IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KARANJA & ASIKE-MAKHANDIA JJ.A.)

CIVIL APPLICATION NO. 83 OF 2018

BETWEEN

ELEX PRODUCTS EAST AFRICA LIMITED.....APPLICANT

AND

BUSINESS PARTNERS INTERNATIONAL KENYA SME FUND.....1ST RESPONDENT

BUSINESS PARTNERS INTERNATIONAL LIMITED.....2ND RESPONDENT

(Being an application seeking an injunction order pending an intended appeal against the

whole of the ruling of the High Court of Kenya (Hon. Olga Sewe, J.)

dated 20th November 2015

in

HCCC No. 610 of 2014)

****

REASONS FOR THE RULING OF THE COURT

On 2nd of November 2020, the Notice of Motion dated 21st March 2018 came before us for hearing and determination. The motion is brought under **Rule 5(2)(b)** and **42** of the **Court of Appeal Rules**. The motion substantively seeks orders that:

> **"2. THAT this Honourable Court be pleased to grant an injunction order to restrain the respondents from attaching for sale the movable and immovable assets of the applicant herein pending the hearing and determination of an intended appeal against the ruling and orders given by the High Court on 20th November, 2015.**
>
> **3. THAT costs of this application do abide the intended appeal."**

The application is supported by grounds on its body and a supporting and supplementary affidavit of **Gabriel M. Muli** together with annextures thereto.

The respondent filed no replying affidavit in opposition as none has been placed before us. The application was canvassed by the sole pleadings, written submissions of the applicant and legal authorities relied upon by the applicant in support of the application without oral highlighting. On 2nd November 2020, we considered the applicant's pleadings, submissions and legal authorities relied upon in support of the application at the conclusion of which we granted orders as follows:

> **1. Prayer 2 of the application dated 21st March 2018 seeking an injunction order to restrain the respondents from attaching for sale the movable and immovable assets of the applicant herein pending the hearing and determination of an intended appeal against the ruling and orders given by the High Court on 20th November 2015 be and is hereby granted pending the delivery of the ruling on 18th December 2020.**
>
> **2. Costs of the application to abide the outcome of the ruling on 18th December 2020.**

We reserved reasons for the ruling which we now proceed to render as hereunder.

The background to the application albeit in a summary form is that, the applicant filed Nairobi Milimani Commercial and Admiralty Division Civil Suit No. 610 of 2014, on 22nd December 2014. A defence was filed thereto by the respondents on 18th December 2015 followed by a reply to defence filed by the applicant. On the plaint, the applicant anchored a notice of motion dated 21st January 2015 seeking an interlocutory injunction order to bar the respondents from their then intended sale of the applicant's securities held by them. The notice of motion which was defended was canvassed through written submissions resulting in the intended impugned ruling delivered on 20th November 2015. The applicant was aggrieved and timeously filed and served a notice of appeal dated 4th December 2015. They also timeously lodged an application for a typed certified copy of the proceedings for appellate purposes.

The application under consideration was triggered by the respondents' conduct of instructing **M/s Garam Auctioneers** to without any lawful court order proclaim the applicant's property for sale allegedly to satisfy the very amounts in dispute before the High Court. The application under consideration as we have already indicated above was dated 21st March 2018 and filed on 23rd March 2018. It had not been disposed off as at August 2020 when the respondents instructed **M/s Garam Auctioneers** to proclaim the applicant's properties which action prompted the applicant to move back to the High Court vide a Notice of Motion dated 1st October 2020 seeking an order for status quo. The application was determined before **Hon. M. Odero, J**. on 2nd October 2020. The delay in the delivery of the ruling on the determined application for the status quo order is what prompted the applicant to write a letter to the Registrar Court of Appeal dated 5th October 2020 bringing the aforementioned matter to the attention of the Registrar of the Court and requesting for an early hearing date for the application under consideration resulting in the application being placed before us on 2nd November 2020 for hearing and disposal.

In support of the application, the applicant relies on the supporting pleadings together with the annextures thereto, their written submissions as well as legal authorities cited in their written submissions which were also annexed to the written submissions, all in support of the applicant's arguments that what they have laid before court meets the threshold for granting relief under the provisions of the law on which the application under consideration is premised.

