



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 65 OF 2017 (UR 53/2017)

BETWEEN

MTWAPA EPZ LIMITED.....APPLICANT

AND

COAST APPAREL EPZ LIMITED.....1ST RESPONDENT

I & M BANK LIMITED.....2ND RESPONDENT

(An application for stay or suspension of the ruling of the Environment and Land Court at Malindi (Olola, J.) dated 31st October, 2017

in

ELC No. 174 of 2017)

RULING OF THE COURT

1. **Mtwapa EPZ Limited** (the applicant) and **Coast Apparel EPZ Limited** (the 1st respondent) entered into an agreement dated 17th November, 2017 wherein the appellant agreed to construct on its property, Plot No.MN/IV/875/1 a factory, an administrative office and residential blocks according to the 1st respondent's specification. In order to construct this custom-made property for the benefit of the 1st respondent the applicant borrowed a sum of USD 1,900,000 from **1&M Bank Limited** (the 2nd respondent) to partly finance the project which was worth more than Kshs.400,000,000. According to the applicant, it did so based on the agreement that the 1st respondent would lease the suit premises for a period of 10 years. As part of the agreement, the 2nd respondent provided an irrevocable guarantee of USD 522,599 issued by the 2nd respondent, in favour of the applicant being rent for the first year of the 10-year lease.

2. Somewhere along the line a dispute arose between the applicant and the 1st respondent which culminated in the 1st respondent filing a suit at Mombasa being ELC No. 12 of 2017 against the applicant and the 2nd respondent. Pursuant to an interlocutory application filed therein the 1st respondent was granted *ex parte* orders dated 19th April, 2017 restraining the 2nd respondent from paying the sums under the irrevocable guarantee to the applicant pending the referral and conclusion of the arbitration proceedings. Aggrieved by those orders the applicant not only filed a reply to the 1st respondent's application but also filed an application seeking to strike out the suit amongst other orders. Upon considering the parties respective submissions the learned Judge (Korir, J.) struck out the suit on 27th July, 2017.

3. Be that as it may, the 1st respondent filed another suit this time at Mombasa being ELC 287 OF 2017. The 1st respondent also filed an interlocutory application through which it obtained fresh *ex parte* orders restraining any payment under the irrevocable guarantee. The suit was later transferred to Malindi as ELC No.174 of 2017. The applicant filed another application praying for the *ex parte* orders to be set aside and the suit to be struck out. Both the applicant's and 1st respondent's applications were heard together and by a ruling dated 11th October, 2017 Olola, J. directed parties to pursue arbitration as per the terms of their agreement. He also issued the following order:-

“Payment of the Bank Guarantee No. 021/COM/LG/0109/2016 is hereby stopped pending the determination of the dispute between the parties.”

4. The applicant was not pleased with those orders. In its view, none of the parties had prayed for the dispute to be referred to arbitration and

as a matter of fact both the applicant and the 1st respondent had indicated that they were not desirous of pursuing that avenue. Similarly, none of them had sought for the payments under the guarantee to be stopped. As a result, the applicant filed yet another application dated 13th October, 2017 seeking review of the orders dated 11th October, 2017. The grounds in support of the application were that the court issued those orders without hearing any of the parties; the 1st respondent had failed to disclose the suit which was struck out and the appeal it had filed in respect thereof. In that regard, the learned Judge (Olola, J.) on 16th October, 2017 stayed the orders dated 11th October, 2017 pending inter partes hearing of the applicant's application.

5. When the parties appeared next before the court the 1st respondent through its advocate made an oral application for the stay order issued on 16th October, 2017 to be vacated without success. Not one to give up, the 1st respondent filed a formal application dated 23rd October, 2017 praying for those orders to be vacated. The application was filed under a certificate of urgency and since the ELC Judge at Malindi was away on official duty the file was taken to Mombasa. The application was heard *ex parte* by Omollo, J. on 24th October, 2007 who on even date suspended the stay orders issued on 16th October, 2017 for a period of seven days.

6. The file was later brought back to Malindi and both the applicant's application dated 13th October, 2017 and the 1st respondent's application dated 23rd October, 2017 were argued before Olola, J. on 31st October, 2017. The learned Judge reserved the delivery of the ruling for 8th February, 2018 and at least as per the applicant, he directed the 2nd respondent not to make any further payments pending the delivery of the ruling.

7. It is that order that forms the subject of an application before us brought under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules) seeking –

a) ...

b) The orders made by Olola, J. on 31st October, 2017 that the 2nd respondent should not effect any further payment to the applicant under the guarantee be suspended pending the hearing and determination of an intended appeal.

c) The orders made by Olola, J. on 31st October, 2017 that the 2nd respondent should not effect any further payment to the applicant under the guarantee be declared null and void and of no effect.

8. Mr. Kinyua, learned counsel for the applicant, argued that the orders dated 31st October, 2017 were issued without hearing the applicant and without jurisdiction, and without regard to the fact that the 2nd respondent had issued an irrevocable guarantee to pay the applicant. According to him, there was no application or order issued compelling the 2nd respondent to make payments under the guarantee hence no stay could be issued against an order which was never made. Accordingly, the Court should declare the order in question a nullity. He submitted that the applicant was now exposed to severe prejudice and loss on account of the order. The money under the guarantee was to be applied towards repayment of the loan; there is a real likelihood that the 2nd respondent will issue statutory notices under the charge registered against the suit property.

9. Learned counsel for the 1st respondent, Mr. Mugambi argued that the order which the applicant seeks to stay does not exist. All Olola, J. did on 31st October, 2017 was to extend the order made on 24th October, 2017 by Omollo, J. which did not in any way stop the 2nd respondent from effecting any further payment to the applicant. Besides, the only order which stopped the 2nd respondent from making payments was the one dated 11th October, 2017 against which no appeal was preferred. Similarly, the applicant had not filed a notice of appeal in respect of the orders dated 31st October, 2017. He went on to submit that the dispute had since been referred to arbitration and issuance of the order sought would interfere with those proceedings. In any event, the orders sought by the applicant were not within the purview of **Rule 5(2)(b)** of the Rules. Finally, the applicant had neither established that the intended appeal is arguable nor that it would be rendered nugatory if the orders sought are not granted. He urged us to dismiss the application.

10. We have considered the application, submissions by counsel and the law. A Notice of Appeal is what clothes this Court with jurisdiction to entertain an application under **Rule 5(2)(b)** where the appeal proper has not been filed. See **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR**. We note that contrary to the 1st respondent's allegations there is a Notice of Appeal against the order issued on 31st October, 2017 on record.

11. Our jurisdiction under **Rule 5(2)(b)** is restricted to issuing three orders namely, stay of execution, stay of proceedings and injunction. See this Court's decision in **County Director of Planning & Architecture, County Government of Mombasa vs. Makupa Transit Shade Limited [2017] eKLR**. In our view, though the applicant seeks suspension of the order in issue, we find that the choice of the word 'suspension' does not derogate from the fact that what is being sought is stay of execution of that order. Stay of execution connotes suspension of an order. However, prayer (c) seeking a declaration of that order a nullity is not one of the orders contemplated under **Rule 5(2)(b)** of the Rules hence cannot be granted.

12. In exercising our jurisdiction under **Rule 5(2)(b)** we are guided by principles which are settled and as observed by this Court in the case of **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd.- Civil Application No. Nai. 157 of 2006 (unreported):-**

"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 that 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 that appeal will be rendered nugatory. See Githunguri vs. Jimba Credit Corporation Ltd. No. 2 (1988) KLR 838, J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88)." Emphasis added.

13. Taking caution not to delve into the merits of the intended appeal or make a final determination on the same, we find that whether the learned Judge extended the orders issued by Omollo, J. as contended by the 1st respondent or whether he directed the 2nd respondent not to pay any money under the irrevocable guarantee pending the delivery of the ruling is one and the same thing. Whether the learned Judge could issue such an order at that stage pending the delivery of the ruling and in light of the circumstances surrounding the applications before him, given that the 2nd respondent is obliged to honour the irrevocable guarantee it issued, is an arguable point. We are equally convinced that the applicant stands to suffer irreparable harm in light of the looming statutory notices that may issue against the suit property on account of default in repayment of the loan amount, rendering the intended appeal nugatory should we not issue the orders sought.

14. In the circumstances, we find that the application has merit and we hereby issue prayer (b) of the applicant's application. Costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 15th day of February 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR