



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPLICATION NO. E016 OF 2020

BETWEEN

MEA LIMITED.....1ST APPLICANT

CRISTLE LIMITED..... 2ND APPLICANT

LEE NGUGI.....3RD APPLICANT

AND

EASTERN AND SOUTHERN AFRICAN TRADE

AND DEVELOPMENT BANK.....RESPONDENT

(Being an application for stay of execution of the Ruling of the High Court of Kenya at Nairobi (Kasango, J.) dated 2nd July, 2020

in

H.C.C.C. No. E418 OF 2018)

RULING OF THE COURT

The Motion dated 15th July, 2020 is brought under **rule 5(2) (b)** of the **Rules of this Court**. It is prayed in the main that pending the hearing and determination of the application and of an intended appeal we grant an order of stay of execution of the ruling and orders of the High Court issued on 2nd July,2020 (Kasango, J.). In grounds in support of the Motion and in a supporting affidavit of **E.M. Muriuki**, the Managing Director of the 1st applicant MEA Limited, it is said that the High Court allowed a Motion where summary Judgment had been sought pursuant to **Order 36 Rule 1(1) (a) Civil Procedure Rules 2010**; that the summary Judgment application was premised on alleged breach by the applicants of a Deed of Debt Settlement entered into between the parties by which the applicants undertook to pay an outstanding debt owed to the respondent; that summary Judgment application was filed one day after the applicants entered Appearance to defend the suit; that the application was filed prematurely before expiry of the timeline within which the applicants could enter appearance and defend the suit; that there was an application to refer the dispute to arbitration; that the Judge erred in fact and in law in finding that the applicants had failed to raise a bona fide issue to justify the suit going to trial when the applicants had filed a replying affidavit and a statement of defence under protest; that the Judge erred in striking out the applicants’ defence under protest which, to the applicants, went beyond the scope of the summary procedure under the Civil Procedure Rules; that the applicants should have been given an opportunity to file a defence; that the suit should have gone to full trial. It is stated that there is an arguable appeal which shall be rendered nugatory if stay of execution is not granted and at paragraph 13 of the affidavit:

“13. I am therefore advised by the Applicants’ advocates, which advice I believe to be accurate, that the deadline for compliance with filing the defence and thereafter serving the same on the Respondent had not yet lapsed for the Applicant to file the Summary Judgment application. In the foregoing, the Summary Judgment application was premature.”

It is also stated that the applicants filed an application under Section 6 of the Arbitration Act to refer the dispute to arbitration but that application was dismissed. Also, that unless the application for stay of execution pending appeal is granted the respondent will proceed to execute the decretal sum as against the applicants which stood at **United States Dollars 10,229,253.12** as at 31st October, 2019 which amount is significant and may cripple the applicants’ business.

In the Motion taken before the Judge of the High Court under **Order 36 1(1) (a) Civil Procedure Rules** it was prayed that Judgement be entered against the applicants as prayed in the Plaint. It was stated that by various facility agreements entered between the 1st applicant (MEA Limited) and the respondent (Eastern & Southern African Trade & Development Bank Limited) the respondent advanced to the 1st applicant revolving import credit facilities not exceeding the principal sum of USD 50,000,000 to facilitate the 1st applicant's importation of fertilizer, agricultural and veterinary products. It was further stated that by various Deeds of Guarantee, and particularly those dated 25th May, 2007, 15th March, 2011 and 14th March, 2012 both the 2nd and 3rd applicants (**Cristle Limited** and **Lee Ngugi**) issued in favour of the respondent, unconditional and irrevocable guarantees guaranteeing and securing repayment of the facility. It was further stated that in breach of the express terms of the facility the applicants had faulted to make payment of the sums due to the respondent. Also, that the applicants had admitted the debt due to the respondent under the facility which stood at USD 12,641,184 as at 10th December, 2015 and had undertaken to repay the respondent a sum of USD 10,351,708 which was negotiated and agreed as the settlement amount, in 60 monthly instalments, commencing 31st May, 2016 but that the applicants in breach of a Deed of Settlement had failed to make payments.

The Judge considered the application for summary Judgment and in the ruling delivered on 2nd July, 2020 struck out the defence; entered Judgment in favour of the respondent and awarded costs of the Motion to the respondent.

The principles that apply in an application of this nature – grant of stay of execution pending appeal are well settled. For an applicant to succeed in such an application he must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Secondly, the applicant must demonstrate that the appeal would be rendered nugatory absent stay – See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR* where those principles are well summarized.

In the application before the High Court it was shown that there was a loan facility advanced to the 1st applicant and when it was not repaid there was a Deed of Settlement entered by the parties. When the applicants did not meet their obligations as set out in the said Deed the respondent filed suit and upon entry of appearance by the applicants, the respondent applied for summary Judgment under **Order 36 1(1)(a) Civil Procedure Rules**. This is what **Order 36 1 (1) (a)** of the said rules provide:

“(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.”

From a reading of the whole record we find that the respondent was entitled, in the premises, to apply for Judgment after entry of appearance by the applicants. It was not necessary, as alleged by the applicants, to await filing of a defence. The respondent was entitled to apply for summary Judgment. Being of that view we do not think that there is an arguable point in the intended appeal and in the premises the Motion fails and is dismissed with costs to the respondent.

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

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR