IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPLICATION NO. 19 OF 2015

BETWEEN

ACCREDO AG……..……..…….....…..……..1ST APPLICANT

SALAMA BEACH HOTEL LIMITED…….2ND APPLICANT

HANS JUERGEN LANGER…….…….3RD APPLICANT

ZAHRA LANGER……...…..4TH APPLICANT

AND

STEFFANO UCCELLI…….…..……...……1ST RESPONDENT

ISAAC RODROT…….……2ND RESPONDENT

(Application for stay of execution of the ruling and order of the High Court of Kenya at Malindi, (Chitembwe, J.) dated 30th April 2015

in

HCCC No. 118 of 2009)

****

RULING OF THE COURT

The four applicants, ***ACCREDO AG, SALAMA BEACH HOTEL LTD, HANS JUERGEN LANGER*** and ***ZAHRA LANGER***, have applied vide a Notice of Motion dated 8th May 2015 and taken out principally under ***rule 5(2)(b)*** of the ***Court of Appeal Rules***, for stay of execution of the ruling and orders of the High Court (***Chitembwe, J.***), dated 30th April 2015 and for stay of further proceedings in Malindi HCCC No. 118 of 2009. The application is vigorously opposed by the respondents, ***Steffano Uccelli*** and ***Isaac Rodrot***, who separately submit that the ruling and orders of the High Court, which reviewed and set aside a consent decree, are legally sound and beyond reproach to warrant any order of stay of execution.

The application arises from events said to have taken place in 2001 in Milan, Italy, involving ***Viaggi Del Ventaglio SPA,*** an Italian company and ***Adinos AG***, a Swiss company. On 14th December 2001, it was

claimed, Adinos AG obtained from the High Court of Milan, Italy, a judgment for ***€ 825,000,*** with interest and costs of ***€ 2,420*** against Viaggi Del Ventaglio SPA. Before settlement of the judgment, Viaggi Del Ventaglio SPA became insolvent and was struck off from the stock exchange. Its only known asset was the tourist business operated on ***Plot No. 9890, Watamu***, ***Kenya*** by its wholly owned subsidiary, ***Salama Beach Hotel Ltd (the 2nd applicant).*** By an agreement between Adinos AG and ***Accredo AG (the 1st applicant)*** in which Hans Juergen Langer ***(the 3rd applicant)*** and Zahra Langer ***(the 4th applicant),*** are the majority shareholders, Adinos AG assigned to the 1st applicant all its rights and liabilities arising from the Milan judgment.

By a plaint dated 15th December 2009, the 1st applicant instituted ***Malindi HCCC No. 118 of 2009*** against the 2nd applicant seeking, among others, an order for enforcement of the Milan judgment under the ***Foreign Judgments (Reciprocal Enforcement) Act***, **cap 43,** attachment of the 2nd applicant's property before judgment, an injunction restraining the 2nd applicant from alienating its assets and an order allowing the 1st applicant to take over the ownership and management of the 2nd applicant for such time as it would be necessary to satisfy the Milan judgment.

Contemporaneously with the plaint the 1st applicant filed a ***Chamber Summons*** seeking the same prayers it had sought in the plaint. On 18th December 2009 the 2nd applicant, through its advocates ***Fadhili & Kilonzo***, filed a ***Statement of Admission*** by which it admitted the entire claim by the 1st applicant. By an affidavit sworn on 16th December 2009 by ***Steffano Uccelli***, ***(1st respondent)*** in his capacity as director of the 2nd applicant, he admitted all the averments by the 1st applicant and deposed further that the 2nd applicant was not opposed to the reliefs sought by the 1st applicant. Consequently, by a consent letter dated 18th December 2009 and signed by the advocates for both parties, the Chamber Summons dated 15th December 2005 was allowed as prayed.

Ibrahim, J. (as he then was), eventually issued a consent decree on 20th January 2010. The consent decree had other additional provisions which were not claimed in the plaint and effectively allowed the 1st, 3rd and 4th applicants to takeover shareholding, directorship, ownership, management, operation and control of the 2nd applicant for such period as was necessary to satisfy the Milan judgment; directed the Registrar of Companies to transfer all shares of the 2nd applicant to the 3rd and 4th applicants equally; and allowed the 1st respondent to continue in the board of directors of the 2nd applicant but without being a shareholder.

It appears that thereafter, in accordance with the consent decree the 1st, 3rd and 4th applicants took over and have since been running the business of the 2nd applicant. Up to that point the only parties to the suit were the 1st applicant as the plaintiff and the 2nd applicant as the defendant. By an order made 8th September 2010, the 3rd and 4th applicants and the 1st and 2nd respondents were joined to the suit as defendants.

What led directly to the current application was a Notice of Motion filed on 21st November 2014 by the 1st respondent seeking substantively, the review and setting aside of the consent decree. The application was supported by a 67-paragraph long affidavit sworn by the 1st respondent. Shorn of all verbosity, the basis of the application was that the consent decree was procured by fraud and misrepresentation. It was contended that there was no judgment from the High Court in Milan and that in any event, the Foreign Judgments (Reciprocal Enforcement) Act, upon which the consent decree was based, was inapplicable to the extent that there was no reciprocal arrangement between Kenya and Italy within the meaning of the Act.

The 3rd and 4th applicants contested the application on the basis of an equally long 56-paragraph affidavit sworn by the 3rd applicant on 11th December 2014. Again, the gist of the response was that the consent decree was lawfully and properly entered into and that there was no basis for interfering with it.

Chitembwe, J. heard the application and in a ruling dated 30th April 2015, reviewed and set aside the consent decree. In addition to setting aside the decree, the learned judge made the following other orders, set out verbatim below, which have aggrieved the applicants.

> ***"2. The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Juergen Langer and Zahra Langer, as directors of Salama Beach Ltd and shall ensure that the status of the company in its registry is restored to the position as at December 2009;***
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> ***3. The 2nd defendants to hand over all the properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants (i.e. Steffano Uccelli and Isaac Rodrot). Counsel for both parties to participate in the transfer process;***
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> ***4. The 2nd and 3rd respondent's names to be removed as signatories to all bank accounts of Salama Beach Hotel Ltd and to be replaced by the original signatories as at 14th December, 2009;***
>
> ***5. in view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove;***
>
> ***6. Costs of the application to the applicant."***

After the ruling, the applicants lodged a notice of appeal on 4th May 2015 within the period prescribed by rule 75(1). On the same day they applied for certified copies of the ruling and proceedings. Thereafter they filed the application before us.

The application is supported by an affidavit sworn by the 3nd applicant on his own behalf and that of the other applicants in which he has deponed, as far as it is relevant to this application, that upon the recording of the consent decree in 2010, the applicants took over operation of the hotel business in the 2nd applicant and have injected over Kshs 500,000,000/- into the business; that the orders by the learned judge, unless stayed were likely to cause the applicants irreparable loss and harm; that the applicants were unlikely to recover their investment if stay of execution was not granted and their appeal was ultimately successful; that the applicants had an arguable appeal as demonstrated by the annexed draft memorandum of appeal listing 26 grounds of appeal; that the applicants were ready to furnish security should the Court deem it necessary and that in the circumstances the balance of convenience titled heavily in favour of granting their application.

To demonstrate that the applicants' intended appeal was arguable, Mr. ***Ahmednassir Abdullahi,*** learned senior counsel who led ***Mr. Ndegwa Kiarie***, learned counsel, for the applicants highlighted some of the 26 grounds that the applicants propose to canvass before this Court. It was submitted the respondents, at whose prompting Chitembwe, J. reviewed and set aside the consent decree, had no *locus standi* in the matter. It was argued that the two were not parties to the decree and had never filed any pleadings in the suit even after they were joined into the suit ten months after the consent decree was recorded. In counsel's view, on the authority of ***CHARLES C. SANDE V. KCCC LTD. CA NO. 154 OF***

1992, parties to a suit can only raise issues from pleadings and not from affidavits, which are not grounded on a plaint or a defence. It was submitted that in those circumstances the respondents lacked standing to apply for review of the decree.

Senior counsel also contended that the learned judge erred fundamentally by granting far-reaching orders, which the respondents had not applied for, and of which the applicants did not have proper notice or opportunity to respond to. It was argued that whilst the respondents had only prayed for the court ***"to set aside or review the decree on record so that the parties can be heard on merit"***, the court had instead gone overboard and issued draconian orders that were not only not applied for, but had the effect of expropriating or depriving the applicants of their property without an opportunity for proper hearing. ***NAIROBI CITY COUNCIL V. THABITI ENTERPRISES [1995-98] 2 EA 231*** was cited for the proposition that a court must confine itself to the issues that the parties have pleaded.

Finally, counsel submitted that the learned judge erred by purporting to determine, at an interlocutory stage and with finality, all the contested issues between the parties. It was submitted that the respondent had applied to set aside the consent decree so that the suit could be heard on merit, yet the learned judge had purported to determine all the issues without the benefit of a full hearing entailing calling of witnesses and testing of evidence through cross-examination.