To buttress their submissions, the applicant relies on the case of **Daniel Lomagul Kandei & 2 Others vs. Kamanga Holdings Limited & 40 Others [2017]eKLR, Rhoda Mukuma vs. John Abuoga [1988]eKLR** and, lastly, **Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013]eKLR** all on the principles that guide the Court in the exercise of its unfettered discretionary mandate under **Rule 5(2)(b)** of the **Rules** of the Court to which we shall revert shortly.

Our invitation to intervene on behalf of the applicant has, therefore, been invoked under the cited rules. **Rule 42** is merely procedural and requires no further interrogation. **Rule 5(2)(b**) is the substantive **Rule** for accessing the relief sought. The principles that guide the Court in the exercise of its mandate under the said **Rule** and which we fully adopt are as aptly summarized in the case of **Stanley Kang'ethe Kinyanjui vs. Tonny Ketter & 5 Others [2013]eKLR**, *inter alia* that the exercise of the Court's mandate under the said rule is purely discretionary and which discretion is unfettered, albeit subject to an applicant seeking relief under the said **Rule** satisfying the twin principles required to be satisfied before granting relief under the said rule namely that the intended appeal/appeal is arguable. Second, that the same will be rendered nugatory if the relief sought is not granted.

We have considered the record in light of the above threshold and the applicant's sole supportive pleadings and submissions as assessed above and proceed to make findings thereon as follows: the memorandum of appeal annexed to the application in support of their submission that the intended appeal is arguable, raises six grounds of appeal which we find prudent to paraphrase as follows: the applicant intends to argue on appeal that it has a fair and bona fide question in relation to the agreements entered into with the respondents which required investigation by the Court into their validity; the appellant and the respondents entered into a contractual relationship based on a misapprehension that they were two entities with equal bargaining power only for the applicant to realize subsequently that the resulting relationship was one of a horse and a rider, a borrower and a lender; the respondents had unduly influenced the applicant to enter into a bad joint venture resulting in the respondents jumping ship when the business venture entered into between them took a downward trajectory; the applicant was entitled to be relieved from the unequal bargain it had been unduly influenced to enter into; the relief of specific performance was erroneously granted in favour of the respondents and, lastly, that the matter called for the application of the principle of equality of arms which required the trial court to uphold the principle that in an instance where contracting parties purport to contract on equal terms, equity cannot be called into play to blame one party to the exclusion of another where both are to blame for the causation of the circumstances triggering the litigation between them.

The position in law is that 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. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Limited & 2 Others, Civil Application No. 124 of 2008**.

Second, that it is sufficient if a single bona fide arguable ground of appeal is raised. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd Civil Application No. Nai 345 of 2004**.

In light of the above principle we are satisfied that all the grounds applicant intends to raise on appeal are arguable notwithstanding that they may not ultimately succeed. We therefore find the first prerequisite has been satisfied to the required threshold. The position in law is that both limbs must be satisfied before any relief can be granted under the said **rule**. See the case of **David Morton Silverstein vs. Atsango Chesoni [2001]eKLR**.

Turning to the second prerequisite, the applicant has argued that it will suffer substantial loss if the relief is not granted. The position in law on this prerequisite is that each case depends on its own set of circumstances. See the case of **David Morton Silverstein** [supra]. Second, that 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. See **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1E. A 227**.

Applying the above threshold to the applicant's argument in support of this prerequisite, it is our finding that what is threatened is an auction

of the applicant's movable and immovable properties. There has been no response from the respondents as to their preparedness to make good the loss that may have been occasioned to the applicant should its intended appeal ultimately succeed. The applicant has also pleaded that the intended loss will be substantial, a positon not controverted by the respondents. Neither is there indication of any assurance from the respondents of their preparedness to make good the alleged substantial loss should the intended appeal ultimately succeed. We, therefore find this prerequisite has also been satisfied to the required threshold.

In light of the totality of the above assessment and reasoning, we make orders as follows:

1. **We affirm the interim orders we issued on 2nd November 2020 pending hearing and determination of the intended appeal/appeal.**

2. **Costs of the application to await the outcome of the intended appeal.**

Dated and **Delivered** at **NAIROBI** this **18th day of December, 2020.**

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR