IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI. 314 OF 2018 (UR 252/2018)

BETWEEN

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....APPLICANT

AND

SIEWA FURNITURE AND

INTERIOR DESIGNERS LIMITED.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

(An Application seeking stay/conservatory Orders/Injunctive Orders pending the hearing and determination of the application as well as pending the hearing and determination of the intended appeal from the decision of the High Court of Kenya at Nairobi (Ng'etich, J.) dated and delivered on 25th May, 2018

in

HCCC NO. 104 OF 2016)

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RULING OF THE COURT

1. By a plaint dated 1st April, 2016, Siewa Furniture and Interior Designers Limited (the 1st respondent) moved the Commercial & Admiralty Division of the High Court at Nairobi seeking various orders against Rift Valley Railways (K) Ltd (applicant).

2. Among the orders sought was payment of Ksh. 174,719,746.00 for breach of contract. It would appear from the record before us that Kenya Railways Corporation was subsequently joined to the proceedings as a third party.

3. Before the suit could be set down for hearing, the 1st respondent filed the Chamber Summons dated 13th September, 2017 seeking *inter alia "… an order directed at the defendant to give security for the instant claim to the tune of Kenya Shillings one hundred seventy four million, seven hundred and nineteen thousand, seven hundred and forty six (Ksh. 174, 719,746.00) being the amount claimed in the suit within 7 days of the date of the order."*

The motion was predicated on ten grounds on its face and supported by the affidavit of one Andrew Wanyoike sworn on even date. It gave details of the contract giving rise to the cause of action by explaining how the amount claimed had been arrived at.

4. In a nutshell, the applicant herein and the 1st respondent entered into a contract dated 23rd January, 2012 for renovation of twenty (20) train coaches at an agreed contract price of Ksh. 194,719,746.00. Some twenty million shillings appears to have been paid leaving the balance of the amount claimed by the 1st respondent. We are alive to the fact that the suit itself is yet to be heard and we must therefore eschew discussing the merits or otherwise of the claim.

5. It is imperative to note however, that the 1st respondent had entered into a concession with the 2nd respondent (Kenya Railways Corporation) to operate and manage the Kenya Uganda Railway Line for a period of 25 years. Following the concession, the applicant took over the properties belonging to the 2nd respondent to enable it run and manage the railway line. Among the properties taken over were the trains. In a bid to improve the train services, the applicant decided to refurbish the old coaches and sought the services of the experts in that

field. That is how the contract which is the subject of the suit before the High Court came about.

6. Things appear not to have gone as well as anticipated. Problems ensued and the 1st respondent was unable to continue operating the railway line as expected. The 2nd respondent terminated the concession agreement as a result of which the applicant moved to court for redress. Before the matter was heard, the parties recorded a consent in which the 1st respondent was supposed to hand back the property, including the employees etc which it had initially taken over from the 2nd respondent. Unfortunately, the 1st respondent which was still engaged in refurbishing some of the 2nd respondent's old coaches had not completed the task and had not been fully paid for the work already done. It was this amount that the 1st respondent sought to recover from the applicant vide the suit we mentioned earlier.

7. According to the 1st respondent, the applicant has no known assets which could be liquidated to settle any decree made in 1st respondent's favour if it were to succeed in the said suit. Further, that the applicant's shares are owned by foreign entities among them Qalaa Holdings, an Egyptian Company based in Cairo with 80% shareholding with the remaining 20% being held by Bomi Holdings of Uganda and International Finance Entities. The 1st respondent was therefore apprehensive that the applicant would leave the jurisdiction of the court and thus frustrate satisfaction of any decree that may be given against it. Hence the application in question.

8. Opposing the motion, the applicant filed grounds of opposition dated 22nd September, 2017 and accused the 1st respondent of misapprehending the law and engaging in what in its view was abuse of court process. It maintained that the orders sought, if granted, would be tantamount to condemning the applicant unheard. The court was urged to dismiss the motion.

9. After hearing arguments for and against the motion, the learned Judge (Ng'etich, J) rendered herself as follows:-

> **"… with the handing back of assets to 3rd party herein and without any prove** (sic) **of business operations in Kenya, the plaintiff has justifiable reason to fear of likelihood of failure or delay in satisfying the decree in event (sic) of successful litigation."**

The Judge ordered the applicant to deposit Ksh. 57,000,000.00 in court as security for the claim pending hearing and determination of the suit within 60 days from the date of the Ruling.

10. Those are the orders that prompted the applicant to move to this Court by way of the Notice of Appeal dated 28th May, 2018. It is on the basis of that notice of appeal that the application at hand is premised. In the application, brought under **Rule 5(2)(b)** of the Rules of this Court, the applicant seeks stay of the impugned ruling pending hearing and determination of the intended appeal. In the application, which is supported by the affidavit of Bong Yoon deponed on 31st October, 2018, the applicant has deposed that following the said orders, the 1st respondent has filed a notice of motion seeking committal to civil jail of the applicant's officers for contempt of court.

11. The applicant deposes that they have an arguable appeal as demonstrated by the draft memorandum of appeal on record; among other arguable points. The appellant faults the Judge for giving orders which had the effect of prejudging the outcome of the suit and thus condemning the applicant unheard. The learned Judge is also faulted for misdirecting herself by ordering the applicant to deposit the said amount despite her categorical finding that there was no mischief in the manner the applicant's assets had been retransferred to the 2nd respondent. The learned Judge is cudgeled for misapplying **Order 39 Rule 5** of the Civil Procedure Rules, 2010.

12. On the nugatory aspect, the applicant says that its officers might be committed to civil jail if the stay orders are not granted, and in the event the appeal succeeds, they will already have been incarcerated and their right to liberty violated and that would be irreversible even if the appeal were to succeed.

13. The application is opposed by the 1st respondent vide the replying affidavit sworn by Andrew Wanyoike, its Managing Director. According to Mr. Wanyoike, the applicant had failed to comply with the court order to deposit the money within 60 days of the ruling as directed by the Court and had not therefore come to Court with clean hands. He deposes that the appeal is not arguable as the applicant has failed to demonstrate that it can pay the amount claimed. Moreover, the application for committal to civil jail has been withdrawn and so the appeal will not be rendered nugatory if the orders of stay are not granted. He says that the applicant will not suffer any prejudice if the money is deposited in Court. He therefore urges the court to dismiss the application.

14. When the appeal came up for plenary hearing, learned counsel Mr. Thuo and Ms. Gachamba appeared for the applicant and 1st respondent respectively. Mr. Thuo reiterated the facts surrounding the matter and urged the Court to consider the draft memorandum of appeal on record.

On arguability, Mr. Thuo maintained that the requirements set out under **Order 39 Rule 5(1)** had not been satisfied. He stated that the learned Judge had satisfied herself that there was no mischief established on the part of the applicant and so the order in question ought not to have been issued. The 1st respondent had also failed to demonstrate that the applicant intended to dispose of its property to avoid satisfying the decree if passed against it. On a light touch, counsel posited that the applicant was just being punished for *"being poor"* and had been denied its right to be heard before being condemned to deposit the amount in question.

15. On the nugatory aspect, counsel maintained that although the application for committal to jail for contempt had been withdrawn, the same could still be reinstated to the detriment of the applicant's officers.

He urged that they satisfied the twin principles applicable before stay orders can be granted. He places reliance on the decision of this Court in **John Kipkemboi Sum vs Lavington Security Guards Limited [1998] eKLR** where the court held:-

> **"It was pointed out by this Court in the strongest possible terms in the case of *Kuria Kanyoko t/a Amigos Bar & Restaurant v Francis Kinuthia Nderu and Others* (1988) 2 KAR 126, that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38 rule 5 of the Civil Procedure Rules, namely, that the defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."**

16. Opposing the application, Ms. Gachomba maintained that the intended appeal was not arguable; that the applicant is a foreign entity and the transfer of the properties to the 2nd respondent demonstrated mischief on its part. On the nugatory aspect, counsel submitted that if the money is deposited in Court, the same can always be released to the applicant in the event the appeal succeeds. She added that the applicant had failed to demonstrate ability to settle the debt if judgment was issued against it.

17. In rejoinder, Mr. Thuo maintained that the test under **Rule 39(5)** is not whether the applicant is able to pay, but whether there was mischief in transferring its assets, which had not been demonstrated. He therefore implored the Court to allow the application.

18. We have considered the submissions made by counsel and all the other relevant material on record. The twin principles that an applicant must satisfy in an application made under **Rule (5) (2) (b)** of this Court's Rules such as the one before us are well settled. The first one is that the applicant has to demonstrate that the appeal or intended appeal is arguable and secondly, that unless the order sought is granted the appeal or intended appeal will be rendered nugatory. See **Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 E.A. 227**. Both limbs must be shown to exist before one can obtain relief under **rule 5(2)(b)** (See **Republic vs. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**).

19. On the issue of arguability of the appeal, our starting point will be looking at **Order 39 Rules 1** and **5** Civil Procedure Rules to see whether the application before the learned Judge met the threshold set out under those provisions. Rule 1 provides for the circumstances under which a defendant can be called upon to furnish security for appearance. The said Rule anticipates a situation where a defendant with intent to delay the plaintiff or to avoid any process of the court, or to obstruct or delay the execution of any decree, has absconded or is about to abscond or leave the local limits of the jurisdiction of the court; or where the defendant has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof.

20. **Rule 5** is in furtherance of **Rule 1** and states that the Court moved under those rules needs to be satisfied by way of affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution is about to commit the acts stated above, and if so satisfied may direct the defendant to deposit the security. The key words however as underlined above are intent to obstruct or delay the court process or execution. Did the 1st respondent prove before the learned Judge that the appellant had the intent to obstruct or delay the court process?

21. The learned Judge did not find intent to obstruct or delay the court process on the part of the appellant. What comes out clearly in her ruling is that there was apprehension that the appellant *"had not demonstrated ability to satisfy the decretal amount in the event of successful litigation"*. The question is whether the correct test was applied. The appellant's position is that it had no intent to abuse the court process by consenting to the retransfer of the properties to the 2nd respondent who is the owner of the properties in question, and punishing its officers and threatening to commit them to prison for failing to raise the security was an aberration of Order 39 Rule 5 of the Civil Procedure Rules.

22. On our part we are persuaded that is an arguable point on appeal. This Court has severally reiterated that an arguable appeal is not necessarily one that will succeed but one that is not frivolous or petty and one that merits the consideration of the Court. The Court on appeal will be called upon to consider whether the principle set out in the **Kuria Kanyoko** case *(supra*) has been satisfied. We are persuaded that the first limb of the twin principles has been satisfied.

23. On the second limb we have no hesitation in finding that although the application for committal to civil jail has been withdrawn, there is no bar against refiling the same afresh. This inevitably means that there is real danger of the appellant's officers being committed to jail as they await the hearing of the appeal. If that was to happen, the harm cannot be subsequently reversed and the appeal, were it to succeed would be rendered nugatory.

24. For the foregoing reasons, we conclude that this application has merit. We allow it with costs in the appeal.

Dated and delivered at Nairobi this 20th day of December, 2019.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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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.

DEPUTY REGISTRAR