On whether the intended appeal would be rendered nugatory were it to succeed in the absence of an order for stay of execution, senior counsel submitted that the property in dispute was worth approximately ***Kshs 1 billion*** and that the effect of not staying the order of the High Court would be to immediately effect a major change in shareholding, ownership, property and operations of the 2nd applicant. In addition it was contended that the applicants had invested heavily in the business and that they stood to suffer irreparable loss and damage if the orders of the High Court were not stayed.

For the 1st respondent, ***Mr. A. S. Masika*** opposed the application on three broad fronts. The first was technical, the contention being that the 3rd applicant had not produced authority from the other applicants allowing him to swear the supporting affidavit on their behalf; that the said affidavit was defective because the particulars of the deponent and his place of abode were not disclosed; and that the notice of appeal was yet to be served on the respondents.

The second front of contestation was that the applicants had not complied with the order of the High Court, which they were seeking to stay. In counsel's view, since the applicants were seeking an equitable remedy, they had to show themselves to be deserving of such a remedy. It was submitted that contempt of court proceedings against the applicants for non-compliance with the order were pending in the High Court. On the authority of ***HADKINSON V. HADKINSON [1952] 2 ALL ER 567*** and the ruling of the High Court in ***JUDICIAL SERVICE COMMISSION V. SPEAKER OF THE NATIONAL ASSEMBLY & ANOTHER, HC PETITION NO. 518 OF 2013***, we were urged to decline the reliefs sought by the applicants.

The third front was on the merits of the application and it was argued that the intended appeal was frivolous and not arguable because the respondents, having been joined in the suit had *locus standi* to apply for review of the consent decree; that the consent decree was entered into without jurisdiction because Kenya had no reciprocal arrangements with Italy and so the Foreign Judgments (Reciprocal Enforcement) Act was not applicable; that in any event the Milan judgment, if it was in existence, was not registered within 6 years as required by the Act; and that in the circumstances of the case the setting aside of the decree was within the law and uncontestable.

On whether the intended appeal, if successful, would be rendered nugatory, it was submitted that it would not. Counsel argued that if the 3rd and 4th applicants were removed as directors and shareholders of the 2nd applicant, they could still be restored back if their appeal was successful; that there was no document showing the value of the 2nd applicant to be Kshs 1 billion; that the other applicants had been running the 2nd applicant and had therefore fully recovered the moneys owed to them under the Milan judgment; that the applicants were foreigners with no known assets in Kenya; and that if the court was

inclined to stay the orders of the High Court, it should direct the applicants to deposit Kshs 1 billion as security.

Mr. Joseph Munyithia, learned counsel for the 2nd respondent also opposed the application, relying on the same the same technical objections as those raised by the 1st respondent. On the merits of the application, counsel submitted that the intended appeal was not arguable because the consent decree was properly set aside after the High Court found that it had purported to address issues that were not raised in the plaint such as change of directors and transfer of shares; that the consent decree had deprived the then shareholders of the 2nd applicant of their rights and their property; that the orders granted by Chitembewe, J. which had not been prayed for were merely consequential orders flowing naturally from the setting aside of the consent decree; and that the respondents had *locus standi* since they were joined in the suit by an order of the court which has never been set aside or appealed.

While submitting that the intended appeal would not be rendered nugatory if successful, nevertheless learned counsel proposed that the *status quo* could be maintained in which the applicants continue running the business of the 2nd applicant, while the respondents were in the meantime admitted as share holders thereof. He also proposed that should the court be inclined to grant the application, the applicants should deposit security of Kshs 1 billion.

We have anxiously considered this application, the ruling of the High Court, the affidavits in support and in reply, the submissions of learned counsel, the authorities cited and the law. It is conceded by all the parties that this is an intricate litigation that has a rather murky and unpleasant history. Without in any way pre-empting the matter, and acutely aware of our solemn duty as a Court under the Overriding Objective, we have no doubt in our minds that the best way to resolve this protracted and contested matter once and for all is not through interlocutory applications and appeals founded on conflicting and unverifiable facts in affidavits, but rather through a proper hearing, which will determine the issues in dispute with finality.

We shall first dispose of the technical objections raised by the respondents and the question of the alleged non-compliance with the impugned court order. The objections raised are not jurisdictional in nature and it has not been shown how any of the parties has been prejudiced. The objections raised point clearly to infractions, which cannot stand in the way of substantive determination of the application before us. We echo what ***Ouko, JA*** said in ***NICHOLAS KIPTOO ARAP KORIR SALAT V IEBC & 6 OTHERS, CA NO. 228 OF 2013*** regarding technicalities:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."***

On the question whether the Notice of Appeal has been served upon the respondents, that is not an issue we can determine in the application before us. The respondents have a clear and efficacious remedy under the rules, which they have not yet exercised. As this Court held in ***NATIONAL INDUSTRIAL CREDIT BANK LTD V. AQUINAS FRANCIS WASIKE & ANOTHER, CA NO. NAI 238 OF 2005,*** in an application under ***rule 5(2) (b)*** of the Rules of this Court, the Court does not have to determine the validity of a notice of appeal, that being an issue for an appropriate application under rule 84.

As regards the violation of the of the court order alleged against the applicants, the statement of the

law as cited by counsel for the 1st respondent that this Court will not give an equitable remedy to a party which had demonstrated that it is unworthy of the relief, is correct and valid. In this instance however, it is alleged that the applicants are in contempt of court, which charge they deny. Determination of that very issue is pending before the High Court. We do not think in the circumstances that it is advisable for us to be drawn into that dispute or to be invited to make a finding on the issue in this application.

Turning to the merits of the application, the jurisdiction of this Court under rule 5(2)(b) is original and discretionary. It is properly invoked when the applicant or intended appellant has filed a notice of appeal. To be entitled to the orders sought the applicants must satisfy us that their intended appeal is arguable and that will be rendered nugatory if it succeeds in the absence of an order of stay of execution. ***(See J. K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD. [1982 – 88] KAR 1088*** and ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (NO. 2) [1988] KLR 838).***

The applicants have to satisfy both of those considerations. Satisfying one and failing in the other will not be good enough. (See ***REPUBLIC V. KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31*)**. It has been said time and again that an arguable appeal is not necessarily an appeal, which must ultimately succeed but is an appeal, which raises a *bona fide* point of law worthy of consideration by this Court. In the same vein the applicant for relief under rule 5(2) (b) does not have to satisfy the Court that he has numerous arguable points; even one single *bona fide* point of law will satisfy the requirement regarding an arguable appeal. (See ***KENYA TEA GROWERS ASSOCIATION & ANOTHER V. KENYA PLANTERS & AGRICULTURAL WORKERS UNION, CA NO. NAI. 72 OF 2001).***

We have carefully considered the applicants' draft memorandum of appeal. It raises issues such as whether the High Court could in the circumstances of this case validly grant orders that were not applied for, whether such orders could have been granted in the interlocutory application that was before the court; whether the impugned ruling determined with finality all the contested issues in the suit, thus rendering the suit academic; whether the applicants were unlawfully deprived of vested property however regularly or irregularly it was acquired by them; and whether the learned judge could, with finality, find fraud established on the basis of affidavits only, without the benefit of cross-examination.

In our view these are not idle or frivolous complaints. They are issues that deserve proper and full consideration by this Court. We shall not say more in that respect to avoid any perception that we have a concluded view on the matter and to further avoid embarrassing the bench that finally hears the intended appeal.

On whether the intended appeal will be rendered nugatory were it to succeed, the primary consideration is this: assuming that what the applicants are seeking to stop happens, and the appeal is ultimately successful, will the success of the appeal be of any benefit to them, or will it amount to a mere pyrrhic victory? (See ***STANLEY KANGETHE KINYANJUI V. TONY KETTER & 5 OTHERS, CA NO. 31.*** Whether or not a successful appeal will be rendered nugatory of course depends on the circumstances of each case. (See ***RELIANCE BANK LTD. V. NORLAKE INVESTMENTS LTD. [2002] 1 EA).***

On the whole, there is agreement between the parties that the 2nd applicant is a valuable business and even though the 1st respondent contends that its value has not been proved by documents to be approximately Kshs 1 billion, both respondents, in their replying affidavits and or oral submission in Court, asked for a security deposit of Kshs 1 billion, which is possibly a pointer to what they also consider to be the value of the business. The amount of deposit asked for the same figure given by the applicants as the value of the business of the 2nd applicant.

The applicants have been in possession and operating the business of the 2nd applicant since the consent decree was recorded in 2010. Whether that possession and operation has been lawful or not cannot be determined in this application; it will have to be determined after full hearing of the dispute by the High Court. The 2nd applicant is *prima facie* a valuable operating business. Immediate effectuation of the fundamental charges directed by the impugned ruling may result in disruption of its operations and other

consequences that will render the intended appeal, if, successful nugatory. We note too that while the 1st respondent contends that the applicants are non-Kenyans; the applicants also point out the 1st respondent is a non-Kenyan. In these circumstances nothing much should turn on that issue.

Having carefully considered this application and weighing the rival contentions, we are satisfied that unless we grant an order of stay of execution, the applicants' intended appeal, which we have found to be arguable, will be rendered nugatory if it succeeds. In the premises, we allow the motion dated 8th May 2015 in terms of prayer 4 thereof. Costs of this application will abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Malindi this 3rd day of July 2015

ASIKE MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.