



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, G. B. M. KARIUKI & SICHALE, JJ.A)**

**CIVIL APPLICATION NO. 257 OF 2015**

**BETWEEN**

**UNITECH INDUSTRIES AGENCIES LIMITED ..... APPLICANT**

**AND**

**YAMANCHILI VENKATA SIVA CHALAPATHI & 12 OTHERS**

**Suing as partners of PRATHAP INDUSTRIES ..... RESPONDENTS**

*(An Application for Stay of Execution of the Ruling, Judgment and Orders (Ochieng, J) issued at Nairobi on 12<sup>th</sup> October, 2015*

*in*

***H. C. C. NO. 758 OF 2012)***

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**RULING OF THE COURT**

The applicant **UNITECH INDUSTRIES AGENCIES LIMITED** filed a Notice of Motion application dated 19<sup>th</sup> October, 2015. Yamanchili Venketa Siva Chalapathi Rao & 12 Others suing as partners of Prathap Industries were named as the respondents. In the main, the applicant sought the following order:

***“THAT there be stay of execution of the Ruling and Judgment and consequential orders granted on 12/10/2015 by Hon. Justice Fred Ochieng’ in H. C. Commercial and Admiralty No. 758 of 2012 pending the hearing and determination of the intended appeal.”***

The motion was supported by the affidavit of **VIPIN PANDYA**, a director of the applicant, dated 14<sup>th</sup> October, 2015. He deposed that the learned judge of the High Court “... **made errors in the judgment** ...”; that he entered into a contract on behalf of a principal, that the said principal is bound by the actions of the agent and that the applicant has an arguable appeal which will be rendered nugatory unless an order for stay is granted.

On behalf of the respondent, **YAMANCHILI VENKATA SIVA CHALAPATHI RAO** swore an affidavit dated 7<sup>th</sup> November, 2015 and deposed that the applicant placed an order of specific and

specialized industrial machinery; that the applicant made payment of 30% thereof; that it supplied the goods ordered by the applicant; that the applicant has previously acknowledged its indebtedness and made part payment; that the applicant had also made a proposal to pay the outstanding balance in installments and finally that the applicant has no arguable appeal with chances of success.

That brief background to the motion is that by an amended plaint dated 25<sup>th</sup> November, 2013 the respondent sought to recover a sum of 106,523.90 Euros for goods sold and delivered to the applicant.

In an amended defence dated 28<sup>th</sup> November, 2014, the applicant denied owing the respondent any monies and sought to have the respondent's suit dismissed with costs.

Following the applicant's denial, the respondent filed a Notice of Motion dated 23<sup>rd</sup> January, 2015 and sought summary judgment in terms of Order 2 rule 15 (a) (b) (c) and (d) of the Civil Procedure Rules. The motion was heard by Ochieng, J who in a Ruling delivered on 12<sup>th</sup> October, 2015, dismissed the applicant's defence and entered judgment in favour of the respondent to the tune of 102,346.90 Euros. The applicant was dissatisfied with the said outcome and filed a Notice of Appeal dated 13<sup>th</sup> October, 2015. The motion before us is predicated on this Notice of Appeal.

During the plenary hearing before us on 16<sup>th</sup> June, 2016, Mr. Mutai learned counsel for the applicant urged the motion. It was counsel's submission that the applicant has an arguable appeal as the goods supplied by the respondent were received by a 3<sup>rd</sup> party, namely Chemelil Sugar Company.

He further submitted that the interest awarded to the respondent was punitive. He relied on the authority of **Kenya v Sharok Kher Mohamed Ali Hirji & Another C.A. No. 74 OF 2015 (UR 63 OF 2015)** on the principles governing the exercise of their court's jurisdiction under Rule 5 (2) (b) of the Court's Rules. For the proposition that a single arguable point is sufficient, he cited the case of **Damji Praji Mandavia v Sara Lee Household And Body Care (K) Ltd C.A. No. Nai 345/2005**. It was counsel's further submission that unless an order of stay is granted, the applicant's intended appeal would be rendered nugatory.

In response, Miss Ndegwa for the respondent opposed the application. She submitted that whereas the applicant's contention before us was that it was an agent of the respondent, in the amended defence filed on 28<sup>th</sup> November, 2014 it denied being the respondent's agent. In court their contention was that the goods were received by a 3<sup>rd</sup> party, namely **CHEMELIL SUGAR COMPANY** yet the applicant failed to enjoin the 3<sup>rd</sup> party as per O. 10 of the Civil Procedure Rules. She contended that the applicant had no arguable appeal. On the aspect of the intended appeal being rendered nugatory, it was counsel's contention that the fact that the respondent is outside the geographical jurisdiction of this Court did not necessarily mean that the respondent was not in a position to refund any sums paid to it. She relied on several relevant authorities to buttress her submissions.

We have considered the application, affidavits on record, rival submissions of counsel and the law. The twin principles for consideration by this Court in determining an application under Rule 5 (2) (b) are now well settled. An applicant is required to show that it has an arguable appeal. This does not however mean that it is an appeal that must succeed, but suffice to state that it is not a frivolous appeal. The other ground to be satisfied is that the applicant has to show that an applicant's appeal will be rendered nugatory if stay is not granted. In **Multi Media University & Another v Professor Gitile in Naituli (2014) eKLR** this Court while considering an application under Rule 5 (2) (b) rendered itself as follows;

***“when one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and record, second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied.”***

Has the applicant herein satisfied the twin principles? We have our reservations on this. It would appear

that the applicant had previously admitted its indebtedness, made part payment of the debt and had further made proposals on how to repay the debt. In court, Mr. Mutai told us that a 3<sup>rd</sup> party, namely **CHEMELIL SUGAR COMPANY** should take up the payment of the sums owed to the respondent. However, **CHEMELIL SUGAR COMPANY** was not enjoined as a 3<sup>rd</sup> party to the proceedings before the trial court. Given the above, it is our view that the applicant has not established that he has an arguable appeal.

Further, the applicant has not established that if stay is not granted, its appeal would be rendered nugatory. The applicant contended that the respondent is based outside the geographical jurisdiction of this Court. That may well be so, but the applicant has not shown that the respondent's financial position is impecunious and hence incapable of making a refund. It is in view of this that we find that the second principle too has not been established.

The upshot of the above is that we find no merit in this motion. It is hereby dismissed with costs.

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

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certified that this is a true copy of the original.*

**DEPUTY REGISTRAR**