court (Hon. Lady Justice W. A. Okwany) dated 23rd April, 2020 and a stay of proceedings in Nairobi High Court Insolvency Petition No. 07 of 2019 pending the hearing and determination of the intended appeal to this Court against the said Ruling. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 24th day of July, 2020.

H. M. OKWENGU

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR