IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & OKWENGU, JJ.A)

CIVIL APPLICATION NO. 18 OF 2020 (UR)

BETWEEN

AEE POWER SA.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT

(An application for an injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Okwany, J.) dated 28th November, 2019

in

(H. C. COMM. & TAX DIV. CASE NO. E162 OF 2019)

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RULING OF KOOME, JA

[1] Pursuant to the Government of Kenya's policy initiative of ensuring increased electricity access to Kenyans, ***Kenya Power & Lighting Co. Ltd*** (the respondent), through the Last Mile Connectivity Project, contracted the ***AEE POWER SA*** (the applicant) in two separate contracts dated 10th December, 2015 to provide the following services: -

> ***(a) Contract number*** *KP1/12A-2/PT/2/15/A4- LOT 2* ***for the procurement of plant, design, supply and installation of extensions of LV single phase lines and service cable for the Last Mile Connectivity Project (LMCP) in Kisumu, Siaya, Vihiga, Busia, Bungoma and Kakamega Counties (hereinafter referred to as LOT 2); and***
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> ***(b) Contract number*** *KP1/12A-2/PT/2/15/A40 – LOT 4* ***for the procurement of plant, design, supply and installation of extensions of LV single phase lines and service cable for the Last Mile Connectivity Project (LMCP) in Narok, Nakuru, Samburu and Nyandarua Counties (hereinafter referred to as LOT 4).***

[2] Both contracts were for a term of 18 months, however at the instance of the applicant, they were extended four times to enable them complete the project. The applicant had also obtained the following bank guarantees to secure the performance of the said contracts: -

> **i. Performance Guarantee No. TFBG/18/0432KE for USD797,971.00 issued by Co-operative bank due to expire on 30th June, 2020 in respect of LOT 2.**
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> **ii. Performance Guarantee No. 0771TGU183090001 for Kshs. 160,925,826.00 issued by Barclays Bank due to expire on 30th June, 2020 in respect of LOT 2.**
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> **iii. Advance Payment Guarantee No. 0771TGU1720700023 for USD 246,240.08 issued by Barclays Bank due to expire on 30th June, 2019 in respect of LOT 2.**
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> **iv. Advance Payment Guarantee No. 0771TGU1720700025 for Kshs. 143,586,062.50 by Barclays Bank due to expire on 30th June, 2019 in respect of LOT 2.**

v. Performance Guarantee No TFBG/18/0433KE for USD 612,935.00 issued by Co-operative bank due to expire on 30th June, 2020 in respect of LOT 4.

vi. Performance Guarantee No TFBG/18/0430KE for Kshs. 98,492,573.00 issued by Co-operative bank due to expire on 30th June, 2020 in respect of LOT 4.

vii. Advance Payment Guarantee No. 0771TGU172070004 for USD 17,889.84 issued by Barclays Bank due to expire on 30th June, 2020 in respect of LOT 4.

viii. Advance Payment Guarantee No. 0771TGU172070002 for Kshs. 87,779,356.65 issued by Barclays Bank due to expire on 30th June, 2020 in respect of LOT 4.

[3] It is undisputed that the two contracts provided for alternative dispute resolution mechanism and therefore when a dispute occurred regarding the change of scope of the contract, the applicant filed suit in the High Court under ***Section 7*** of the **Arbitration Act** seeking an interim measure of protection as the parties embarked on arbitration proceedings. The application fell for hearing before **Okwany, J.** who dismissed it by a ruling dated 28th November, 2018. In dismissing it, this is what the learned Judge stated which will be central to this application: -

"31. I have perused the plaintiff's annexure "OM6" attached to the affidavit in support of the application and I note that indeed, the proposal of change order agreement was duly signed by both parties on 22nd March, 2019. I further note in the said proposal of change order agreement; the period of contract completion was extended by 3 months from 31st March, 2019 to 30th June, 2019 to allow for completion of project. My finding however that is the issue of whether or not the scope of works was reduced is not a matter for determination by this court the most glaring fact is that the contracts whether reduced in scope or not were to expire on 30th June 2019.

32. The question which this court has to grapple with is whether, following the expiry of the contracts, the plaintiff is still entitled to the orders of interim measure of protection to restrain the defendant from termination of the contracts and calling up the Bank Guarantees. My take is that the answer to the above question is to the negative for the following reasons: Firstly, as correctly submitted by the plaintiff, the Bank Guarantees were under clause 3.3 of the contract, part and parcel of the said contracts. Clearly therefore, with the expiry of the contacts' term, one can say that the issue of the Bank Guarantees is also spent.

33. Secondly, and similarly, the contracts having lapsed, this court cannot be seen to issue orders restraining the defendant from terminating the same contracts that have already lapsed. I find that the plaintiff did not demonstrate that the contracts were to be in place even after the agreed expiry date of 30th June, 2019.

34. For the above reasons I find that the prayers sought in this application cannot be issued. Consequently, I dismiss the application with orders that costs shall abide the outcome of the main suit".

[3] The applicant filed a Notice of Appeal and the instant notice of motion dated 24th January, 2020 seeking an interim order of injunction restraining the respondent from calling or enforcing the said bank guarantees. The applicant's case which is supported by a very detailed affidavit sworn by ***Olivier Munga***, is that they encountered some challenges which were mutually acknowledged even by the respondent, together with other project stakeholders namely the ***African Development Bank*** and the ***Ministry of Energy*** and parties agreed on reduction of the scope of the works in the contracts. Thus, the contracts were extended several times with the most recent extension being up to 30th June, 2019. Pursuant thereto, the applicant and the project consultant appointed by the respondent presented the Scope Reduction Proposal on 22nd March, 2019. The contractual period for rejecting any change proposal was fourteen (14) days. However, on 28th May, 2019, the respondent issued the applicant with notices of alleged default and termination of the contracts purporting to reject the change proposal. The applicant insisted that the rejection of the scope of change of contract proposal was unfair and based on unsubstantiated allegations. The applicant therefore invoked clause 8.2. of the contracts that provided for alternative dispute resolution mechanism.

[4] According to the applicant, the contract contained an arbitration clause to the effect that in the event of a dispute (of any kind whatsoever), arising between the parties in connection with the performance of contracts, either party may refer the dispute in writing to the Dispute Board for its decision. In the event the dispute was not resolved amicably and in respect of which the Dispute's Board decision was not final and binding, or in its absence, the said dispute would be referred to arbitration. The applicant therefore sought an interim measure of protection by way of an order of injunction under ***Section 7*** of the **Arbitration Act** stating that unless the order was granted, the applicant would terminate the contracts, call and enforce the Bank Guarantees thus nullifying the intended arbitration proceedings or rendering them nugatory.

[5] It is emphasized that the appeal is arguable; it is argued by ***Mr. James Muthu****i,* learned counsel for the applicant that although the learned trial Judge found the applicant had met the requirements for granting an interim measure of protection under ***Section 7*** of the **Arbitration Act,** and that there was an agreement for reduction of the scope of works under the contracts, duly signed by both parties, she nonetheless dismissed the application on the grounds that the time for delivery of the contracts which was 30th June, 2019 had already lapsed. That notwithstanding, following an oral application, the learned Judge gave an interim order for ninety (90) days to allow the applicant file an appeal before this Court. The instant application was filed on 28th January, 2020.

[6] On the nugatory aspect, counsel for the applicant submitted that unless the order sought is granted, the respondent will proceed to call the advance payment and performance guarantee and terminate the contracts before the dispute is determined. Finally, it was argued that the

applicant has commenced arbitration proceedings in light of the disputes arising from the contract and that the applicant having obtained the extension of the guarantees to 30th June, 2020 the respondent's interests will not be prejudiced.

[7] The motion was opposed by the replying affidavit sworn by ***Jared Biwott*** on behalf of the respondent. It was admitted that the contracts were indeed awarded to the applicant at a total contract price of approximately Kshs. 4 Billion. It was also admitted that although the contracts were initially for a term of eighteen (18) months with effect from April, 2015, they were extended on four (4) occasions to enable the applicant complete the project with the last extension being for a period of three (3) months from 31st March, 2019 to 30th June, 2019. That notwithstanding, the applicant continued to lag behind schedule in its performance and by a letter dated 28th February, 2017 the respondent sought an explanation for poor performance. The applicant acknowledged its challenges and sought more time to remedy the breach.

[8] Despite the applicant's numerous assurances, it made no substantial progress thereby prompting the respondent to issue a fourteen (14) days' notice dated 10th May, 2017 terminating the contract in accordance with the terms therein. It was further stated that due to the applicant's failure to complete the contracts, the projects were adversely affected which had a spiral effect in the respondent's ability to pay the loan and also to provide electricity to Kenyans under the Last Mile Connection Project. The respondent also admitted that the applicant vide their letters dated 6th December, 2018 and 19th March, 2019, sought a reduction of the scope of work in both contracts citing inability to complete obligations under the contracts but that no agreement was reached in respect of their submitted proposals and therefore vide a letter dated 22nd May, 2019, the respondent rejected the said request for reduction of scope of work.

[9] The applicant was also accused of not coming to court in good faith to seek an equitable order because after obtaining an interim order of injunction for ninety (90) days, the respondent's counsel urged the applicant to extend the bank guarantees that were set to expire on 31st December, 2019 without success. It is only after counsel for the respondent filed an application on 21st December, 2019 seeking to discharge the said interim order that the applicant extended the guarantee to the 30th June, 2020. The applicant was also faulted for forum shopping, by engaging three different courts in the same litigation. That the applicant filed an application before the High Court seeking to enjoin the banks that gave the guarantees as parties and also another suit in the High Court in Spain seeking the same orders. Finally, it was submitted that the respondent called up all the guarantees and indeed ABSA Bank has already honored its obligation under the guarantee issued. Moreover, even if the applicant is successful in its appeal, the respondent is capable of reimbursing the guaranteed sums as it has assets worth over Ksh. 300 billion in Kenya while the applicant is a company registered in Spain which has no assets in Kenya.

[10] I have considered the motion as well as the submissions and authorities cited. I must state at the outset that this being an interlocutory application, I will not in this ruling make any firm pronouncement on any issue since the dispute is pending determination and so is the intended appeal before this Court. The Court has, over the years, developed certain well-known guidelines on which it will grant or refuse to grant the preservative order sought. These propositions are now old hat and there are numerous authorities to that effect. See the case of **Reuben & 9 Others vs. Nderito & Another**, **[1989] KLR 459**: -

> **"1. In dealing with applications under rule 5 (2) (b) of the Court of Appeal Rules the Court of Appeal exercises original jurisdiction.**
>
> **2. Once the applicant is properly before the Court, the Court has jurisdiction to grant an injunction or make an order for stay on such terms as the Court may think just.**
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> **3. This exercise does not constitute an appeal from the trial judge's discretion to the Court of Appeal."**

[11] The exercise of original jurisdiction mentioned above must refer to the fact that even where the superior court has refused to grant an injunction or an order of stay, the Court of Appeal can still grant them preservative orders when waiting to hear and determine the appeal. An applicant is properly before the court when he or she has lodged a notice of appeal under ***Rule 75***. The learned Judges of Appeal put it thus in the ***Reuben's Case*** (supra): -

> ***"The plaintiffs have lodged a notice of appeal in accordance with rule 74 of the Rules of this Court and have bespoken proceedings to prepare the necessary record of appeal for filing. And so it is they who have come here in an attempt to stop the defendants from going ahead with the construction of the college pending the hearing and determination of their intended appeal."***

[12] That said, under ***rule 5(2)(b)*** of the Rules of this Court, it is trite that the applicant has to satisfy us that it has an appeal which is arguable and not a frivolous one, and secondly that unless we grant to it the order of stay sought, its intended appeal would be rendered nugatory were the said appeal to eventually succeed. These two requirements must both be satisfied before we can grant the motion of the applicant. In this case, the applicant states that the dispute arose because despite the parties having agreed a change of scope of the contracts, the respondent purported to decline to extend the contracts. Moreover, the learned Judge also indicated in a ruling that the parties had agreed to enter into an agreement on change of scope of contract but found the orders sought were overtaken by events as the contract had been extended until 30th June, 2019. I have also considered the grounds stated in the draft memorandum of appeal and I am persuaded that the applicant has some arguable grounds in the intended appeal, in other words, the intended appeal is not frivolous. I also wish to throw the usual caution that an arguable appeal is not one which must necessarily succeed, but which ought to be argued fully before this Court.

[13] However, with respect, found no material to persuade me, even slightly, that the denial of interim reliefs would render the appeal nugatory. This is because the contracts were already cancelled and the bank guarantees were recalled and some banks like Barclays Bank had already discharged its obligation under the guarantees. This is what distinguishes this case from the case of **Safaricom Limited vs. Ocean Beach Hotel Limited & 2 Others [2010] eKLR**. In that case, this Court granted an interim measure of protection which was sought under the same ***Section 7*** of the **Arbitration Act** because the applicant satisfied the second limb by demonstrating that the respondent had asked the applicant not only to vacate the suit premises but also to demolish the equipment erected by the applicant in the premises. If the applicant

was evicted and its equipment demolished, the intended appeal would have been rendered nugatory.

[14] In the instant case, the threats had been executed, contracts cancelled and guarantees recalled. We are also of the view that since the bank guarantees are in form of money claims, they can be reimbursed in the event that the applicant is successful in the arbitration proceedings or in the intended appeal. The respondent put up a very strong argument that the guarantees had an expiry date and if the respondent is restrained from calling them up, it would lose the right to do so upon the completion of litigation. We are also persuaded the respondent is capable of reimbursing the guaranteed sums because it has vast assets, while the applicant is a foreign company based in Spain with no known assets in Kenya, a matter that was not controverted by the applicants.

[15] Consequently, and for the aforesaid reasons I must refuse the motion. I order that it be dismissed with costs.

Dated and delivered at Nairobi this 7th day of August, 2020

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

RULING OF OKWENGU, JA.

I have read the ruling of Koome, JA in draft. I agree entirely with the reasoning in the ruling and have nothing useful to add.

Dated and delivered at Nairobi this 7th day of August, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

RULING OF W. KARANJA, JA.

I have read the Ruling of Koome, JA in draft. I agree with the history of the matter as outlined and the exposition of the applicable law particularly as relates to application of the guiding principles in applications under **Rule 5(2) b** of the Rules of this Court. I will not therefore repeat the same for purposes of this Ruling. Having read the Ruling of the learned Judge of the High Court, giving rise to the appeal herein, I have no doubt in my mind that it raises issues that invite the consideration and determination of this Court on appeal. In other words, the appeal is not frivolous and the issues raised in the memorandum of appeal are not trifling.

The law binds me to eschew any finding that might embarrass the bench that will be seized of hearing and determining the pending appeal. I will not therefore say more save that the appeal definitely raises substantive grounds of appeal. I am therefore in agreement that the principle on arguability has been established.

It is however on the 2nd limb of the nugatory aspect that I differ with my learned sister Judges. I will therefore, address the question as to whether the appeal will be rendered nugatory if the injunction sought is not granted.

It is trite that for an application such as this one to succeed, the twin principles of arguability and nugatory aspect have to be satisfied. **See Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [2013] eKLR.** As the twin principles are conjunctive, establishing only one of them will not suffice. See **David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001**.

In this case, the parties signed their contracts and chose arbitration as the mode of dispute resolution of their choice in the event a dispute arose that could not be resolved amicably. A dispute having arisen, a suit was filed and pursuant to **Section 7 of the Arbitration Act** the applicant moved to the High Court for interim orders of injunction in a bid to safeguard the subject matter of the intended arbitration. The

learned Judge for reasons given in the impugned Ruling, even having found that the applicant had established a prima facie case nonetheless declined to grant the injunctive orders sought.

Following the learned Judge's Ruling, the respondent called in some of the Bank guarantees, which were subject of the arbitration and also the appeal process. It is nonetheless the applicant's contention that the contracts have not been terminated and that they should be given a chance to fulfill their intention to sort out their differences before an arbitral tribunal.

My view of the matter is that as the matter is subject to the arbitral process, the subject matter, or what remains of it ought to be dealt with within the arbitral process and not before the courts. In this regard, I have noted the contents of the replying affidavit of Mr. Biwott, in which at paragraph 38 he deposes that "the guarantees expire on 30th June, 2020" and that the applicant had obtained interim orders until 13th May, 2020 restraining the respondent from calling up and enforcing the guarantees. It is instructive to note that this application was heard on 11th May, 2020. By then, the interim orders were still in place, and the guarantees which were to expire on 30th June, 2020 had not yet expired. I am unable to presume, or anticipate that the guarantees which were supposed to expire on 30th June, 2020 really did expire and that the orders which were in place as at the time this application was heard, was actually discharged. I am considering the circumstances prevailing in this application as at 11th May, 2020 when we heard it. I cannot therefore say with certainty that the contracts have been cancelled and guarantees recalled. To that extent, I respectfully differ with my two sisters. I am also cognizant of the fact that the cancellation of the contracts and calling in of the guarantees are issues that should be determined through arbitration and in order for the arbitral process to be given life, the order of injunction sought ought to be granted, otherwise the arbitral process will be rendered nugatory if the orders of injunction are not granted and the appeal eventually succeeds.

I therefore find the nugatory aspect established and would, therefore, allow the application. Nonetheless, as I am in the minority, the majority decision carries the day, with the result that the notice of motion filed on 28th January, 2020 is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL