



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 1 OF 2020

BETWEEN

NCBA BANK (K) PLC.....APPLICANT

AND

LANDMARK PORT CONVEYORS LIMITED.....1ST RESPONDENT

BUZEKI ENTERPRISES LIMITED.....2ND RESPONDENT

(Being an application for stay of execution and injunction pending appeal from the ruling and orders of the

High Court of Kenya Nairobi (Msagha Mbogholi, J) dated 27th November, 2019 in H. C. C.C No. 43 of 2017

RULING OF THE COURT

[1] Landmark Port Conveyors Limited (**Landmark**) filed a suit in the High Court and obtained judgment against Buzeki Enterprises Limited (**Buzeki**). In execution of the said judgment, Moran Auctioneers proclaimed 53 trucks and trailers belonging to Buzeki. NCBA Bank (K) PLC (**the bank**), who is now the applicant before us, filed objection proceedings before the High Court, objecting to the attachment of the 53 trucks and trailers. The Bank contended that it was holding Debentures over the moveable and immoveable properties belonging to Buzeki, including the 53 trucks and trailers, as security for a loan of Kshs 2,700,000,000 issued to Buzeki, and that the Debentures had crystallized and the assets could not therefore be proclaimed or sold by Landmark as the Bank had become the owner of the assets.

[2] Upon hearing the objection proceedings, the High Court (**Mbogholi Msagha, J.**) delivered a ruling in which it dismissed the objection proceedings, holding that the Bank had not dislodged the priority of Landmark in the execution proceedings. This is the ruling that the Bank is aggrieved of and intends to appeal.

[3] The Bank now seeking orders under section 3A & 3B of the Appellate Jurisdiction Act, Cap 9 and Rule 5(2)(b) of the Court Rules, that pending the hearing and determination of its intended appeal, an order of stay of execution of the judgment and decree of the High Court issued on 12th May 2017, and the subsequent warrants of attachment and sale of movables issued to Moran Auctioneers on 9th March, 2018 be issued, and that there be an order of injunction restraining Landmark, its agents servants or employees, from attaching, advertising for sale, selling, transferring or in any other manner interfering with the Bank’s rights or title over the 53 trucks and trailers listed in the four sets of proclamation and attachment issued by Moran Auctioneers.

[4] The Bank urges that its intended appeal raises arguable issues which include: whether the learned Judge appreciated the automatic crystallization clause in the Debenture; whether the Bank waived its rights; and whether it was mandatory for the Bank to have a hire purchase agreement to prove its legal interest.

[5] In addition, the Bank argues that unless the orders sought are granted, its appeal may be rendered nugatory as it will have lost its security and Landmark may not be able to repay the loan. The Bank urges that the amount involved in the decree is so substantial that the mere fact of payment before the appeal is heard may render the appeal nugatory. The Bank argues that if Buzeki is placed under receivership, there is a possibility that its assets may be taken as security, which would significantly dissipate or completely wipe out its assets, thereby rendering any appeal a judicial farce.

[6] Landmark opposes the Bank’s motion, maintaining that it has a solid judgment, which was entered by consent against Buzeki. Landmark contends that there was no judgment entered on 12th May, 2017 which could be stayed but that the execution was in regard to the consent

judgment dated 30th November, 2017. Landmark contends that the Bank is not interested in the recovery of its debt but is only shielding Buzeki from its creditors. As regards the Debentures, Landmark maintains that under the Debentures, the Bank contracted that it would cease to be under any further commitment to Buzeki if any judgment/order is entered against him, and is not satisfied within 7 days. Landmark therefore maintains that the Bank does not have an arguable appeal.

[7] With regard to the second requirement, Landmark contends that it stands to suffer irreparable loss and damage, should the orders sought be granted. This is because the orders would amount to shielding Buzeki, who is incapable of satisfying the decree. Landmark contends that the Bank has not demonstrated that it would not have the means to repay the decretal sum, should that become necessary. Landmark therefore urges the Court to dismiss the motion. Buzeki did not appear or make any submissions in this application.

[8] This being an application under Rule 5(2)(b) of the Court Rules, the Bank must satisfy the twin principles for the grant of an order of stay of execution, pending the hearing and determination of the intended appeal. As restated in **Stanley Kang'ethe Kinyanjui V. Tony Ketter & 5 others** (2013) eKLR, the twin principles are, that the intended appeal is arguable and that if the orders sought are not granted, the appeal will be rendered nugatory.

[9] The judgment entered against Buzeki is not in issue. What is in issue is the execution process that is underway, specifically whether Landmark has the right to attach and sell Buzeki's properties which have been proclaimed by Moran Auctioneers, or any other properties belonging to Buzeki in light of the Debentures that the Bank is holding. The learned Judge of the High Court dismissed the Bank's objection and the Bank has indicated a wish to challenge that ruling. Needless to state, there are arguable issues concerning the interpretation of the Debentures, and one issue being sufficient the Bank has satisfied the first part of the twin principle.

[10] As regards the nugatory aspect, the amount involved in the decree is a hefty sum of Ksh.118,566,172. The 53 trucks and trailers subject of the attachment are equally worth a lot of money. If the properties are sold, and the Bank succeeds in its appeal, the appeal may be rendered nugatory as the Bank will have already lost the securities for the amount loaned to Buzeki.

[11] We take into account the fact that Landmark has a judgment in its favour which has not been set aside, and that we have an obligation to make orders that are fair and just and which takes into account the interest of both parties. The order that commends itself to us is an order of stay of execution of the judgment and decree in favour of Landmark pending the hearing of the Bank's intended appeal against the ruling issued on 27th November, 2019 on the following conditions:

- (i) **That the 53 trucks and trailers attached by Moran Auctioneers shall remain under attachment but shall not be sold.**
- (ii) **That the Bank shall provide security of Kshs. 60,000,000 by way of deposit into an interest earning account in the joint names of the parties' counsel within 30 days from the date of this Ruling, failing which the order of stay of execution shall stand discharged.**
- (iii) **The appeal shall be filed within 60 days from the date of this Ruling and shall be heard on priority basis.**
- (iv) **Costs of the application shall be in the appeal.**

Those shall be the orders of the Court.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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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