



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 255 OF 2020

MASHREQ BANK PSC..... APPLICANT

AND

KUGURU FOOD COMPLEX LIMITED.....RESPONDENT

(Application for an Order of stay of proceedings in High Court (Commercial & Tax Division No. 1287 of 1999, pending lodging, hearing and determination of an intended appeal from the Ruling of the High Court Kenya at Nairobi (Hon. Lady Justice Mary Kasango) delivered on 4th day of October, 2019)

in

H. C. (Commercial & Tax Division) Civil Case No. 1287 of 1999)

RULING OF THE COURT

[1] On 4th October 2019, the High Court (Kasango J) delivered a ruling in HC (Commercial Tax Division) Civil Case No. 1287 of 1999 (High Court Suit) in which it, *inter alia*, rejected an application made by Mashreq Bank P.S.C. (applicant) to have its name struck out from the suit contending that its assets and liabilities were transferred to Dubai Bank. The Court ruled that there was no evidence that the liability in the dispute subject of the suit was transferred to Dubai Bank and that in addition the applicant’s counsel had confirmed that the applicant was based and is operating in Dubai.

[2] The applicant is dissatisfied with the Ruling in the High Court Suit and has filed an appeal against that Ruling. The applicant has now moved this Court under Rule 5(2)(b) of this Court’s Rules, for an order of stay of further proceedings in the High Court suit pending the hearing and determination of its appeal.

[3] The motion is supported by an affidavit sworn by Mostafa Abdel Latif Hussein, the Assistant Vice President and Legal Manager Risk Management of the applicant. It is also supported by grounds stated on the body of the motion. In brief the applicant contends that its appeal is arguable and has high chances of success; that if the order of stay of proceedings is not granted the intended appeal will be rendered nugatory; that the applicant stands to suffer grave and irreparable harm that cannot be compensated in monetary damages by participating in proceedings in which it ought not to be a party.

[4] Due to the Covid 19 pandemic the application was canvassed by way of written submissions that were duly filed by the parties’ advocates. For the applicant, it was submitted that it had satisfied the requirements for granting stay under Rule 5(2)(b) of this Court’s rules. This was because the appeal was arguable and not frivolous; that it raised triable issues with high chances of success; that such issues include failing to strike out the applicant from the High Court suit despite evidence showing it was no longer a party to the suit. It was also submitted that the appeal would be rendered nugatory should it succeed since the applicant will not be in a position to continue defending the suit and any form of damages would not adequately compensate the applicant.

[5] The respondent on the other hand submitted that there were no arguable issues raised by the applicant as the issues raised were not supported by evidence; that a High Court Judgment delivered by Havelock, J

which the applicant sought to rely on was not applicable as the parties in the High Court suit were not the same parties as the suit subject of the judgment of Havelock J; that Section 44 of the Evidence Act under which the applicant sought to have the trial court adopt the judgment of Havelock, J. proving that they are no longer a party to the suit before the trial court, was not applicable to the High Court suit as it could not supersede the provisions of the Banking Act.

[6] As regards the nugatory aspect, it was submitted that it was the respondent who continued to suffer and that the applicant had not demonstrated how the failure to grant the order affects their intended appeal.

[7] This being an application under Rule 5(2)(b) of this Court's Rules, for an order to stay further proceedings, an applicant must satisfy the Court that the appeal is arguable and not frivolous, and secondly, that, if the stay order is not granted, the appeal would be rendered nugatory if it eventually succeeds. As was stated by this Court in **National Bank of Kenya Limited v Loenard G. Kamweti [2015] eKLR:-**

“The object of the provisions of rule 5(2)(b) of this Court's Rules to, *inter alia*, stay proceedings, is to preserve the substratum of the appeal so that the appeal is not rendered nugatory should it, once heard, succeed. The dual limbs of arguability of appeal and the nugatory aspect must be shown to co-exist in default of which an order under rule 5(2)(b) of the Court of Appeal rules shall be declined.

[8] On the first limb, it is evident that the applicant has demonstrated that it intends to canvass various issues in the appeal including whether the learned Judge rightfully exercised her discretion in refusing to strike out the applicant from the High Court suit, and in failing to find that the applicant's assets and liabilities were transferred and/or sold to Dubai Bank Limited. Clearly, these are arguable issues that will need to be determined in the appeal.

[9] As regards the second limb on the nugatory aspect, the applicant has not demonstrated how the intended appeal will be rendered futile should the order of stay of proceedings not be granted. Should the High Court suit proceed with the applicant still appearing as a party, the High Court may hear and determine the High Court suit. This will however not render the applicant's appeal irrelevant or nugatory. The appeal can still proceed and if the applicant succeeds in his appeal, appropriate orders can be made with regard to the High Court suit. In other words, the situation can easily be reversed, and the applicant compensated through costs. Moreover, in balancing the interest of the parties we take note of the fact that the High Court suit is a very old one and an order for stay of proceedings would have the effect of delaying the matter further, to the prejudice of the respondent.

[10] We find that the applicant has not proved the second limb regarding the nugatory aspect. As stated in **National Bank of Kenya Limited v Loenard G. Kamweti** (supra) both limbs must be satisfied. Accordingly, we dismiss the applicant's motion dated 3rd August, 2020 and award costs to the respondent.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR