



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 202 OF 2020**

**(CORAM: OKWENGU, KIAGE & MURGOR, J.J.A)**

**IN THE MATTER OF AN APPEAL**

**BETWEEN**

**ALMA TUJU.....APPLICANT**

**AND**

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

*(Application for stay of proceedings of the High Court of Kenya at Nairobi (Mary Kasango, J) in High Court Insolvency Cause No. E002 of 2020)*

in

*High Court Insolvency Cause No. E002 of 2020)*

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**CONSOLIDATED WITH**

**CIVIL APPLICATION NO. 203 OF 2020**

**DARI LIMITED (In Receivership) RAPHAEL TUJU,**

**YMA TUJU, ALMA TUJU, MANO TUJU**

**& SAM COMPANY LIMITED.....APPLICANTS**

**VS**

**EAST AFRICAN DEVELOPMENT BANK.....1ST RESPONDENT**

**GEORGE WERU.....2ND RESPONDENT**

**MUNIU THOITHI.....3RD RESPONDENT**

**CONSOLIDATED WITH**

**CIVIL APPLICATION NO. 204 OF 2020**

**MANO TUJU.....APPLICANT**

**VS**

EAST AFRICAN DEVELOPMENT BANK.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. 205 OF 2020

RAPHAEL TUJU.....APPLICANT

VS

EAST AFRICAN DEVELOPMENT BANK.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. 206 OF 2020

YMA TUJU.....APPLICANT

VS

EAST AFRICAN DEVELOPMENT BANK.....RESPONDENT

RULING OF THE COURT

[1] Alma Tuju, Mano Tuju, Raphael Tuju and Yma Tuju who are the applicants in Civil Application No. 202, 204, 205 and 206 of 2020 respectively (herein jointly referred to as the applicants), have each moved this Court by way of notices of motion dated 17th July, 2020. The substantive orders sought in each motion are similar and are as follows:

**(i) That the Honourable Court grant a stay of proceedings in High Court Insolvency Cases involving them; E001 of 2020 (Raphael Tuju); (E002 of 2020 (Alma Tuju); E003 of 2020 (Yma Tuju); E004 of 2020 (Mano Tuju) and E469 of 2019 (Dari Limited); (hereinafter collectively referred to as insolvency proceedings) pending the hearing and determination of Civil Appeal No. 70 of 2020 between Dari Limited & 5 others vs East African Development Bank (EADB) (Civil Appeal No. 70 of 2020).**

**(ii) That the Honourable Court stays the enforcement of the statutory demand notices dated 20th January 2020 issued against the applicants, pending the hearing and determination of Civil Appeal No. 70 of 2020 between Dari Limited & 5 Others vs EADB.**

[2] The grounds upon which each of the applicants' motion is anchored, is that in Civil Application No. 49 of 2020, between Dari Limited & 5 Others vs EADB, this Court issued orders for stay of execution of the High Court order dated 13th February, 2020 and all consequential orders, pending the hearing of an intended appeal. In its order of 13th February, 2020, the High Court upheld a previous order dated 7th January 2020 for the recognition and enforcement of a judgment delivered on 19th June, 2019 by the High Court of Justice, Business and Property Courts of England and Wales (the UK judgment).

[3] In granting the order of stay of the aforementioned High Court orders, this Court ordered the applicants to deposit a sum of Kshs. 50 million in the joint names of the parties' advocates within 30 days. The applicants contend that they have complied with that condition and have also filed a substantive appeal, that is, Civil Appeal No. 70 of 2020 against the decision of the High Court.

[4] In Civil Application No. 203 of 2020, the applicants jointly with Dari Limited and S.A.M. Company Limited, through a notice of motion dated 17th July 2020 seek orders that the Court issue:

**(i) A stay of the proceedings in HCCC No. E479 of 2019 between Dari Limited & 5 others vs. EADB & 2 Others, pending the hearing and determination of Civil Appeal No. 70 of 2020, and the appeal that the applicants intend to file against the decision of the High Court delivered on 8th July, 2020.**

**(ii) A stay of the enforcement of the notice of appointment of receivers and managers dated 23rd December 2019, appointing George Weru and Muniu Thoithi (who are 2nd and 3rd respondents in the application), as Receiver Managers of Dari Limited, pending the hearing and determination of Civil Appeal No. 70 of 2020, and the intended appeal against the ruling of the High Court of 8th July 2020.**

[5] Civil Application No. 203 of 2020 is also anchored on similar grounds as Civil Applications Nos. 202, 204, 205 and 206 of 2020. In addition, the applicants challenge the appointment of the receivers as the same is based on the UK judgment whose recognition has been stayed by this Court. The applicants urge that proceedings in High Court Civil Case No. E479 of 2019 and the notice of appointment of the receiver managers are inextricably linked, and that the continuation of the proceedings is likely to result in disharmonious interpretation of the validity of the debt, and will also render Civil Appeal No. 70 of 2020 and the intended appeal against the decision of the High Court of 8th July 2020 nugatory.

[6] East African Development Bank (EADB) who which the respondent in Civil Applications Nos. 202 of 2020, 204 of 2020, 205 of 2020, 206 of 2020; and the 1st respondent in Civil Application No. 203 of 2020 has lodged a notice of preliminary objection in each of the motions. The preliminary objection is against the application for stay of execution dated 17th July 2020 filed in each of these matters. In regard to Civil Applications No. 202, 204, 205 and 206 of 2020 the objection is identical.

[7] The preliminary objection is anchored on the doctrine of *res judicata* on the ground that this Court (**Koome, Warsame & J. Mohammed, JJ.A**) having issued a ruling dated 19th June, 2020 in Civil Application No. 49 of 2020, Dari Ltd & 5 others vs EADB, and having further clarified on 14th June, 2020 (**Warsame, J**) that the Court did not issue a blanket order of stay in regard to the ruling dated 19th June 2020 (such as to involve other court cases between the parties), and the order not having been appealed against, the issue of the applicability of the order of stay of the ruling of 19th June 2020, to the insolvency proceedings is now *res judicata* and cannot be re-litigated. Hence, the Court has no jurisdiction to deal with the application for stay of proceedings dated 17th July 2020.

[8] In addition, the objection postulates that the Court of Appeal has no jurisdiction to issue a second stay order arising from the statutory stay of section 17(2)(D) of the Insolvency Act, and the High Court Order of 10th March, 2020 staying the filing of the respondent's bankruptcy proceedings.

[9] It is the respondent's further submission in support of the preliminary objection that based on the clarification issued by this Court in Civil Application No. 49 of 2020, Dari & 5 others vs. EADB, the position taken by the applicants that the stay ruling granted on 19th June, 2020 in regard to the enforcement and recognition of the UK judgment made by the High Court, does not apply to the insolvency receivership proceedings, and therefore the Court has no jurisdiction to deal with the application for stay of the insolvency receivership proceedings. In support of this proposition the respondent relied on **Daniel Toroitich Moi vs Mwangi Mureithi [2014] eKLR**.

[10] The respondent further argued that the High Court having issued orders restraining the respondent from filing insolvency proceedings against the applicants, section 17(2)(D) of the Insolvency Act prevents the applicants from filing an insolvency petition when there is an outstanding application seeking to set aside the statutory demands, and therefore, the Court has no jurisdiction to issue a second stay order when there is already a statutory stay in place. The respondent maintains that the application for stay of the insolvency proceedings on account of the stay granted is in different, distinct and separate proceedings, and has no legal basis or backing.

[11] In Civil Application No. 203 of 2020 the respondents have raised a preliminary objection to the stay application dated 17th July 2020 on the grounds that some of the applicants, that is, Raphael Tuju, Yma Tuju, Alma Tuju and Mano Tuju, having been found guilty of contempt of High Court orders issued on 2nd and 13th March 2020, by denying the Receivers access to the charged properties, they have no right of audience in respect of their stay application dated 17th July 2020, unless they purge their contumelious conduct and contempt in disobeying the court orders.

[12] In their written submissions, the respondents have argued that the applicants are not deserving of any equitable discretionary order from the Court, first because they have not come to the Court with clean hands. This is because it will be a travesty of justice for the Court to grant a stay of the receivership proceedings given the applicants' brazen conduct in outrightly disobeying court orders relating to the receivership proceedings and the law by locking out the Receivers without any regard to the consequences of their actions.

[13] Secondly, the respondent submit that the applicants have not disclosed to the Court their indebtedness to the respondent, but have intentionally attempted to mislead the Court. In this regard the respondents cited **Ahmed Ishmael vs Kumbe ole Ntamorua & 4 Others [2014] eKLR**. The respondent maintain that the applicants' motion for stay of execution is an abuse of the court process as it is intended to allow the applicants to continue with their acts of impunity and disobedience of court orders. The respondent further relied on **AB & Another vs R.B [2016] eKLR** for the proposition that the Court retains the discretion to decline to hear a contemnor, the moment the contemnor hacks at the foundation of the constitutional edifice predicated on the respect for the rule of law. The respondent urged that the applicants' flagrant disobedience of the court orders is detrimental to the rule of law.

