



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, HANNAH OKWENGU & J.

MOHAMMED, J.J.A)

CIVIL APPLICATION NO. NAI 211 OF 2016 (UR.164/2016)

BETWEEN

SHAH MUNGE & PARTNERS LTD.....APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES..1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

DEPOSIT PROTECTION FUND BOARD LIQUIDATORS

OF EURO BANK LTD (in liquidation).....3RD RESPONDENT

SOUTHERN BELL LIMITED.....INTERESTED PARTY

(Being an application for an injunction and stay of execution pending appeal from the decision of the High Court of Kenya at Nairobi (Azangalala, J.) dated 23rd October, 2009)

in

Commercial & Admiralty Civil Suit No.1175 of 2002)

RULING OF THE COURT

There has been some delay in the delivery of this Ruling. The delay has been occasioned by challenges presented by transfer of all three members of the bench to new Duty Stations. The delay is highly regretted.

Background

[1] The application before the Court is brought pursuant to Rule 5(2) (b) of the Court of Appeal Rules. **Shah Munge & Partners Ltd**, the applicant herein, seeks an order of injunction and stay of execution from the decision of the High Court pending the filing, hearing and determination of the intended appeal.

The High Court delivered judgment on 23rd October, 2009.

[2] The application is founded on the grounds set out on the face thereof and also on the averments deponed in the supporting affidavit and further affidavit of John Munge, the Managing Director of the applicant herein.

[3] A brief background of the dispute as gleaned from the amended plaint filed on 10th December, 2002 is that the 1st respondent's claim against the applicant was founded on breach of contract and negligence. The dispute revolves around Treasury Bill Number 1471 (TB 1471). The 1st respondent deponed that it had engaged the applicant to provide stock brokerage services to it; that the applicant was in breach of contract and that as a result of the said breach, fraud and deceit the 1st respondent suffered loss of Kshs.258,133,330.00 together with interest.

[4] The 1st respondent claimed that the 2nd respondent discounted TB 1471 before the maturity date which was contrary to the agreed terms; that the discounting was done without the 1st respondent's authority; that the 2nd respondent owed the 1st respondent a duty of care and had a duty to ensure that the rediscounting of the said TB 1471 was validly effected; that the 2nd respondent was negligent in the performance of its duty of care to the 1st respondent in respect of the rediscounting; and that this led to loss to the 1st respondent amounting to Kshs.258,133,333.00 together with interest.

[5] In its defence, the 2nd respondent pleaded immunity under the Internal Loans Act (Cap 420) on the basis that it acted on behalf of the Government of Kenya. The 2nd respondent asserted that the proceeds of TB 1471 were paid to the 1st respondent's designated account and it therefore stood absolutely discharged; that TB 1471 was validly rediscounted in accordance with the mandate held; and that it owed no duty of care to the 1st respondent and did not act negligently.

[6] On its part the applicant filed a defence in which it denied the allegations of breach, deceit, fraud and or conversion, and maintained that there was no contract between it and the 1st Respondent from which any breach could rise.

[7] The applicant filed a counter claim claiming that the 1st respondent misrepresented to the Capital Markets Tribunal that the transaction involving TB 1471 arose under the Capital Markets Authority Act whereas it did not, and that as a result of the misrepresentation the applicant suffered damages of Kshs.501,500,000.00

[8] The learned Judge considered the submissions and evidence and entered Judgment against the applicant in the sum of Kshs.258,133,330.together with interest and costs.

[9] Aggrieved by that decision, the applicant filed a Notice of Appeal dated 28th October, 2009 and the notice of motion dated 23rd September 2016. In the motion, the applicant relied on grounds *inter alia* that there are merited and serious issues to be determined in the intended appeal; that the intended appeal is arguable; that the applicant stands to suffer irreparably if the injunction sought is not granted as the 1st respondent may execute the decree at any time.

[10] The 1st respondent opposed the application by way of a replying affidavit sworn by Caroline Rakama, the Legal Officer of the 1st respondent in which it was averred that the doctrine of laches applied so as to deny the applicant the orders sought as it had failed to pursue the filing of the intended appeal with expediency; that from delivery of the judgment in 2009 to date the intended appeal had not been filed; and that the 1st respondent had recently discovered the applicant's attempt to discreetly dispose of its only known asset, shares in the Nairobi Securities Exchange (NSE), in order to frustrate the recovery of the decretal award.

[11] Southern Bell Limited the Interested Party herein (The objector in the High Court) made known its interest in the shares held by the applicant at the NSE. The Interested Party in an application before the High Court sought a declaration that it was the lawful proprietor of 1,575,000 ordinary shares held by the applicant at the NSE. The application was dismissed with costs by J. Kamau, J.

[12] By a replying affidavit sworn by John Njenga Mungai, the Director of Southern Bell Limited, the Interested Party supported this application as the beneficial owner of 1,575,000 ordinary shares of NSE held by the applicant.

Submissions by Counsel

[13] When the application was heard before this Court, learned counsel, Mr. D. Ndolo represented the applicant; Mr. J. Wananda represented the 1st respondent while Mr. Thuita represented the Interested Party. The 2nd respondent did not file any documents in response to the application.

[14] Mr. Ndolo submitted that the applicant has an arguable appeal as evidenced by the draft memorandum of appeal annexed to the application. Counsel highlighted two arguable grounds of appeal; whether the applicant was liable to the 1st respondent for breach of contract and whether the 1st respondent gave instructions to the applicant to place its funds with the 3rd respondent. On the nugatory aspect, counsel submitted that the 1st respondent seeks to execute the decree by disposing of the only asset the applicant possesses, that is, the shares at NSE which stand at a value of Kshs. 78 Million; and that the shares are completely insufficient to satisfy the decretal sum plus interest which then stood at Kshs.790 million.

[15] The Interested Party, represented by Mr. Thuita supported the application, and claimed ownership of the 1,575,000 ordinary shares. Counsel submitted that they had already filed a notice of appeal against the learned Judge's ruling but have been unable to obtain typed proceedings from the High Court to facilitate the filing of an appeal.

[16] Mr. Wananda for the 1st respondent opposed the application and reiterated that as a result of the applicant's delay in filing the appeal it was undeserving of the orders it sought. Counsel submitted that the intended appeal is not arguable and that it would not be rendered nugatory since the 1st respondent is capable of refunding any amount paid to it by the applicant should the appeal succeed.

Determination

[17] We have considered the application, submissions by counsel and the law. It is trite law that before the Court can grant any orders sought under Rule 5(2)(b) of the Court of Appeal Rules, the applicant must satisfy the Court that the appeal is not only arguable but that it will be rendered nugatory if the orders sought are not granted and the appeal succeeds. This Court in **Stanley Kang'ethe Kinyanjui V Tony Ketter**

- **5 others [2013] eKLR** summarised the jurisprudence that has evolved from this Court in regard to applications under Rule 5(2)(b) as follows:

i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.

ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.

iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

vii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).

ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.

[18] The first issue for our consideration is whether the intended appeal is arguable. This Court has stated on numerous occasions that; an arguable appeal is not one which must succeed but which is not frivolous and that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

[19] In considering this application, we shall bear in mind these principles. On the issue of arguability, the applicant has set out in its Draft Memorandum of Appeal, several grounds under this limb including whether the applicant was liable to the 1st Respondent for breach of contract and whether the 1st Respondent gave instructions to the applicant to place its funds with the 3rd Respondent.

[20] This Court is minded to avoid delving into the merits of the intended appeal as this will be the preserve of the Bench that will hear and determine the intended appeal. We are satisfied that the applicant has demonstrated that it has an arguable appeal, with regard to the issue whether the applicant was liable to the 1st respondent for breach of contract.

[21] On the nugatory aspect, as this Court stated in ***Reliance Bank Ltd vs Norlake Investments Ltd (supra)***, the factors which could render an appeal nugatory have to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated:

"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined".

[22] In the instant application, the applicant depones that the intended appeal will be rendered nugatory as the shares in the NSE are the only asset it holds. The objector has urged the Court to allow the application and thereby preserve 1,575,000 shares which it purchased from the NSE.

[23] Counsel for the respondent submitted that the 1st Respondent owns substantial assets and is in a position to refund monies due to the applicant if the intended appeal succeeds. We are inclined to agree with counsel for the 1st Respondent in view of the fact that the 1st respondent is a public body which owns substantial assets and will therefore be in a position to refund monies due to the applicant if the

intended appeal succeeds. In the circumstances, it is our finding that the intended appeal will not be rendered nugatory if we decline to grant the injunction and stay of execution sought and the appeal eventually succeeds.

[24] From the circumstances of the application before us, the applicant has demonstrated that the intended appeal is arguable but has failed to demonstrate the existence of both limbs as required by **Rule 5 (2) (b)** of this Court's Rules.

[25] The upshot is that we decline to grant an injunction and stay of execution pending the hearing and determination of the intended appeal. The application is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 19th day of January, 2018.

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR