



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. 158 OF 2020**

DAVID NJAU WAMBUGU.....1<sup>ST</sup> APPLICANT

POLY CHEM EAST AFRICA LIMITED.....2<sup>ND</sup> APPLICANT

EAGLES CHEMICALS EL SHARK.....3<sup>RD</sup> APPLICANT

COMPANY FOR TRADE & INDUSTRY.....4<sup>TH</sup> APPLICANT

EAGLE SPECIALTY CHEMICALS LIMITED.....5<sup>TH</sup> APPLICANT

DAES HOLDINGS LIMITED.....6<sup>TH</sup> APPLICANT

**AND**

**HIGH CHEM EAST AFRICA LIMITED.....RESPONDENT**

*(Being an application for stay of further proceedings pending the lodging, hearing and determination*

*of an intended appeal from the Ruling and Order of the High Court of Kenya*

*at Nairobi (M. Kasango, J.) delivered on 6th May, 2020*

in

**H.C.C.C. No. 310 of 2017)**

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**RULING OF THE COURT**

[1] On 6th May, 2020, the High Court (**Kasango, J**) delivered a ruling in which she dismissed an application that had been lodged by the defendants who are now the applicants before us. The applicants had sought to have some documents intended to be relied upon by the Plaintiff **High Chem East Africa Limited** expunged from the record, as the documents were alleged to have been obtained illegally or were inadmissible. In dismissing the application, the learned Judge found that the applicants had not shown how reliance on the documents would be detrimental to the trial or render the trial unfair, and directed that the matter proceed to full hearing.

[2] The applicants who are aggrieved by the ruling of the High Court have filed a notice of appeal and have also filed a motion under Rule 5(2)(b) of the Court Rules seeking an order of stay of further proceedings in the High Court suit, pending the hearing and determination of the applicants’ intended appeal against the ruling of the High Court. The applicants are apprehensive that should the proceedings before the High Court proceed, the plaintiff who is the respondent to the applicant’s motion shall adduce evidence in support of its case including the evidence that was alleged to have been obtained illegally and unlawfully. This, argued the applicants, will prejudice their right to a fair trial stipulated under 50(4) of the Constitution and their right to protection of property guaranteed under Article 31 and 40 of the Constitution, shall be violated.

[3] The applicants maintain that they have an appeal which has good prospects of success as the trial court erred in finding that the applicants were guilty of latches; that the trial court erred in basing its findings on the contents of the documents which the applicants sought to have expunged from the record, thereby misdirecting itself. The applicants maintain that the intended appeal would be rendered nugatory if the hearing in the trial court proceeds as the substratum of the intended appeal would be lost. In addition, the applicants argue that the balance of convenience tilts in their favour as they will suffer undue hardship if the application is not allowed, and it is therefore in the interest of justice that the application be allowed.

[4] Hearing of the application proceeded by way of written submissions. In their written submissions, the applicants reiterated that their appeal was arguable and that unless stay of further proceedings was issued, the appeal would be rendered nugatory. The applicants relied on Attorney General v Okiya Omtata Okoiti & Anor [2019] eKLR, Okiya Omtata Okoiti & 2 Others v Attorney General [2020] eKLR, Njonjo Mue & Anor v Chairperson IEBC & 3 Others [2017] eKLR. The applicants argued that the life of its application and the intended appeal is dependent on the High Court proceedings being stayed pending the conclusion of the intended appeal.

[5] On its part the respondent submitted that the applicants had not met the threshold under rule 5(2)(b) of the Court Rules, as its intended appeal is not arguable. Nor have they demonstrated that the intended appeal has high chances of success. On the issue of the appeal being rendered nugatory, the respondent argued that the applicants would not be prejudiced because if the intended appeal is successful, the Court can give orders that the impugned documents be expunged from the proceedings at any stage. It was maintained that the applicants have not demonstrated how they will suffer prejudice or loss that cannot be compensated by damages. To the contrary, it is the respondent who continues to be prejudiced due to the delay in finalizing the proceedings. The Court was therefore urged to dismiss the application.

[6] The object of Rule 5(2)(b) of this Court's Rules is to, *inter alia*, stay proceedings to preserve the substratum of the appeal so that the appeal is not rendered nugatory should it be heard and is successful. The dual limbs of arguability of the appeal and the nugatory aspect must be proved for an order under Rule 5(2)(b) of the Court Rules to be granted. This was made clear by this Court in Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31 wherein it was stated:

***“The law as regards the principle that guide the court in such an application brought pursuant to rule 5(2)(b) of the rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb.”***

[7] As to whether the appeal is arguable, the applicants contend that the trial court erred in declining to grant their motion to have some documents filed by the respondent, expunged from the record for being illegally and unlawfully obtained, and that the trial court delved into the contents of the documents as opposed to inquiring how the documents were acquired. This in our view is an arguable point.

[8] In addition, the applicants claim that the production of the documents shall result in the violation of their right to a fair hearing as envisaged under Article 50 of the Constitution, and their right to privacy and protection of property as provided for under Articles 31 and 40 of the Constitution. There is also the issue whether the learned Judge properly exercised her discretion in declining to grant the orders. Needless to state, the applicants have met the first limb of arguability of the appeal.

[9] On whether, if the order of stay of proceedings is not issued the appeal, if successful, would be nugatory, we note that the applicants seek to have some documents expunged from the record. Should the matter proceed for hearing before the intended appeal is heard and determined, the hearing of the suit would proceed with the impugned documents being produced in evidence and this may result in prejudice

to the applicants which cannot be reversed as the information will already be out. It would also result in an unnecessary waste of judicial time as the High Court suit may have to be heard by another Judge. In the circumstances, we find that the applicant has satisfied the dual requirement of arguability and the nugatory aspect. Moreover, we find it expedient, just and in the interest of justice to stay the proceedings in the High Court until the issue of the production of the contentious evidence is resolved in the appeal.

[10] Accordingly, the applicants' notice of motion dated 17th June, 2020 is granted to the extent of issuing an order staying further proceedings in High Court Commercial Case No. 310 of 2017 pending the hearing and determination of the applicants' intended appeal. The appeal shall be filed and served within 60 days from the date hereof.

**Dated and delivered at Nairobi this 4th day of December, 2020.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**