[14] It is appropriate at this stage to mention that there is a confusion as to whether the application subject of the order made by this Court on 19th June 2020 was filed in 2019 or 2020, reference having been made to both years. However, looking at the ruling of 19th June, 2020, it is apparent that the ruling was in regard to an application for stay of execution of orders of the High Court dated 13th February, 2020. This is consistent with the application having been filed in 2020 and not 2019, as that would be before the ruling was delivered. For the avoidance of doubt, we take it that the application was filed in 2020, and we shall refer to it as such. Secondly, there is reference to a ruling of this Court (**Warsame, JA**), which is dated 14th June, 2020. That ruling was in regard to settling the terms of the order made by this Court on 19th June 2020. It is evident that there is inconsistency in the dates and the date of 14th June, 2020 can only be a typographical or clerical error.

[15] The applicants' response to the preliminary objection is that the Court has jurisdiction to stay the insolvency proceedings in order to prevent the respondent from taking steps that would enable it to evade a possible outcome against it. The applicants argue that the Court of Appeal in its ruling of 19th June, 2020 in Civil Application No. 49 of 2020, issued a stay of execution of the ruling of the High Court in regard to the recognition and enforcement of the UK judgment delivered on 19th June 2019; that the UK judgment whose recognition and enforcement was stayed, is in regard to the principal debt instrument between the parties (that is, facility agreement dated 10th April 2015); that the Court having stayed the recognition and enforcement of the UK judgment, the Court stayed the enforcement directly or indirectly of the facility agreement, pending the hearing and determination of the intended appeal; that the guarantee and indemnity in regard to which the statutory demand notice was issued, is a guarantee in respect of the term loan facility under the same facility agreement; that the facility agreement and the guarantee and indemnity documents were executed contemporaneously on 10th April 2015, and are therefore part of one transaction, and that it is important that status quo in respect of the entire transaction be maintained, hence there is no need for the continuation of the receivership proceedings.

[16] Furthermore, the application for stay is an application under rule 5(2)(b) of the Court Rules in regard to Civil Appeal No. 70 of 2020; that the statutory notice issued to the applicants is in regard to enforcement of the term loan which is the subject of Civil Appeal No. 70 of 2020; and that in view of the intricate link between the insolvency proceedings and Civil Appeal No. 70 of 2020, the appeal would be rendered nugatory if the insolvency proceedings are not stayed.

[17] The applicants submit that the facility agreement and the guarantee and indemnity give rise to separate causes of action in respect to the same right, and that the respondent has elected to pursue the causes of action separately with the ultimate end of enforcing the common right, which is the right to recover the monies advanced under the facility agreement, and the guarantee and indemnity separately. In addition, EADB has issued a 45 days notice under section 96 of the Land Act, of its intention to sell property charged to it as securities for the monies advanced to the principal debtor through the facility agreement. The Court is urged not to allow the respondent to pursue the same right by separate causes of action. [18] The applicants submit that they are at risk of being committed to civil jail on the basis of contempt orders issued pursuant to separate receivership proceedings in a further attempt to pursue a right that had been stayed by the Court before the contempt proceedings. The applicants urge the Court not to allow the contempt proceedings to stand in the way of their application, as they have a right to be heard. In addition, the circumstances surrounding the application demonstrate the need for the exercise of the Court's discretion in their favour.

[19] In regard to the stay proceedings, the applicants argue that the overriding objective espoused under sections 3A and 3B of the Appellate Jurisdiction Act, requires the Court to balance the interest and hardships of the parties with a view to placing them on an equal footing; that in order to achieve this, the Court should grant the orders sought, to reduce the cost of litigation and deal with the issues raised in a proportionate manner; and that the applicants having satisfied the conditions for stay issued on 19th June 2020 by depositing Kshs. 50 million in a joint interest earning account, the Court should grant stay of the insolvency proceedings.

[20] Finally, the applicants reiterate that for the reasons it has given, the Court should exercise its discretion in their favour as it would be extremely prejudicial for the applicants to be subjected to insolvency proceedings in regard to a disputed debt; and that the respondent would not suffer any prejudice as it already holds security in respect of the facility. The applicants maintain that it is in the interest of justice and prudent use of judicial time for the Court to stay the proceedings in the insolvency matter, and the enforcement of the statutory demand notice, to await the determination of Civil Appeal No. 70 of 2020.

[21] In considering the preliminary objection that has been raised before us, it is instructive to recall the remarks made by *Sir Charles Newbold P* in Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Limited (1969) EA. 696 at page 701 that:-

***“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”***

In Aviation and Allied Workers Union of Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR the Supreme Court reiterated this position when it stated:

***“Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law the Court has to be satisfied that there is no proper contest as to the facts.***

[22] In regard to Civil Applications Nos. 202, 204, 205 and 2006 of 2020, the preliminary objection is anchored on the doctrine of *res judicata*. However, it is apparent that the parties are not agreed on the facts. For instance, an issue has been raised regarding whether there was one or two loan facilities. There is therefore need for the Court to clarify and determine the facts in determining the motion before it. We note that the order issued by the single Judge, (**Warsame, JA**) was in regard to settling terms of the order of 19th June, 2020. It was not dealing specifically with whether the order of stay could apply to the circumstances before us. In Independent Electoral & Boundary Commission vs. Maina Kiai & 5 others [2017] eKLR the Supreme Court stated the circumstances required before the doctrine of *res judicata* can be invoked as follows:

- (a) The suit or issue was directly and substantially in issue in the former suit.**
- (b) The former suit was between the same parties or parties under whom they or any of them claim.**
- (c) Those parties were litigating under the same title.**
- (d) The issue was heard and finally determined in the former suit.**
- (e) The court that formerly heard and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.**

[23] The motions which are now before the Court are different applications from that which was considered by the Honourable Judges in Civil Application No. 49 of 2020. Without giving the parties an opportunity to fully ventilate the motions, the Court will not be able to analyse the facts and determine whether the doctrine of *res judicata* applies. We find that this is not a matter which can be determined by way of a preliminary objection. We therefore, overrule the preliminary objection in regard to Civil Applications Nos. 202, 204, 205 and 2006 of 2020.

[24] As regards the preliminary objection relating to Civil Application No. 203 of 2020, we note that the issue of contempt of court upon which the preliminary objection is anchored, is a subject of the intended appeal, and will therefore be a substantive issue in determining the main appeal. It would be premature and prejudicial for this Court at this stage to address the issue of contempt as a preliminary issue. We think it would only be fair and just for the Court to look at the entire proceedings in determining the motion before it. For this reason, we also overrule the preliminary objection in regard to Civil Application No. 203 of 2020.

[25] In regard to the merit of the applicants' motion for stay of execution, in **Reliance Bank Limited vs Norlake Investment Limited** [2002] 1EA 227 this Court identified the two principles of arguability and the nugatory aspect that must be established before an application under rule 5(2)(b) can succeed. In **Stanely Kang'ethe Kinyanjui vs Tony Ketter & 5 Others** [2013] eKLR, this Court, reviewed several authorities and set out the circumstances to be considered in determining an application for stay of execution/proceedings pending appeal under rule 5(2)(b) and reiterated the twin principles of arguability and the nugatory aspect that must both be satisfied. In a nutshell, the applicants must satisfy this Court that they have an arguable appeal and that if the orders sought are not granted, the intended appeal will be rendered nugatory. [26] Two specific orders are sought by the applicants, namely; stay of execution of the insolvency proceedings pending the hearing and determination of Civil Appeal No. 70 of 2020, and an order that the Court stays the enforcement of the statutory demand notices dated 20th January 2020 issued by EADB, pending the hearing and determination of Civil Appeal No. 70 of 2020.

[27] The question that this Court must determine is whether the applicants have satisfied the twin requirements of arguability and the nugatory aspect. This Court (differently constituted) has already ruled in Civil Application No. 49 of 2020 that the intended appeal by the applicants, against the orders regarding the recognition and enforcement of the UK judgment is arguable. That appeal which has been filed by the applicants is Civil Appeal No. 70 of 2020. Clearly, the issue of recognition and enforcement of the UK judgment is still live in the appeal. The enforcement of the statutory demand notices cannot also be divorced from the UK judgment.

[28] The applicants maintain that unless the insolvency proceedings and the enforcement of the statutory notices are stayed, this appeal may be rendered nugatory and they may also suffer irreparable loss. We find that the insolvency proceedings and the enforcement notices are all anchored on the UK judgment which arises from the debt instrument, that is, the facility agreement dated 10th April, 2015 executed by the parties. Therefore, unless the order of stay of execution and proceedings is granted, Civil Appeal No. 70 of 2020 will be rendered nugatory.

[29] We therefore, find that the applicants have satisfied the twin requirements of Order 5(2)(b) of the Court Rules. Accordingly, we grant the motions and issue orders as prayed by the applicants.

**Dated and delivered at Nairobi this 20th day of November, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**