IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & KOOME, JJ.A)

CIVIL APPLICATION NO. 234 OF 2019

BETWEEN

SIMBA CORPORATION LIMITED……................................APPLICANT

AND

CAETANO FORMULA EAST AFRICA, SA........................RESPONDENT

(Application for injunction pending the lodging, hearing and determination of an appeal from the Ruling of the High Court at Nairobi, Commercial & Admirality Division (M. Odero, J) dated 10th July, 2019

in

Civil Case No.E049 of 2019)

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RULING OF THE COURT

In an application brought pursuant to **Rule 5(2)(b)** of this Court's Rules, the applicant has prayed for the following 6 orders:

> **"1. THAT the matter be certified as extremely urgent…**
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> **2. THAT pending the hearing and determination of this application, an injunction do issue restraining the respondent, whether by itself, its servants, its agents, or otherwise howsoever from declining to act on orders for Renault Motor Vehicle, spare parts and accessories from the applicant and to continue meeting their obligations pursuant to the Shareholders Agreement, the mutual terms of Distribution and other obligations in relation to their existing partnership.**
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> **3. THAT pending the hearing and determination of the intended Appeal, an injunction do issue restraining the Respondent whether by itself, its servants, its agents, or otherwise howsoever from declining to act on orders for Renault Motor Vehicle, spare parts and accessories from the Applicant and to continue meeting their obligations pursuant to the Shareholders Agreement, the mutual terms of Distribution and other obligations in relation to their existing partnership.**
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> **4. THAT pending the hearing and determination of this application, an injunction do issue restraining the Respondent, whether by itself, its servants, agents, advocates or otherwise howsoever from entering into any other arrangements as itself or through an affiliate or group of companies and/or with any other parties for the distribution of Renault motor vehicles, accessories, spare parts and after sale services.**
>
> **5. THAT pending the hearing and determination of this application, an injunction do issue restraining the Respondent, whether by itself, its servants, agents, advocates or otherwise howsoever from entering into any other arrangements as itself or through an affiliate or group of companies and/or with any other parties for the distribution of Renault motor vehicles, accessories, spare parts and after sale services.**
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> **6. THAT the costs of and incidental to this Application be in the intended Appeal."**

From the foregoing, prayer 1 is spent, and prayer 5 is an exact *replica* of prayer 4. That leaves prayers 2, 3, 4 and the issue of costs for

determination.

Briefly, the applicant, a company carrying on the business of distribution and sale of various brands of motor vehicles, spare parts and accessories in Kenya and the respondent, a grantee and beneficiary of exclusive license to market, distribute and sell the Renault brand of motor vehicles, accessories and spare parts in Kenya and other parts of Africa entered into a Shareholders' Agreement in June 2014 which resulted in the formation of a joint venture company known as Simba Caetano Formula Limited (SCF). This Shareholders' Agreement regulated the relationship between the parties, which include *inter alia* shareholding, directorship, and management of the company. Additionally, there was a second agreement, the Distribution Agreement whose sole purpose was the distribution of Renault brand of vehicles, accessories and spare parts within Kenya and Mozambique.

In a letter dated 19th February, 2019 the respondent notified the appellant of its decision not to renew the Distributorship Agreement between itself which was due to cease on 30th June, 2019. The respondent cited systematic failure to meet the defined objectives. Aggrieved by this action, the applicant filed the suit before the High Court claiming that the termination of the Distribution Agreement was the epitome of several breaches of the shareholders' agreement by the respondent. Together with the suit the applicant took out a motion dated 28th March, 2019.

By a ruling on 10th July, 2019 the High Court *(M. Odero, J.)* declined to grant an order of temporary injunction to restrain the respondent from entering into any other arrangements for the distribution of Renault motor vehicles accessories, spare parts and after sales service. The Judge also dismissed the prayer for an order of interlocutory mandatory injunction, which sought to compel the respondent to continue meeting its obligations under the Distribution Agreement, the shareholder's agreements relating to its partnership with the applicant and other related obligations.

Aggrieved, the applicant has evinced, by the lodgement of a Notice of Appeal its intention to challenge the rejection of its application. The notice of appeal lists a whooping 25 grounds. It has also filed a draft memorandum of appeal. In the meantime, the applicant has taken out the instant application seeking the 6 interlocutory reliefs aforementioned.

Mr. Arwa, learned counsel for the applicant conceded that although there was a secondary agreement between the parties which had expired, parties continued to carry on business under the joint venture; that in 2018 the respondent proposed to introduce a new brand which idea was rejected by the applicant; that as a result, the respondent moved to terminate the distribution agreement that had expired.

Convincing this Court that the intended appeal will not be frivolous counsel contended that the learned Judge failed to appreciate the ambit of the High Court's power under **section 7** of the Arbitration Act under which the learned Judge was limited to only consider whether the applicant's cause of action fell within the terms of a reference to arbitration; whether the arbitral proceedings are in danger of being rendered nugatory if the orders sought are not granted; and that the learned Judge failed to appreciate that the applicant's complaint against the respondent concerned several violations of the shareholders' agreement which were not only limited to the threatened distribution agreement hence the Judge ignored all other complaints raised by the applicant and proceeded to deal solely with the threatened violation of the distribution agreement.

On the nugatory aspect it was submitted that the respondent has initiated the following actions which will render the intended appeal nugatory: first, that it has stopped the delivery of orders of the Renault brand of motor vehicles, accessories and spare parts exposing the applicant to liability to third parties for failure to meet its obligations; that it has initiated negotiations with third parties with a view to passing the distributorship of the Renault brand of motor vehicles to those third parties, which move might render the intended appeal nugatory; that the respondent has already written to SCF to hand over certain information and assets in relation to the business of the company; that the respondent has, through its agents written to customers of SCF directing them to stop doing business with SCF and has communicated its intention to re-launch Renault business and to provide solutions to customers outside SCF's business; that the respondent has acquired premises with a view of taking over the business of SCF; that it has actively approached SCF's and the applicant's employees for the purpose of setting up of the Renault business and lastly; that it has passed a resolution to incorporate another company to wholly take over the business and undertakings of SCF.

For these reasons, it was submitted that the applicant is at risk of losing its investment in SCF in the form of direct capital injection, the customer base that it has established over the last 4 years, support in building its brand and its trained staff, facilities it has provided such as show rooms, workshops, special tools and diagnostic equipment. It was posited that the businesses of the suppliers and vendors of SCF have been affected and the reputation that the applicant has built over the past 50 years in the market is at risk of being damaged by the respondent's actions.

Further, counsel submitted that the application seeking the interim reliefs before the High Court is yet to be determined; and that, as dispute is subject to arbitration the respondent's actions, if not stopped is likely to undermine the arbitral process. Lastly, it was argued that no prejudice would be occasioned to the respondent, as the profits will still be shared.

The respondent did not file a replying affidavit to the application however, Mr. Munyu learned counsel for the respondent responded from the bar submitting that the distributorship agreement lapsed on 30th June, 2019 by effluxion of time; that there was nothing to restrain by an injunction as the contract between the parties had lapsed; that as a consequence of that there was no contract between the parties; and that the agreement was between the respondent and a different party being Simba Caetano Formula Ltd rendering the applicant a stranger with no *locus standi* . To support its position, the respondent cited to us the case of **CMC Holdings Limited & Anor V. Jaguar Land Rover Exports Limited**, Civil Application No. NAI 66 of 2013. It also contended that if we were to grant the reliefs applied for in this motion, the effect would be to renew the expired contract contrary to the opinion expressed in **Giant Holdings Limited V Kenya Airports Authority**, Civil Application No. 193 of 2005, where it was stated that a court of law will not issue an injunction whose effect would be to revive a contract which has already been lawfully terminated. Counsel clarified that the respondent's letter of 19th February, 2019 was not, as contended by the applicant a termination of the agreement but rather a notice of non-renewal of the agreement; that in any case, by clause 3.1 the distribution agreement was non-exclusive giving the respondent the freedom to enter into agreement with any other party, hence there was no need for injunction; and finally, that the issue of arbitration in pending before the High Court.

For the foregoing, it was submitted that there is no arguable appeal; that the appeal will not be rendered nugatory; and that in any event, damages would be sufficient to compensate the applicant.

For an application under **Rule 5(2)(b)** to succeed, the applicant needs to satisfy the well known twin principles, namely:

> i. That the intended appeal is arguable, that it is not frivolous while bearing in mind that an arguable appeal is not necessarily one that will succeed; and
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> ii. Secondly, that if the orders sought are not granted, and the appeal succeeds, then the same would be rendered nugatory.

The twin principles are conjunctive and not disjunctive. An applicant who expects to benefit from an application under **Rule 5(2) b** must prove both limbs. See: **Reliance Bank (in liquidation) V. Norlake Investments Ltd,** (2002) 1 EA 227.

Further, in consideration of such application Court cannot make definitive or final findings of either fact or law. See: **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others,** Civil Application 31 of 2012, for this proportion.

From the foregoing principles, does the applicant have an arguable appeal and is it entitled to the injunctive orders that it seeks?

It is rare to find in the first limb of an application under **Rule 5(2)(b)** that the appeal or intended appeal is not arguable or is frivolous. This is one such application. Without going into the merit of the intended appeal, it is common factor that the distribution contract that is the subject of the suit has lapsed. It did so on 30th June, 2019; that is four months before it lapsed the respondent wrote to the applicant on 19th February, 2019, expressing its intention not to renew the contract which was in line with **Article 18** of the said agreement. Based on these facts the learned Judge, in exercise of her judicial discretion declined to grant the applicant's prayers for temporary injunction, saying:

> **"…That is not for the Courts to re-write contracts between parties. Similarly, the courts ought not issue orders whose effect would be to compel a party to continue to engage with a partner where they are no longer interested in such engagement. The Plaintiff did not submit on this particular point.**
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> **…**
>
> **(41) Finally I find that the Defendant issued a letter of non-renewal dated 19th February 2019 in full compliance with the terms of the Distribution Agreement. This is a country and jurisdiction where contracts are honoured and upheld. Parties have the freedom to enter into and to opt out of contracts as they wish. This Court would be reluctant to compel a party to remain tethered to a contract where that party has already in compliance with said contract, indicated its intention to opt out of the Agreement. The freedom of business association must be protected and upheld."**

We say no more save to observe in passing that the circumstances of this case are comparable to those in the cases of **CMC Holdings Limited & Anor V Jaguar Land Rover Exports Limited**, Civil Application No. NAI 66 of 2013 and **Giant Holdings Limited V Kenya Airports Authority**, Civil Application No. 193 of 2005, cited to us.

Whether the agreement was properly or lawfully terminated or whether the parties remained in business even after the expiry of the contract, will be subject of the arbitral proceedings and this court cannot make definitive findings at this stage.

The applicant, in the result has failed to demonstrate that it has an arguable appeal. Having failed to demonstrate this aspect, since both limbs are conjunctive, there is no need to go into the nugatory aspect. Accordingly, this application is bereft of merit and is dismissed with costs.

Dated and delivered at Nairobi this 6th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

<u>DEPUTY REGISTRAR</u>