



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NUMBER 301 OF 2018

BETWEEN

DARASA INVESTMENT LIMITED.....APPLICANT

AND

DUBAI BANK KENYA LIMITED

(IN LIQUIDATION).....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of the application as well as the determination of the intended appeal against the Ruling/Order of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 28th September 2018

in

HCCC No. 145 of 2017)

RULING OF THE COURT

1. The applicant, Darasa Investments Limited, has moved the Court under Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Court of Appeal Rules for an order that pending the hearing and determination of its intended appeal, there be a stay of execution, enforcement and or implementation of the ruling and orders of the High Court (**F. Tuiyott, J.**) given on 28th September 2018 in High Court Civil Case No. 145 of 2017.

2. In that ruling, the High Court allowed an application by the respondent, Dubai Bank Kenya Ltd (in Liquidation), and granted an order against the applicant permitting the following and tracing of the applicant's assets; an order for full disclosure of the applicant's unencumbered assets to the value of Kshs.103,421,770.85 as at 24th August 2015 or such other amount sufficient to answer the respondent's claim; and upon such tracing, assets to that value to be frozen to answer to the respondent's claim pending the hearing and determination of the suit. On its part, the respondent was ordered to give an undertaking that it will pay damages to the applicant should it ultimately turn out that the freezing order should not have been granted.

3. The background in brief, is that on 4th April 2017, the respondent (the bank) filed suit against the applicant (the company) in which it averred that arising from a bank customer relationship, the bank granted the company financial accommodation that was to be secured by the company's properties comprised in 15 title deeds; that those title deeds were deposited with the bank with a view to ultimately creating a charge; and that those title documents were released to the company in unclear circumstances, despite facilities having been extended. In the suit the bank sought judgement for Kshs.103,421,770.85 and interest at 29% per annum.

4. In its statement of defence, the company denied the bank's claim; it denied holding any accounts with the bank or that any financial facilities were extended to it; it denied that it tendered its title deeds for creation of a mortgage or any security of any kind; and that its attempt to secure financing from the bank was frustrated by the bank which failed to approve or disburse the facilities.

5. Alongside the plaint, the bank lodged an application which was dated and filed on 4th April 2017 in which it sought an order for following and tracing of the company's assets; an order for full disclosure of the company's unencumbered assets to the value of Kshs.103,421,770.85 as at 24th August 2015 "*which continues to accrue interest at the prevailing rate or such other amounts sufficient to answer the [bank's] claim*"; an order freezing the company's assets to the same value pending the hearing and determination of the suit; and in the alternative an

order to furnish sufficient security capable of satisfying a decree in favour of the bank to the extent of the said amount.

6. That application was opposed. The managing director of the company deposed in a replying affidavit that the application was totally unmerited; that it was premised on assumptions, speculation and conjecture; that beyond the acknowledgement that the company held an account with the bank, no funds were ever advanced or disbursed to the company; that the release of the title deeds by the bank to the company was voluntary after it became apparent that the bank was not in a position to extend the facilities; and that no evidence was tendered by the bank to demonstrate that the company was moving or had attempted to move any of its assets outside of the jurisdiction of the court so as to warrant the orders sought in the application; that the legal threshold for the grant of a *mareva* of injunction had not been met; and that it was necessary for a full trial to be conducted and the summary process the bank was invoking was not justified.

7. That is the application that culminated in the ruling of the court given on 28th September 2018 in respect of which the present application relates. During the hearing of the application, **Mr. Peter Gichuru**, learned counsel for the company referred to the grounds in support of the application as well as the supporting affidavit sworn by Ibrahim Noor Hillowly, the managing director of the company as well as the further affidavit that he, Peter Gichuru, swore on 14th October 2018 and submitted that the applicant has demonstrated that it has an arguable appeal and that unless the orders sought are granted, the intended appeal will be rendered nugatory.

8. Counsel urged that the effect of the stay orders of the High Court was to illegally and unfairly exert undue pressure on the company to pay money that is not owed and to preempt its defence; that the issues in contention between the parties can only be addressed substantively in a trial; that the orders were granted without any legal basis; that the company is a Kenyan company based in Kenya and no evidence was presented to the effect that it was moving its assets outside Kenya or that it has or intends to dissipate any of its assets; that the Judge ignored the applicable legal principles when considering the application before him; and that execution of the said orders will paralyze the company's operations and financial stability and occasion it undue hardship. Counsel cited numerous court decisions on the applicable legal principles.

9. Opposing the application, **Mr. Odhiambo Ouma**, learned counsel for the bank, referred to the respondent's replying affidavit sworn by John Masega Ombasa, a Liquidation agent of the bank and submitted that the company's intended appeal is not arguable; that the material that was presented by the bank before the High Court on the basis of which the impugned orders were granted was not rebutted; that it was established that title deeds for properties pledged to the bank to secure money lent were released under unclear circumstances and the bank lost the only security it had; that the defence put forth by the company to the bank's claim is a mere denial. On the nugatory aspect, it was submitted that apprehension by the company that execution of the orders will paralyze its operations is unfounded; that to grant the orders sought will leave the bank exposed, considering that the company has not offered any alternative security; and that in any case no assets of the company have been traced.

10. We have considered the application, the affidavits and the submissions by counsel. The application before us calls for exercise of discretion bearing in mind the object of Rule 5(2)(b) as articulated by Githinji, JA in *Equity Bank Limited vs. West Link Mbo Limited* [2013] eKLR where he stated:

“It is clear that Rule 5(2)(b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just determination of appeals.”

11. To succeed in its application, the company is required to demonstrate that the intended appeal is arguable and that if we do not accede to its request and grant the orders it seeks the intended appeal will be rendered nugatory. In *Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006*, this Court stated that:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

12. As to whether the intended appeal is arguable, we are mindful that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court's consideration. [See *Dennis Mogambi Mong'are vs. Attorney General & others* [2012] eKLR]. In that regard, based on its draft memorandum of appeal, the company complains, that the Judge did not apply the applicable legal principles governing applications under Orders 39 and 40 of the Civil Procedure Rules; that it was not demonstrated that there was any risk of removal of the company's assets from the jurisdiction of the court to warrant the orders made; that the Judge wrongly dealt with matters at an interlocutory stage that should be preserved for trial; and that the Judge erred in the exercise of discretion in granting the orders. We are satisfied that based on those complaints, the intended appeal is arguable.

13. We are however not satisfied that the company has demonstrated that the intended appeal will be rendered nugatory unless we grant the orders sought. What the impugned orders do is to allow the tracing and freezing of assets. The impugned orders do not permit disposal. The company does not say what those assets are or what they might be or how the „freezing“ in itself will paralyse the operations of the company and least of all what those operations are and how they will be affected.

14. Consequently, the application fails and is accordingly dismissed. We make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of June, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR