



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 62 OF 2016

BETWEEN

CFC STANBIC BANK LIMITED APPELLANT/RESPONDENT

VERSUS

JOHN KUNG'U KIARIE 1ST RESPONDENT

DYER & BLAIR INVESTMENT BANK LIMITED... 2ND RESPONDENT

(Being an application for stay of execution of the Decree of the High Court of Kenya at Nairobi (Ogola, J) dated 10th March, 2016

in

HCCC No. 47 of 2008)

RULING OF THE COURT

In a plaint filed at the High Court of Kenya at Nairobi the 1st respondent **John Kungu Kiarie** as plaintiff stated amongst other things that on or about April, 2003 he had approached the 2nd respondent **Dyer and Blair Investment Bank Limited** and that the two had entered into a written agreement where it was agreed that the 1st respondent was to source funds upto a sum of Shs.100,000,000/- which he was to deposit with the 2nd respondent and that the 2nd respondent was to invest the said sum on commission basis by buying shares, fixed deposits, treasury bonds or bills and that the 1st respondent was entitled to a return of the said principal sum plus

interest on demand. It was further stated that the 1st respondent deposited a sum of Shs.91,500,000/- and that the 2nd respondent had invested the said sum with the applicant **CFC Stanbic Bank Limited**. It was also stated that in April 2005 the 1st respondent requested the 2nd respondent to release a sum of Shs.24,000,000/- and that the request was met. Further, that in October, 2007 the 1st respondent requested for a refund of the balance of principal and interest and that the principal and interest was released to the 1st respondent but there was no statement of accounts or a basis for what the 1st respondent stated to be nominal interest paid. There was then a tabulation of the claim by the 1st respondent against the 2nd

respondent and the applicant showing that had the money been properly invested according to the 1st respondent it would have grown in principal and interest. That formed the basis of the 1st respondent's case for which he prayed for a sum of Shs.465,500,000/-together with interest and costs from the 2nd respondent and the applicant.

The applicant and the 2nd respondent filed statements of defence where the claim was denied. The applicant took preliminary points stating *inter alia* that the 1st respondent had no *locus standi* to file suit against the applicant as he was not their customer and that there was no privity of contract or a banker/customer relationship between the applicant and the 1st respondent. The applicant admitted in the defence that it had a banker/customer relationship with the 2nd respondent.

The 2nd respondent admitted in its defence that the 1st respondent was its customer. It proceeded to state *inter alia* that the 1st respondent's account with itself was frozen for a while through a court order.

A hearing took place and in a judgment delivered by E.K.O. Ogola, J dated 10th March, 2016, judgment was entered against the applicant and 2nd respondent jointly and severally for Shs.310,333,333.30 with interest and costs. The applicant and 2nd respondent were aggrieved by the said decision, consequently both lodged separate notices of appeal against the whole of that judgment.

The applicant now comes to us in this application brought under **section 3A and 3B** of the **Appellate Jurisdiction Act** and **rule 5(2) (b)** of the rules of this Court. It is prayed that we stay execution of the decree of the High Court pending the hearing and determination of an appeal. It is stated in the body of the Motion that the applicant has filed an appeal which it says is not only arguable but has good prospects of success. It is also stated that the appeal would be rendered nugatory if stay is not granted because the decretal sum is a colossal sum in excess of Shs.1 billion; that there is no prospect of recovering the money if the same is paid to the 1st respondent and the appeal is successful; that if the applicant was compelled to pay out the money the payment would cause the erosion of the value of the business and stock of its shareholders a loss that could never be remedied and that there would be lost opportunities to invest the money through advances to customers and other investments, a loss that could not be remedied.

There is also an affidavit in support of the Motion sworn by **Eliud Ogutu** who is Head of Legal Department with the applicant. It reiterates the grounds already set out and states further that the applicant has filed an appeal being **Civil Appeal No. 62 of 2016**. Mr. Ogutu further depones that the sum awarded against the applicant is essentially in respect of losses that allegedly arose from a breach of a contract to which the applicant was not a party and that there was no claim pleaded in the plaint that the applicant either induced the alleged breach or otherwise unlawfully interfered with the contract.

The 1st respondent swore a replying affidavit on 28th April, 2016 where he depones amongst other things that the Motion does not meet the principles upon which such an application could be granted; that the learned judge of the High Court was right to find collusion between the applicant and the 2nd respondent; that the record of appeal is incomplete and therefore incompetent and the Motion to which it is predicated cannot stand; that the fact that the decree is for a colossal sum of money is not a ground for grant of a stay – and that:

“..... The allegation that there is no prospect of recovery of the decretal sum if stay is denied and the appeal succeeds has not been substantiated with facts and evidence. In fact I am a man of means capable of refunding the amount as I own profitable businesses and substantial assets”

The narrative is a true reflection of the positions, rights, duties and responsibilities alleged by both sides. Our duty is to discern from the facts and law applicable, whether the applicant is entitled to the orders sought. Put it differently, whether the applicant has met the threshold for the grant of the orders sought. Our duty is simple and straight. We are obliged to apply the facts to the well trodden path of judicial precedents.

The principles applicable for determination of applications under **rule 5**

(2) (b) of our Rules are now well settled as was observed by this Court in **Ishamel Kagunyi Thande v Housing Finance Kenya Limited**, Civil Application No. NAI 157 of 2006 (unreported) where it was stated:

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are 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 v Jimba Credit Corporation Ltd**, No. 2 (1988) KLR 838 & **J.K. Industries Ltd v Kenya Commercial Bank Ltd**, 91982-88) and **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Ors.** [2013] eKLR).”

An applicant under the said rule must demonstrate that the appeal, if filed or the intended appeal, if not filed, is arguable and if an applicant satisfied that limb of the twin principles he has the added responsibility of showing that the appeal or intended appeal if it succeeds would be rendered nugatory if orders of stay pending appeal were not granted.

In **Equity Bank Limited v Westlink MBO Limited**, Civil Application No. 78 of 2011 (unreported) this Court stated that the true nature of an application under **Rule 5(2) (b)** is an interlocutory application in an appeal pending before this Court; and that **Rule 5 (2) (b)** is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter in order to ensure a just and effective determination of appeals. In that case a notice of appeal had been filed and a draft memorandum of appeal attached to the supporting affidavit and the court considered the Memorandum and gave effect to the same.

In **Hon. Peter Anyang Nyongo & 2 Others v The Minister for Finance & Another**, Civil Application No. NAI 273 of 2007 (unreported) it was stated:

“It is trite law that this Court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5(2) (b). It is apparent that under Rule 5(2) (b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an

injunction, and a stay of further proceedings. This Court has consistently construed Rule 5(2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.” Two principles emerge from a consideration of Rule 5 (2) (b) and the two authorities to wit, that, the jurisdiction of the court under Rule 5 (2) (b) is restricted to decisions made in Civil Proceedings and that the reliefs sought must relate to the decision of the superior court in its original or appellate jurisdiction.”

Mr. George Oraro, Senior Counsel appeared with **Mr. Paul Ogunde** for the applicant and Mr. Oraro also teamed up with **Mr. K. Kahiro** for the 2nd respondent. **Mr. Thomas K’bahati** appeared with **Ms. Judith Omollo** for the 1st respondent. Mr. Oraro gave the history of the matter as we have attempted to summarize in this ruling. Learned counsel submitted that the whole principal amount deposited by the 1st respondent with the 2nd respondent had been released after court orders were issued. Counsel submitted that it was arguable whether the learned judge of the High Court could find that there was an intention to defraud when there was no plea for deceit in the plaint. Learned counsel also submitted that it was arguable whether the learned judge could find against the applicant when there was no evidence of privity of contract between the applicant and the 1st respondent. Learned counsel also stated that the applicant is a big multinational corporation capable of paying the decretal sum if the appeal which has already been filed fails.

Mr. K'bahati, learned counsel for the 1st respondent, submitted that on the issue of deceit the same was pleaded in reply to defence. According to learned counsel, the appeal was not arguable because, *inter alia*, the 1st respondent's account with the 2nd respondent had not been frozen by a valid court order. Yet the applicant and the 2nd respondent denied the 1st respondent access to his money. Learned counsel also submitted that the appeal was not arguable because the invested money had not been invested as per contract. On the nugatory aspect, learned counsel relied on the replying affidavit of the 1st respondent where the 1st respondent says *inter alia* that he is a man of means. Learned counsel thought that the 1st respondent was entitled to the fruits of the judgment.

Mr. Oraro in a brief reply submitted that there was no claim in the plaint stating that money was irregularly dealt with. There was also no plea on the order freezing the account.

We have considered the motion, the affidaits in support and in reply, the submissions made before us and the law.

We have peused the Memorandum of Appeal in Civil Appeal No. 62 of 2016. One of the grounds to be argued in the appeal is whether the learned judge of the High Court failed to appreciate or give any weight to the fact that the 1st respondent's order had no contract with the applicant.

Another ground set out in the Memorandum of Appeal is whether the learned judge failed to appreciate that the 1st respondent was not a customer of the applicant and that the 1st respondent could not maintain a claim against the applicant. Also set out as a ground of appeal is whether the learned judge could find fraud or collusion between the applicant and the 2nd respondent when there was no pleading to that effect in the plaint. We find all these to be arguable grounds. An applicant, in an application like the one before us, need not establish a multiplicity of arguable points or that the grounds of appeal will succeed. One arguable ground will suffice – See **Judicial Commission of Inquiry into the Goldenberg Affairs & 3 Others v Kilach [2003] KLR 249** or **Hashmukhal Virchand Shah v Mayuri Sunil Shah [2014] eKLR**.

What about the nugatory aspect which an applicant, to succeed under a **rule 5(2) (b)** application, must also satisfy? Learned counsel for the applicant submits that the sum awarded, said to stand at Shs.1.2 billion when the Motion was heard, was so colossal and there was no evidence that the 1st respondent could repay such sum if the appeal succeeded. The 1st respondent, on the other hand, submitted that he was a man of means with substantial assets who had capacity to pay back the decretal sum if the appeal failed.

The matter in **Nation Newspapers Limited v Peter Baraza Rabando [2007] eKLR** involved a defamatory article carried in an issue of the appellant against the respondent where funeral damages were awarded. An application for stay pending appeal was presented to this Court and one of the arguments by the respondent was that a successful claimant was entitled to the fruits of his judgment. It was observed as part of the ruling that:

“.....The respondent's is a money decree. In Kenya Shell Limited v Kibiru & Another [1986] KLR 410, this Court held that normally a stay of execution would not issue in money decrees. However, recent decisions of the Court are to the effect that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory, and the court granted a stay in those cases.”

It was also observed in that case that in such cases the court balances two parallel positions – first, that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause. The second factor is that, if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay, on terms.

In **Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227** one of the prayers was that a stay of execution be granted pending appeal. The circumstances were peculiar in that a liquidator had

been appointed against the applicant bank. It was held as the Court granted orders:

“For an application under rule 5(2) (b) to succeed, the Applicant had to satisfy the Court that the appeal was arguable, that is, that it was not frivolous, and that if the order were not granted, the appeal, were it eventually to succeed, would be rendered nugatory.

In determining the second limb of the test, the court in Oraro and Rachier Advocates v Co-operative Bank of Kenya Limited (supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case (Oraro and Rachier Advocates v Co-operative Bank of Kenya (supra) explained and followed). Rule 5(2) (b) conferred on the court original jurisdiction based on the exercise of discretion by the judges of the court. In the exercise of that discretion, certain principles had been developed to guide the court, the scope of which took account of evolving circumstances as they arose in various cases. In this instance, the circumstances showed that it would be too onerous to require the liquidator of the Applicant to deposit the money in court. A refusal to grant a stay would cause the Applicant such hardship as would be out of proportion to any suffering the respondent might undergo while awaiting the hearing and determination Applicant’s appeal.”

We have gone through the judgment of the trial judge and the central issue for the award is based on an intention to defraud the 2nd respondent. Mr. Oraro, Senior Counsel submitted that there was no plea for deceit and intention to defraud in the plaint of the 2nd respondent. We think that the issue of pleadings play a pivotal role in the determination before court. The purpose is to inform both the respondent and court, what the claim or cause of action is about. And where as in this case, such issue tilts the scales in favour of one party, the other is justified to question it. In that regard, we think the use of pleading and placing the correct cause of action cannot be wished away and termed frivolous.

Another issue which to our mind, is arguable is the nature and extent of the contract between the parties herein. Mr. Oraro, SC submitted that there was no privity of contract between the applicant and 2nd respondent. Attached to that point is to interrogate the consequences for breach of contract and whether the trial court was justified in awarding the sum awarded to the 2nd respondent. More importantly is what caused the dispute between the parties, which was the investigations commenced by 3rd parties and the time the order was issued, lifted and validity of the same. We think, these are weighty issues which can only be determined through an appeal.

In the instant Motion all the 1st respondent says in the replying affidavit is that he is a man of means with substantial assets and that he is capable of paying back the decretal sum were the appeal to succeed. No evidence was placed before us to show such ability. Mr. Oraro told us at the hearing of the Motion that the decretal sum stood at Kshs.1.2 billion, a rather substantial sum which could cause instability to the applicant which is a corporation listed on the Nairobi Securities Exchange and capable of paying the decretal sum if the appeal which has already been filed fails. We are required to exercise our discretion in a manner which ensures that an appeal, if successful, would not be rendered nugatory – See **Butt v Rent Restriction Tribunal [1982] KLR 417**.

We are satisfied, on the material placed before us, that the applicant has satisfied both limbs of the principles which we apply in a consideration of an application such as this one. That is why we hereby grant an order of stay pending hearing and determination of Civil Appeal No. 62 of 2016. Costs of the Motion shall be in the appeal.

Dated and delivered at Nairobi this 15th day of July, 2016.

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR