IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 266 OF 2015 (UR 225/2015)

JOSEPH KIBE..….....1ST APPLICANT

AND

PLANTFARM INVESTMENTS LIMITED.....2ND APPLICANT

MAE PROPERTIES LIMITED..... RESPONDENT

(Being an application for stay of execution of the order pending the hearing of the appeal from the Ruling of the High Court of Kenya at Nairobi (Gikonyo, J.) dated 18th day of

May, 2015

in

HCCC No. 311 of 2004)

****

RULING OF THE COURT

The applicants, ***Joseph Kibe*** and ***Plantfarm Investments Limited***, by Notice of Motion dated 27th October, 2015, ask us, in the main, to stay the ruling and order made in ***HCCC No. 311 of 2004***, pending the hearing and determination of an appeal. In the grounds set out in support of the motion it is stated, *inter alia*, that if we do not grant the orders sought the respondents will proceed to have the applicants' defence at the High Court struck out with judgment being entered against the applicants; that in the ruling to be appealed, the learned Judge ordered the applicants to produce through discovery, documents which were not in the applicants' possession; that a Notice of Appeal has been filed against the said ruling; that the effect of the orders made by the High Court is to abrogate the applicants' constitutional rights to a fair trial; that the applicants have a right of appeal and, finally, that the large amount of money involved in the dispute between the parties constitutes special circumstances meriting the grant of stay of execution pending hearing and determination of an appeal which has already been filed. ***Joseph Kibe*** the 1st applicant swore an affidavit on 27th October, 2015, in support of the motion. He deponed, amongst other things, that after a plaint was filed against them and after they had filed a defence, parties were ordered by the High Court to complete discovery. The respondent then served on the applicants a *"request for discovery of certain documents"* but the applicants could not furnish documents requested because they did not have them. That the respondents then filed a motion asking that the applicants' defence be struck out and the High Court, upon hearing the application, ordered the applicants to produce documents

requested by the respondent within 14 days failure to which the court was to issue further orders including an order to strike out the defence. The deponent went on to say that there was an arguable appeal which would be rendered nugatory if the orders sought are not granted.

In a replying affidavit sworn on 30th December, 2015, ***Emma Wachira***, the respondent's Company Secretary and Chief Legal Officer stated, *inter alia*, that they had filed an application to strike out the applicants' defence which application was pending before the High Court and had not been heard; that the application before us was not brought timeously but was delayed; that the application before us was also premature as no order to strike out defence had been made and finally, that should we find it fit to grant the applicants' orders of stay, then we should do so on condition that the whole sum claimed in the trial court should be deposited in a bank to earn interest.

We have already set out the facts of the case and need not repeat the same here for purposes of this application. We may add that in the plaint presented before the High Court **Mae Properties Limited** *(as plaintiff)*, sued the applicants alleging breach of duties and other breaches by the applicants against the respondent while the first applicant was a director of the 2nd applicant. It was prayed, *inter alia*, that the 1st applicant was a director of the 2nd applicant. It was prayed, *inter alia*, that the 1st applicant should give a full account of money he was said to have received; that he be ordered to pay a sum of Ksh. 9,532,909/- and that general and punitive aggravated damages be awarded to the respondent. The applicants filed a statement of defence where the whole claim was denied.

F. Gikonyo, J., heard the application asking that the applicants' defence be struck out for failure to make discovery and in a ruling delivered on 15th May, 2015, the learned Judge ordered the applicants to produce certain documents within 14 days in default, the Judge would:

> ***"...give further orders on the matter including a possibility of striking out of the defence if it becomes absolutely necessary and appropriate...".***

Those are the orders being appealed.

We heard the motion on 22nd June, 2016. **Mr. K. Wakwaya**, learned counsel, appeared for the applicants while **Mrs. A. W. Kimani,** learned counsel, appeared for the respondent. Learned counsel for the applicants in submissions before us faulted the learned Judge for ordering the applicants to produce documents which the applicants had stated in affidavit evidence were not in their possession and according to counsel, the learned Judge erred in application of the principle on discovery of documents and this was an arguable point. Learned counsel pointed out that there were various arguable points established in the draft Memorandum of Appeal annexed to the motion. On the nugatory aspect, it was learned counsel's position that the possibility of the applicants' defence being struck out would render the appeal nugatory.

Learned counsel for the respondent did not agree. According to her, the application before us is premature because the learned Judge of the High Court merely ordered the applicants to produce documents but did not order the applicants' defence to be struck out. Learned counsel further submitted that the applicants, having admitted that sale transactions had taken place, they had a duty to explain where the relevant documents were and to produce them.

In a brief reply, **Mr. Wakwaya** reminded us that the respondent had already moved the High Court to strike out the applicants' defence after the orders granted to produce documents had not been complied with.

The principles that we apply in consideration of an application for stay pending appeal are now well settled. It is trite law that we exercise a discretionary jurisdiction and the law enjoins us to exercise that discretion judicially but not to do so by whim, caprice or sympathy but with sound legal reason. These principles have been well enunciated in many judicial pronouncements that have come forth from this Court such as the case of **Githiaka v Nduriri [2004] 2 KLR 67**. A useful discussion on those principles

can be found in the earlier case of **Ruben & 9 Others v Nderito & Another [1989] KLR 459** where the following observation is made at p.462:

> ***"In dealing with Rule 5(2) (b) applications, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (a new) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial Judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: See Stanley Munga Githunguri -vs- Jimba Credit Corporation Limited, Civil Application Nai. 161 of 1988".***

In **Bob Morgan Systems Limited & Another vs Jones, [2004] 1KLR 194** this Court said at page 195:

> ***"The powers of the Court under Rule 5(2) (b) aforesaid are specific. The Court will grant a stay or an injunction as the case may be if satisfied firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory".***

That is to say that an applicant who approaches the Court for protection under the said rule must, firstly, demonstrate that the appeal if filed, or the intended appeal if not filed, is arguable, and if that limb is met, such an applicant has a further duty to demonstrate that if a stay of execution is not granted the appeal, or the intended appeal, as the case may be, would be rendered nugatory.

We have considered the motion and the affidavit in support and that in opposition to the motion, the rival submissions and the law.

The applicants' position before the trial court as relates to the production of documents requested by the respondent was that they did not have those documents. In an affidavit sworn by ***Mr. Kibe*** in opposition to the motion before the trial court, he deponed *inter alia*:

> ***" ....***
>
> ***6. That I signed Sale Agreements for the Purchase but I remember signing only two agreements.***
>
> ***7. That for the rest, I assigned my interest in the transactions to third parties after identifying the plots and carrying out the negotiations with Mae Properties.***
>
> ***8. That my Assignees then proceeded with those transactions directly with Mae Properties signing the sale agreement and paying the purchase price directly to them.***
>
> ***9. That the properties in respect of which I signed the sale agreements, I merely signed the agreements but never obtained copies of the same.***
>
> ***10. That when I was asked by my Advocate to furnish copies of the same, I inquired from my former advocates and was told that all the files for the transactions that took place before the year 1999 had long been destroyed owing to the lapse of the statutory period.***
>
> ***11. That for the above stated reasons, the documents that the Plaintiff is seeking are simply non-existent.***
>
> ***12. That the Plaintiffs continued insistence that I am holding on to some documents is an attempt to portray me in bad light and constitutes an abuse of the court process.***

13. ...."

The learned Judge of the High Court was not persuaded that the applicants had misplaced documents sought by the respondent and ordered production within specified time failure to which other consequences would follow. Learned counsel for the applicants submitted before us that the applicants want to show on appeal that the learned trial Judge erred in his application of the principle in discovery of documents when he ordered the applicants to produce documents when the applicants had stated in affidavit evidence that they did not have those documents at all. Learned counsel for the respondents answer to this was that the application before us was premature because there was no order to strike out the defence.

As we have shown in this ruling, the learned Judge made an order that the applicants produce documents within a specified period failure to which consequences including striking out the defence would follow. The record shows that an application to strike out defence dated 21st July, 2015, has already been filed before that court. The reasons given for that application are, *inter alia*, that the applicants have not complied with the order for discovery. We do not, in the premises, agree with learned counsel for the respondent that the application before us is premature. It is not. Consequences of failure to comply with the order to be appealed are already taking place.

We are satisfied that the applicants have an arguable appeal and as was stated in **Yellow Horse Inns Limited v A. A. Kawir Transporters Limited & 4 Others [2014] eKLR**, an applicant need not show a multiplicity of arguable points as one arguable point will suffice. Also, an arguable point is not one which will necessarily succeed.

On the nugatory aspect of the application, learned counsel for the applicants submits that the natural consequence of lack of compliance with the order for discovery would be that the applicants' defence will be struck out. We agree. As we have pointed out, the respondent has since moved the trial court with an application to strike out defence on the ground that the order for discovery has not been complied with. If the defence of the applicants is struck out, judgment would be entered for the respondent thereby removing the substratum of the suit as there would be nothing left and the appeal which has already been filed would be rendered nugatory.

The effect of our findings is that the applicants have satisfied both limbs of the principles we apply in applications such as this one. We allow the motion dated 27th October, 2015, and hereby stay execution of the ruling and order of the High Court made on 18th May, 2015, pending hearing and determination of appeal.

Costs of the motion will abide the appeal.

Dated and delivered at Nairobi this 29th day of July, 2016.

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

…….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR