IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 79 OF 2018

BETWEEN

MOMBASA BRICKS & TILES LIMITED.....1ST APPLICANT

DINESH KUMAR ZAVERCHAND JETHA.....2ND APPLICANT

ATEET DINESH JETHA.....3RD APPLICANT

ZAVERCHAND SOJPAL

JETHA HOLDINGS LTD.....4TH APPLICANT

EXON INVESTMENTS LTD.....5TH APPLCIANT

EXON PLASTICS LTD.....6TH APPLICANT

AND

ARVIND SHAH.....1ST RESPONDENT

HASHABEN SHAH.....2ND RESPONDENT

CORSANI HOLDINGS LIMITED.....3RD RESPONDENT

COAST PROPERTIES LTD.....4TH RESPONDENT

COAST CLAY WORKS LTD.....5TH RESPONDENT

COAST MAIZE MILLERS LTD.....6TH RESPONDENT

SPA MILLERSNAIROBI LTD.....7TH RESPONDENT

HIGHWAY CENTRE LTD.....8TH RESPONDENT

(An application for an injunction and stay of execution of the Judgment of the High Court (Otieno, J.) dated 22nd December, 2017 pending the hearing and determination of the intended appeal against the Judgment dated 22nd December, 2017

in

H.C.C.C No. 9 of 2011.)

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RULING OF THE COURT

1. The applicants herein have called upon us to exercise our discretionary power under ***Rule 5(2) (b)*** of the ***Court of Appeal Rules*** (the Rules) by issuing an order of stay of execution of a High Court judgment dated 22nd December, 2017 in H.C.C.C No. 9 of 2011 and an injunction which orders they believe will preserve the subject matter of the intended appeal to this Court against the impugned judgment. The application is anchored on two broad grounds namely, that the intended appeal is arguable and that the same would be rendered nugatory if the orders in question are not granted.

2. Before delving into the said application a brief synopsis of the pertinent facts will help to place the application in context. In the grand scheme of things, the parties herein are related in one way or another. The basis of the said relationship seems to have commenced when the 2nd and 3rd applicants being father and son respectively (the Jethas), were carrying out family businesses under the umbrella of the 1st applicant. At some point, in the year 2005, they run into financial difficulties and were unable to service loan facilities which had been offered by Standard Chartered Bank to the 1st applicant. As a result, the bank set in motion the exercise of its statutory power of sale of the charged property by advertising a sale by way of a public auction of Plot No. 500/VI/MN (suit property) which acted as the security of the aforementioned financial facilities. The suit property was then registered in favour of the 1st applicant and a number of factories, a go down, as well as other premises which comprised of the family businesses were erected thereon.

3. It is at this juncture that the 1st respondent who happened to be known to both the 2nd and 3rd applicants rendered his advice not only on how the suit property could be saved but also how the 1st applicant's businesses which were in the red could be preserved. According to the 1st, 2nd, and 3rd applicants, the 1st respondent recommended the incorporation of two new companies, the first having its shareholding exclusively within the Jethas family and the second within his family (the Shahs). This is how the 4th applicant and 3rd respondent companies respectively came into being.

4. Thereafter, the 4th applicant, 3rd respondent in conjunction with the 1st respondent incorporated the 4th to the 7th respondent companies all of which were to hold the 1st applicant's properties. The composition of the shareholding in the said companies is that both the 4th applicant and the 3rd respondent hold 490 shares each with the 1st respondent holding 20 shares. That was not the end of the strategy, the 1st respondent also intimated that he would endeavour to persuade Standard Chartered Bank to sell the suit property by private treaty to the 8th respondent company which was owned and ran by his wife and children.

5. As per the 1st, 2nd, 3rd, and 4th applicants, they all consented to this arrangement because they believed that the same as had been put by the 1st respondent, was the only way to save the suit property and the family businesses from total collapse. Furthermore, it was agreed that if the 1st respondent and his family were interested in actually holding half a share of the suit property and being equal partners in the family businesses they would have to pay the 1st applicant 50% of the market value of all the assets held by the said company. Otherwise, as it were, the ownership of the suit property and the shareholding of the 1st and 3rd respondents in the 4th to the 7th respondent companies were merely on paper.

6. It seems that Standard Chartered Bank acceded to the 1st respondent's request subject to certain conditions. The purchase price of the suit property was set at Kshs.27,000,000 which we understand was the then outstanding loan amount to the bank. The 8th respondent was required to pay upfront a deposit of Kshs.2,700,000 and obtain an irrevocable guarantee of the balance from a reputable bank. As per the 1st, 2nd, 3rdand 4th applicants, the 1st respondent through the 8th respondent was to provide the funds but at the last minute he reneged on his promise claiming he did not have the funds.

7. Be that as it may, the 1st respondent came up with another plan of action, this time he suggested that the suit property be transferred to the 4th respondent as the 8th respondent's nominee and the same be charged as security to Giro Commercial Bank so as to obtain a loan towards the purchase price. With the looming auction of the suit property, the 1st, 2nd, and 3rd applicants were left with no choice but to give in to this suggestion. Ultimately, the suit property was transferred to the 4th respondent as a nominee of the 8th respondent and the outstanding loan with Standard Chatered Bank was cleared.

8. One would have assumed that the foregoing would resolve the predicament the 1st, 2nd and 3rd applicants had found themselves in but that was not the case. Apparently, at least according to the 1st, 2nd, 3rd and 4th applicants, the 8th respondent under the direction of the 1st respondent had obtained a cumulative loan of Kshs.65, 000,000 from Giro Commercial Bank using the suit property as security. To make matters worse, the said applicants believed that the 1st respondent was taking advantage of the so-called majority shareholding (490 shares held by the 3rd respondent which is wholly affiliated with the 1st respondent plus the 20 shares held by 1st respondent) in the 4th to the 7th respondent companies to take over the businesses and suit property from the Jethas family. In hindsight, it was evident to the applicants that the 1st respondent's purported assistance to the 1st, 2nd and 3rd applicants was a ploy to acquire a majority stake in the family business and the suit property without paying the requisite share capital to the 1st applicant.

9. This was the state of affairs that caused friction between the parties culminating in several suits in the High Court which were stayed pending the determination of **H.C.C.C No. 9 of 2011** filed at the instance of the applicants. Basically, the applicants' suit was premised on the grounds that the 1st respondent had orchestrated the transfer of the suit property and the incorporation of the 3rd to the 7th respondent companies through undue influence and fraudulent means. As such, the alleged resolution by the 1st applicant for sale of the suit property, the sale agreement between the 1st applicant and 8th respondent, the transfer of the suit property to the 4th respondent and the shareholding structure in the 4th to the 7th respondent companies were not valid in law.

10. Towards that end, the applicants sought *inter alia* declarations that, the 4th respondent held the suit property in trust for the 1st applicant; the shares held by the 1st and 3rd respondents in the 4th to the7th respondents are held in trust for the 1st, 2nd, and 3rd applicants; and a

mandatory injunction compelling the 4th respondent to transfer the suit property to the 1st applicant or its nominee.

11. A joint statement of defence denying the applicants' allegations was filed on behalf of the respondents and in addition, the 1st, 3rd, 4th and 5th respondents lodged a counter claim against the 2nd, 3rd, 5th and 6th applicants. The respondents' version of events was that in consideration of the assistance offered by the 1st respondent, the 1st, 2nd, and 3rd applicants had agreed to the sale and transfer of the suit property as well as the shareholding structure in the 4th to the 7th respondent companies. The 1st respondent refuted the claims of undue influence or acting in a fraudulent manner.

12. In point of fact, the 1st respondent contended that the loan amount of Kshs.65,000,000 which was obtained from Giro Bank was applied towards salvaging the suit property and reviving the brick making factory which was the main business carried on the suit property. The said credit facility was secured by way of personal guarantees and share certificates of Mumias Sugar Co. Ltd. offered by the 1st respondent's wife and daughter as the directors of the 8th respondent company. In totality, the ownership of the suit property by the 4th respondent as well as the shareholding in the 4th to the 7th respondent companies was above board.

13. On the counter claim, the 1st, 3rd, 4th and 5th respondents averred that the 4th respondent being the registered proprietor of the suit property was entitled to rent from the 5th and 6th applicants on account of their occupation thereon. Nonetheless, the 3rd applicant who is the 4th respondent's Managing Director allowed the 5th and 6th applicant companies who are related to the 1st applicant to enter and continue in occupation without paying any rent or at a nominal rent to the detriment of the 4th respondent. The 3rd applicant had also refused to release share certificates belonging to 1st and 3rd respondents in respect of the 4th to the 7th respondent companies.

14. Moreover, the 3rd applicant had barred the 5th respondent who took over the running of the brick factory upon its revival from doing so. Consequently, the respondents were steadfast that the 3rd applicant was utilizing the revenue received from the suit property as well the sale of the raw materials thereon to the benefit of the 1st and 2nd applicants and to exclusion of the other majority shareholders in the 4th to 7th respondents. Thus, the said respondents prayed for orders compelling the 3rd applicant to release the 1st and 3rd respondents' share certificates; payment of *mesne* profits as well as rent by the 5th and 6th applicants to the 4th respondent; and an injunction prohibiting the 3rd applicant from interfering with the running of the 4th and 5th respondents amongst other orders.

15. Faced with the aforementioned positions taken by the parties coupled with the evidence tendered at the trial court, the learned Judge (**Otieno, J**.) in the impugned judgment dismissed the applicants' suit and partially allowed the respondents' counter claim. Briefly put, the learned Judge found that the applicants did not establish that the transfer of the suit property and the shareholding in the companies in question were obtained through fraud or undue influence.

16. Therefore, he directed firstly, an audit of the books of the 4th respondent, 5th and 6th applicants to ascertain the amount of income generated when the 3rd applicant was in control of the 4th respondent. The auditor was to be appointed jointly by the shareholders of the 4th respondent and in the absence of consensus by the chairman of Institute of Certified Public Accountants of Kenya (ICPAK).

17. Secondly, ascertaining of the area occupied by the 5th and 6th respondent by a qualified valuer for purposes of determining the rent payable. Such a valuer was to be appointed by the 4th applicant and the 3rd respondent and in the event that there is no agreement between them each was to appoint a valuer whose reports would be filed in court. After the requisite rent payable is ascertained, the 5th and 6th applicants were compelled to pay the said sum which was backdated to 1st May, 2013 within 60 days. The learned Judge also gave the 5th and 6th applicants an option to remain in occupation and pay the ascertained rent or move out within 60 days and in default they would be evicted from the suit property.

18. Thirdly, the 3rd applicant was restrained from running the affairs of the 4th and 5th respondents without the involvement of the 1st respondent. In that regard, the learned Judge directed that a general meeting of the 4th respondent be convened within 21days for purposes of complying with the statutory requirements of filing tax returns. In addition, the learned Judge issued a mandatory injunction compelling the 3rd applicant to release the share certificates in issue to the 1st and 3rd respondents. It is this decision that the applicants desire to challenge in the intended appeal.

19. Turning back to the application before us, the applicants seek stay of execution of the impugned judgment and more specifically:

> ***a) The order directing that the 5th and 6th applicants to pay mesne profits and rent backdated to 1st May, 2013 as determined by the appointed valuer.***
>
> ***b) The order directing the audit of the books of the 5th and 6th applicants.***
>
> ***c) The order directing the release of the share certificates to the 1st and 3rd respondents.***
>
> ***d) The proceedings purporting to assess the disputed mesne profits, rent or execution of the decree through contempt.***

20. They also seek an injunction restraining the respondents, their agents and servants from:

> ***a) Selling, charging, mortgaging, leasing, partitioning, subdividing or in any other way disposing or encumbering the suit property.***

b) Removing the 3rd applicant from and/or purporting to appoint the 2nd respondent to the Board of Directors of the 4th to the 7th respondent companies.

c) Evicting and/or dispossessing the 5th and 6th applicants from the suit property or in any way interfering with their quiet possession of the same.

d) Writing to the bankers of the 5th and 6th applicants demanding bank statements of accounts held by the said companies.

21. Mr. Ndegwa, learned counsel for the applicants, placed reliance on the supporting affidavit and further affidavit sworn by Riteet Jetha, the Managing Director of the 5th and 6th applicants to prosecute the application. In elaborating on the arguability of the intended appeal, counsel argued that firstly, the learned Judge failed to take into account the fiduciary relationship that had arisen between the 1st respondent, on one part, and the 1st, 2nd and 3rd applicants on the other part, by virtue of the 1st respondent acting as a financial adviser of the applicants and the breach thereof. Secondly, there was no basis for the examination of the books of the 5th and 6th applicants. The same was humiliating and a fishing expedition which otherwise amounted to violation of the applicants' right to privacy.

22. Thirdly, that there was no justification for the learned Judge to order the 5th and 6th applicants to pay *mesne* profits backdated to 1st May, 2013 in the absence of making any finding of wrong doing on the part of the said applicants. Fourthly, the learned Judge was wrong to delegate its judicial mandate of assessment of rent payable to an outsider, that is, a valuer to be appointed by parties. Fifthly, the learned Judge had failed to appreciate that no consideration had been given either for the alleged purchase of the suit property by the 8th respondent or the shareholding of the 1st, 3rd respondents in the 4th to the 7th respondent companies.

23. On the nugatory aspect, Mr. Ndegwa submitted that the 4th respondent had demanded *mesne* profits and rent arrears totaling to Kshs.74,749,095 based on the assessment of their valuer which sum was colossal and beyond the 5th and 6th applicants' means. The 4th respondent had even gone ahead by a letter dated 5th June, 2018 to threaten to levy distress of the aforementioned amount and eviction of the said applicants from the suit property. If the 4th respondent stays true to its word the 5th and 6th applicants would suffer irreparable loss. Besides, counsel argued that the appropriate monthly rent payable as assessed by the valuer appointed by the applicants, Fairlane Valuers is Kshs.178,350 which amount the 5th and 6th applicants have been diligently paying from the date of the impugned judgment.

24. He went on to state that the applicants have learnt of the 4th respondent's intention to sell, charge, lease or in some other way dispose of the suit property before the intended appeal is determined. This apprehension is based on a message sent by the 1st respondent to the 3rd applicant and information from the 3rd applicant to the effect that he and the 4th applicant were being pressurized by the respondents to agree on the sale, charge or disposal of the suit property. In other words, that the 1st and 3rd respondents were bent on using their alleged majority shareholding in the 4th respondent to push for a resolution for the sale of the suit property and/or the winding up of the 4th to the 7th respondent companies to their benefit.

25. Further, the 1st, 2nd and 3rd respondents were in the process of altering the management structure of the 4th and 5th respondent by purporting to appoint the 2nd respondent who is the 1st respondent's wife and unlawfully removing the 3rd applicant as a director of the said companies. The alteration was calculated at facilitating the attainment of the requisite resolution to sell the suit property. What is more, the 4th respondent had commenced contempt proceedings against the 3rd applicant who was at risk of being committed to civil jail.

26. Rising to his feet, Mr. Kinyua, learned counsel for respondents, also relied on the affidavits sworn by the 1st respondent on behalf of the other respondents to oppose the application. In his view, some of the orders sought had been overtaken by events. A case in point being that the parties had already appointed valuers to assess the rent payable. He asserted that the 4th respondent had no intention of disposing the suit property before the determination of the intended appeal and went ahead to make an undertaking to that effect from the bar. Even assuming that there was such a plan to dispose of the suit property the same could not materialize without the involvement of the 3rd applicant and the 4th applicant as the director and shareholder of the 4th respondent respectively.

27 In any event, the charge and further charge over the suit property in favour of Giro Bank was yet to be discharged since the loan amount had not been paid. As far as he was concerned, the driving force behind the application was for 5th and 6th applicants to remain in occupation of the suit property without paying the requisite rent and *mesne* profits. Nevertheless, counsel intimated that the 4th respondent was willing to accept the monthly rent of Kshs.178,350 as assessed by the applicants' valuer plus VAT and *mesne* profits calculated at the same rate pending the determination of the intended appeal.

28. Mr. Kinyua contended that the applicants were not deserving of the discretionary orders sought. This was because the applicants had failed to comply with the conditions attached to the interim stay of execution which was issued by this Court on 24th July, 2018 pending the determination and hearing of the application before us. In that, despite the Court directing the 5th and 6th applicants to continue paying the monthly rent of Kshs.178,350 as assessed by their valuers plus VAT to the 4th respondent they had failed to do so. Bank statements in respect of the 4th respondent's account reveal that the 3rd applicant who is a signatory of the said account had withdrawn colossal amount and transferred the same in favour of the 5th and 6th applicants. Over and above that, the 6th respondent who ceased operations had sold its milling equipment to a third part for Kshs.52,200,000. The 3rd applicant as the custodian of the cheque books of the said company transferred the entire sum from the 6th respondent's account and shared out the same between the 1st and 2nd applicants leaving out the other shareholders.

29. Counsel stated that the order directing the audit of the books of the 5th and 6th applicants was instigated by the fact that they had participated in defrauding or stealing from the 4th and 5th respondents. There was no intention on the respondents' part to remove the 3rd

applicant from the directorship of the 4th to the 7th respondent companies; while the 2nd respondent was appointed as a director in the said companies way back in the year 2009. At no point in time had the respondents written to the 5th and 6th applicants bankers demanding their bank statements.

30. All in all, the intended appeal has no chance of success and the balance of convenience tilted in the respondents' favour. More so, taking into account that the orders sought would perpetuate the applicants' illegalities and misconduct. In conclusion, Mr. Kinyua urged that in the event we are inclined to grant the orders sought they should be subject to the 5th and 6th applicants continuing to pay rent to the 4th respondent; alteration of the bank mandate with respect to the 4th respondent's account in that any transaction therein should be through joint signatures of the 3rd applicant and 1st respondent.

31. We have considered the application, submissions by counsel and the law. It is common ground that in determining an application under the ***Rule 5(2)(b)*** the Court has to satisfy itself that firstly, the applicant has demonstrated that it has an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See ***Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd***. **[2002] 1 EA 227**. It is equally not in dispute that an applicant is obliged to satisfy both of those principles. See ***Peter Paul Mburu Ndururi vs. James Macharia Njore*** **[2009] eKLR**.

32. This Court in ***Transouth Conveyors Ltd. vs. Kenya Revenue Authority & Another*** **[2007] eKLR** succinctly observed that an applicant is not required to establish a multiplicity of arguable grounds rather a single arguable issue will suffice. Nor is such an applicant required to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if it can show that it has serious questions of law or a reasonable argument, deserving of consideration by this Court. With the foregoing in mind coupled with the caution that we ought not to make final determinations on issues subject of the intended appeal, we find that whether the learned Judge was justified in directing the audit of the 5th and 6th applicants books for purposes of determining the revenue generated by the 4th respondent while it was under the 3rd applicant's control; and whether there was any basis of imposing *mesne* profits backdated to 1st May, 2013 on the 5th and 6th applicants in the absence of any wrong doing on their part warrant consideration by this Court.

33. On the nugatory aspect, we take cognizance of this Court sentiments in ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others*** ***[2013] eKLR*** on what it entails:

> ***"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."***

34. Consequently, upon weighing the competing interests of the parties herein, we find that the intended appeal would be rendered nugatory if the orders sought are not granted. We say so taking into account that there is real likelihood that the 4th respondent would carry out its threat to not only evict the 5th and 6th applicants from the suit property but would also levy distress for the colossal amount demanded as *mesne* profits and rent as assessed by the 4th respondent to the detriment of the said applicants. Similarly, there is a real danger that the suit property may be sold, charged or otherwise disposed before the determination of the intended appeal. More so, in light of the fact that contrary to the respondents' assertion that the title of the suit property was still subject of a charge in favour of Giro Bank we cannot help but note that the applicants annexed a letter from the said bank indicating the contrary.

35. In the end, we are satisfied that in granting the orders sought, we should strike a balance that ensures that the substratum of the intended appeal is preserved. Accordingly, we issue the following orders:

> ***1) We hereby stay execution of the judgment delivered on 22nd December, 2017 pending the hearing and determination of the intended appeal to extent that:***
>
> > ***a) The order directing that the 5th and 6th applicants pay mesne profits and rent backdated to 1st May, 2013 as determined by the appointed valuer.***
> >
> > ***b) The order directing the audit of the books of the 5th and 6th applicants.***
> >
> > ***c) The order directing the release of the share certificates to the 1st and 3rd respondents.***
> >
> > ***d) The proceedings purporting to assess the disputed mesne profits, rent or execution of the decree through contempt.***
>
> ***2) We also issue an injunction restricting the respondents from:***
>
> > ***a) selling, charging, mortgaging, leasing, partitioning, subdividing or in any other way disposing or encumbering the suit property;***
> >
> > ***b) altering the directorship of the of the 4th to the 7th respondent companies;***
> >
> > ***c) evicting and/or dispossessing the 5th and 6th applicants from the suit property or in any way interfering with their quiet possession of the same; and***
> >
> > ***d) writing to the bankers of the 5th and 6th applicants demanding bank statements of accounts held by the said companies pending the determination of the intended appeal.***

3) The aforementioned orders are on condition that the 5th and 6th applicants continue paying the monthly rent as assessed by its valuer at Kshs. 178,350 plus VAT to the 4th respondent. We direct the 4th respondent's bankers to alter the mandate of the 4th respondent's account to require any transaction to be carried out by the two signatories thereof, that is, the 3rd applicant and the 1st respondent.

4) We direct that the substantive appeal be heard on priority next term.

The costs of this application shall abide by the outcome of intended appeal.

Dated and delivered at Mombasa this 6th day of December, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR