IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G.B.M. KARIUKI & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 75 OF 2014 (UR 61/2014)

BETWEEN

EAST AFRICAN PORTLAND CEMENT

COMPANY LIMITED .....APPLICANT

AND

SUPERIOR HOMES (KENYA) LIMITED..... RESPONDENT

(Being an application for stay of execution of orders, pending lodgment, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Nyamweya, J.) delivered 20th August, 2013

in

ELC CASE NO.931 OF 2013)

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RULING OF THE COURT

APPLICATION

1. The applicant, **East Africa Portland Cement Company Ltd**, made an application to this Court on 11th April 2014 by way of notice of motion premised on Rule 5(2)(b) of the Rules of this Court seeking the following orders:

1. ***(spent)***

2. ***That there be a stay of execution of the orders issued by the Honourable Lady Justice Nyamweya on 11th March, 2014 allowing extension of the completion period of the decree issued on the 17th December 2013 and all other subsequent orders be stayed pending the filling hearing and determination of the intended appeal herein.***

3. ***That there be a stay of execution of the orders issued by the Honourable Lady Justice Nyamweya on 11th March, 2014 allowing extension of the completion period of the decree issued on the 17th December 2013 and all other subsequent orders be stayed pending the filing hearing and***

determination of the intended appeal herein.

4. ***That such other and/or further orders be made as this Honourable Court may deem fit to grant.***

5. ***That costs be provided for.***

BACKGROUND

2. The background leading to the making of the application is illuminated by the documents presented to the Court and is not complicated.
3. The respondent, **Superior Homes (Kenya) Ltd**, entered into an agreement with the applicant, **East Africa Portland Cement Company Limited**, in which the latter gave to the former an option to purchase a portion of land at Athi River, measuring 337 acres (the suit land) to be excised from the Applicant's land known as L.R. 8784/4 Athi River Machakos at a price of Ksh.750 million.
4. The respondent through its advocates raised several concerns with regard to the land being purchased. They pointed out that the land (reference No.8784/4) from which the 337 acres were to be excised was listed in the Report of the Commission of Inquiry into illegal/irregular allocation of Public Land (commonly known as the Ndungu Commission Report) with recommendation that it be revoked; there were uncertainties about the title in respect of which they required an indemnity from the appellant against claims and liabilities that might arise upon conclusion of the transaction;. they also sought to know the terms the appellant would require from the respondent's Bankers in relation to undertaking for payment and the progress made in procuring completion documents. Meetings and exchange of correspondences on these matters culminated in expiry of the period within which the respondent was required to exercise the option to purchase the suit property. Consequently the respondent filed ELC Suit No.931 of 2013 against the appellant which resulted in an agreement between the parties which gave rise to a consent decree.
5. In brief, the agreement giving rise to the consent decree required the respondent to pay the agreed price of the land of Ksh.750 million first by remitting Shs 100 million within 7 days from the date of the decree which would be held by the appellant's advocates as stakeholders and would not be released to the appellant until completion; the balance of Ksh.650 million, would be secured upon an acceptable Bank guarantee of Kshs.650 million, as the basis on which the appellant would release to the respondent the completion documents. The completion period was to be 145 days from the date of the consent decree or seven (7) days of successful transfer to the respondent of the 337 acre piece of land.
6. The consent decree was issued on 17th December 2012. The period of 145 days expired before completion. The respondent being apprehensive that the appellant might sell the land to another buyer, made an application in the said suit by way of notice of motion dated 30th July 2013 seeking, inter alia, orders to stop the appellant from alienating the land and for enlargement of the completion period by a further 365 days, or any other reasonable period, to enable the respondent to fully comply with the said decree.
7. The superior court below (Nyamweya J.) heard and determined the application by the respondent, allowed it and enlarged the completion period by a further 120 days with effect from the date of the delivery of the ruling on 11th March 2014. In the words of the learned Judge, the Court stated:-

"I will therefore allow the Plaintiff's notice of motion dated 30th July 2013 for the foregoing reasons. I accordingly order that the terms of the decree issued herein on 17th December 2013 be and are hereby reviewed only to the extent of extending the completion period stated in paragraph 6 of the said decree by a further one hundred twenty (120) days with effect from the date of this ruling.

Each party shall meet their own costs of the said notice of motion."

8. The applicant, aggrieved by the Court ruling (by the Honourable Lady Justice Nyamweya), swiftly instructed its advocates on record to appeal against the said decision. A notice of appeal was duly filed on 24th March 2014 and served. A request for typed proceedings to file Appeal was also timeously made.
9. By an application by way of notice of motion dated 4th April 2014 the applicant moved this Court on 11.4.2014 for the following orders:-

1. ***Spent***

2. ***That there be a stay of execution of the orders issued by the Honourable Lady Justice Nyamweya on 11th March, 2014 allowing extension of the completion period of the decree issued on the 17th December 2013 and all other subsequent orders be stayed pending the hearing and determination of this application.***

3. ***That there be a stay of execution of the orders issued by the Honourable Lady Justice Nyamweya on 11th March, 2014 allowing extension of the completion period of the decree issued on the 17th December 2013 and all other subsequent order be stayed pending the filing hearing and determination of the intended appeal herein.***

4. ***That such other and/or further orders be made as this Honourable Court may deem fit to grant.***

5. ***That costs be provided for.***

10. The application was supported by an affidavit sworn by **Mr. Kepha Tande** the Managing Director of the applicant. A replying affidavit sworn by **Mr. Ian Hazlitt Henderson**, the Managing Director of the respondent, was also filed.

HEARING

9. On 13.10.2014 the notice of motion (lodged on 11.4.2014 but dated 4.3.2014) came up for hearing before us. Learned **Senior Counsel Mr. Ahmednasir Abdullahi** assisted by learned **counsel Ms E. Muigai** appeared for the applicant while learned **counsel Mr. P. Nyachoti** appeared for the respondent. Mr. Nyachoti sought to file at that late hour a further affidavit on behalf of the respondent. Senior counsel Mr. Ahmednasir, ostensibly in an effort to avert the collapse of the hearing of the application, refrained from objecting to the late filing of the affidavit whereupon, under Rule 50(2) of the Rules of this Court, we allowed the late filing of the further affidavit by the respondent which Mr. Nyachoti had just served upon Mr. Ahmednasir Abdullahi in court. The hearing of the application proceeded.

11. Mr. Ahmednasir commenced his submissions by expressing the optimism that perhaps it was not necessary to hear the application for stay and subsequently hear the appeal itself which the applicant had already filed. He was of the view that the Court could go straight to the appeal and hear it and thus make a saving on judicial time and expedite faster the determination of the litigation. This sentiment was not, however, shared by Mr. Nyachoti who was intent on having the application heard. We heard both counsel on their rival submissions on the application.

12. Mr. Ahmednasir submitted that the civil appeal No.158 of 2014 filed by the applicant which has not yet been set down for hearing is not frivolous. It is arguable, he said. He also contended that if stay is not granted as prayed in prayers nos. 2 and 3 of the application, the appeal shall be rendered nugatory.

13. Mr. Ahmednasir submitted that the learned trial Judge erred in law by purporting to extend the time of completion contained in a contract between the parties which had already been rescinded and further that she had no jurisdiction in purporting to re-write the terms of a contract that had been recorded and a decree issued on the same terms and that the court erred in doing so.

14. It was Mr. Ahmednasir's submission that the learned trial Judge gave the application a wrong

interpretation and deemed it an application for review although the application was predicated on Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya. The decision by the learned Judge, said Senior counsel, was obiter.

15. Mr. Ahmednasir stressed that there was a decree by consent of the parties which, inter alia, set the completion period to 145 days from the date of the decree or 7 days of successful transfer of the 337 acre piece of land to the respondent or its nominees and which clearly stated that the balance of the purchase price of Shs.650 million would be secured by an acceptable Bank Guarantee issued on behalf of the respondent's advocates and that the transfer documents would be released to the respondent's advocates upon receipt of the Bank guarantee. It was learned counsel's submission that the respondent failed to perform or honour the terms for securing payment of Shs.650 million contained in clause 4 of the consent decree. He contended that the consent decree also realistically contemplated the possibility of failure to honour clause 4 of the said decree and made provision for the consequences of such failure by providing in clause 7 that default in completion for whatever reason would result in refund of the deposit of shs. 100 million within 7 days of written demand, and further that the respondent would have no other claim against the applicant in respect of the said parcel of land. It was counsel's submission that as the respondent failed to provide a Bank Guarantee in compliance with clause 4, the consent stood rescinded. However, we observe that the learned trial Judge posed three questions in her impugned Ruling namely (1) whether the applicant could unilaterally discharge itself from the consent order and (2) whether the High Court had discretion to extend the time of completion agreed on by the parties to the consent decree and (3) whether the Court could vary the terms of the consent order as to the time of completion. The learned trial Judge held that the consent became an order of the Court upon being endorsed as such and that that is why a decree was subsequently issued. The Court stated-

"once such consent order ..... was recorded by the Court and a decree was issued, it consequently became subject to the law governing the discharge of court orders and decrees. Under the Civil Procedure Act, such discharge can only be by way of appeal from the order or review and setting aside of the order ... noting that under Section 67(2) of the Civil Procedure Act, no appeal lies from a decree passed by the Court with the consent of the parties. The only allowed legal procedure ... through which a consent order and decree issued thereof can be discharged is by way of review and setting aside."

16. The learned trial Judge also held that she had discretion to extend time under the provisions of Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules if good reason was shown and, she then found that there were grounds for interfering with the timelines in the consent-decree. In her own words, she said -

"it is therefore the finding of this Court and for the foregoing reasons that this Court has discretion to extend time set in a consent order, and that for the plaintiff (Super Homes (Kenya)) Ltd to be able to set aside or vary the terms of their consent order and decree as to time, it must show a good ground."

17. These legal issues are certainly debatable and they show that the appeal is not frivolous. It is arguable. We need not delve into these issues as they are the preserve of the Bench that shall hear the appeal. On our part, all we need is to satisfy ourselves that the appeal is arguable.

18. We agree with Mr. Ahmednasir's submission that the appeal does raise issues of law not least whether the superior court below had jurisdiction to revive the "rescinded" sale between the parties or to alter the terms of the contract between the parties that resulted in a consent decree or to impose new terms. These are issues of law that clearly make the appeal arguable.

19. As to whether the appeal will be rendered nugatory, it was Mr. Ahmednasir's submission that it will become nugatory if stay is not granted. For starters, he said, the applicant will be compelled to perform the terms of the "rescinded" contract and sale may proceed thereby rendering the appeal, if successful, nugatory if stay is not granted. He urged the Court to allow the application and grant stay pending the hearing and determination of the appeal so as to do justice to the parties.

20. On his part, **Mr. Nyachoti**, learned counsel for the respondent opposed the application. He relied on the respondent's replying and further affidavits and contended that the application has no merit and should be dismissed. He conceded that although the notice of motion dated 30th July 2013 by the respondent (Superior Homes (K) Limited)) was not premised on the review Order No. 45) of the Civil Procedure Rules, nevertheless the Court was entitled and justified in enlarging the time for completion as it did. It is in respect of that Court decision that the applicant (East African Portland Cement Co. Ltd) lodged on 24th March 2014 a Notice of Appeal dated 18th March 2014 intending to appeal against the whole of that decision.

21. Mr. Nyachoti submitted that the applicant attempted to set aside the impugned ruling in its application by notice of motion dated 16th June 2014 to no avail. He however conceded that the applicant's application dated 16th June 2014 was not premised on Order 45 (for review) of the Civil Procedure Rules but rather on Article 50 (1) of the Constitution which relates to *"the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body"* and that prayer No.1 of the application was for recusal of the Honourable Judge of the Superior Court below (Nyamweya J) from further hearing the dispute between the parties. That order was granted and the Judge recused herself as prayed. However, the Judge declined to set aside or to vacate the order in her impugned ruling of 11th March 2013 enlarging the period of completion. Mr. Nyachoti contended that that ruling was not challenged as no Notice of Appeal has been given in its respect. Consequently, he said, it is binding on the parties and no appeal is available to the applicant who failed in its attempt to obtain review. It was Mr. Nyachoti's submission that the applicant is not now entitled to apply for stay or injunction under Rule 5(2)(b) of the Rules of this Court. It was his contention that the issue of arguability of the appeal does not arise as no appeal was preferred against the ruling dated 4th July 2014 arising from the applicant's notice of motion dated 16th June 2014.

22. Mr. Nyachoti referred to the consent decree and submitted that order No.12 of the consent decree gave liberty to, and entitled the parties, to apply and in his view, an application for extension of time of completion was contemplated by Order No.12 of the consent decree. In his submission, he did not see merit in the argument that the Superior Court below was not entitled to interfere with the agreed terms of the consent which gave rise to the consent decree.

23. On the issue whether the appeal, if successful, will become nugatory if stay is not granted, Mr. Nyachoti expressed the view that no demonstration of this principle had been made. At any rate, he said, the transaction giving rise to this litigation was commercial and nothing will collapse if parties are allowed to conclude the transaction.

24. On the issue of consents from relevant government departments, Mr. Nyachoti contended that if the parties get stuck in respect of any consent, there is law to deal with that in its own time-frame. Mr. Nyachoti contended that the appeal, even if successful, would not become nugatory if stay of execution is not granted and in his view, the application was an abuse of the court process. His client, he said, has been out of pocket with regard to Ksh. 100 million paid to the applicant on which no interest accrues. If the sale does not proceed, his client as an investor stands to suffer. He urged the Court to dismiss the application.

25. In his reply, Mr. Ahmednasir Abdullahi drew the attention of the Court to clause No.7 of the consent decree which states that –

"in default of completion for whatever reason, the deposit of Ksh.100 million shall be refunded to the plaintiff (Superior Homes (Kenya Limited)) within seven (7) days of written demand without interest".

26. He contended that it was the respondent that failed to honour clause No.4 of the consent decree which required the respondent to remit to the applicant's advocates acceptable Bank Guarantee or such other security as would secure the balance of the purchase price amounting to Ksh.650 million. In his view, an application by the respondent seeking a loan for this sum did not amount to a Guarantee.

27. Mr. Ahmednasir submitted that the matter before the superior court below in the application dated 16th June 2014 was for setting aside or vacation of orders, but not for review under Order 45 of the Civil Procedure Rules. In his submission, the view by the superior court below that the matter related to review was *per incuriam*. With regard to the applicant's application dated 16th June 2014 and the ruling thereof dated 4th July 2014, it was Senior Counsel's contention that there was nothing to appeal against in the Judge's order recusing herself from dealing with the litigation or indeed her refusal to set aside the orders because the application was not for review under Order 45 and the question of appeal not being available does not arise. He emphasized that the germane issue was failure by the respondent to perform the terms of the consent decree. A party who has failed to perform its part of the contract cannot be aided in equity, he contended. He opined that it is burdensome to force the applicant to perform the rescinded contract.

ANALYSIS

28. We have perused the application and the affidavits filed by the parties and have duly considered the rival arguments of both counsel.

29. The application before us is founded on Rule 5(2)(b) of the Rules of this Court. The jurisdiction of this court under Rule 5(2)(b) is original and discretionary. Its exercise is guided by the twin principles which are fairly well settled. An applicant must demonstrate to the satisfaction of the Court firstly, that the appeal or the intended appeal is arguable. An arguable appeal need not be one that must succeed (see **Joseph Gitahi Gachau & Another v. Pioneer Holdings Ltd & 2 Others** (Civil Appeal No. Nai 124 of 2008). Nor does an applicant have to demonstrate a plethora or plurality of arguable points of law to show that the appeal is arguable. Even a solitary arguable point is sufficient.

30. Secondly, an applicant under Rule 5(2)(b) must demonstrate to the satisfaction of the Court that the appeal, if successful, shall be rendered nugatory if stay is not granted. In **Reliance Bank Ltd (in liquidation) v. Norlake Investments Ltd**, this Court stated –

"hitherto this Court has consistently maintained that for an application under Rule 5(2)(b) to succeed, the applicant must satisfy the Court on two matters, namely-

1. ***that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
2. ***that if an order of stay or injunction, as the case may be, is not granted, the appeal or the intended appeal were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."***

31. C.B. Madan JA, as he then was, expounding on Rule 5(2)(b) in **M. M. Butt v. The Rent Restriction Tribunal** (Civil Application No. Nai 6 of 1979) stated:

"... it has been said that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, L.J. in Wilson v. Church (No 2) 12 Ch.1) [1979], 454 at pg 459" in which Cotton L. J. at pg 458 said -

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory."

32. Megarry J., as he then was, followed **Wilson v. Church** (supra) in **Erinford Properties Limited v. Cheshire County Council** [1974] 2 All E.R. 448 at pg 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that Court reverse the Judge's decision. The Court will grant a stay where special circumstances of the case so require, per Lopes, L.J. in **The Attorney General v. Emerson** and Others 24 QB D [1989] 56 at pg 59. The special circumstances in the case were that there was a large amount of rent in dispute between the parties, and the appellant had an undoubted right of appeal.

33. It is important to point out that these twin principles (that the appeal is arguable and that it will be

rendered nugatory if successful if stay or injunction is not granted) are inseparable and both must be demonstrated to the satisfaction of the Court for an application under Rule 5(2)(b) to succeed. If or where only one of the twin principles is established, the application must fail.

34. In **Nairobi Deluxe Service Ltd v. Eric Onyango Ndege** (Civil Application No Nai 64 of 1992) this Court differently constituted)) after referring to the conditions required to be met by an applicant under Rule 5(2)(b) sated that –

"we would like to point out that once these conditions are satisfied, this Court will normally grant an order for stay of execution without making any distinction between money and other decrees."

35. Has the applicant established the twin principles in the instant application? The impugned ruling was delivered on 11th March 2013. A notice of appeal was lodged by the applicant demonstrating its intention to appeal against the whole decision contained in the ruling of the superior court below. Learned Senior Counsel Mr. Ahmednasir informed the court that the applicant has lodged the record of appeal and that the appeal is No.158 of 2014.

36. The applicant contends that the parties entered into an agreement on the terms of the sale of the aforementioned land. Those terms were contained in the consent that gave rise to the consent decree. The applicant contends that it was not open to the Court below to vary the completion date which was a fundamental term of the contract of sale. On the other hand, the respondent contends that once the terms were incorporated in a court decree, it became an order of the Court which the Court could vary by dint of Section 95 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya which states that-

"where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired."

The issue whether the time for completion of the sale of the said land was *"any period fixed or granted by the superior court below"* within the meaning of Section 95 (supra) seems to us a moot point and therefore arguable.

37. Although in **Purcell V. F.C. Trigell Ltd.** [1971] 1 QB 358 (at pg 364), Lord Denning, M. R. in his judgment stated-

"But, even though the order cannot be set aside, there is still a question whether it should be enforced. The Court has always a control over interlocutory orders. It may, in its discretion vary or alter them, even though made originally by consent."

it seems to us that an agreement voluntarily entered into by a vendor and a purchaser containing terms that should govern a sale between them is binding on the parties privy to it and a Court of law ought not to interfere unless there exists a ground to vitiate the agreement or to impeach it on any ground on which a contract may be impeached. Where such ground does not exist, it is debatable whether a court of law can at the invitation of one party alter the terms to the detriment or disadvantage of the other party (see **Huddersfield Banking Co. Ltd v. Henry Lister & Son Ltd** [1895] 2 Ch.D. pg 273 – Lindley L. J. at pg 280.)

38. We agree with Mr. Ahmednasir's submission that the appeal does raise issues of law not least whether the superior court below had jurisdiction to revive the "rescinded" sale between the parties or to alter the terms of the contract between the parties that resulted in a consent decree or to impose new terms. These are issues of law that clearly show that the appeal is arguable.

39. We refrain from delving further into this legal issue because the Bench that shall hear the appeal shall deal with and determine the issues and it is not prudent for us to comment further. Suffice it to state that we have said enough to demonstrate that there is a point of law involved which is arguable. Moreover, the draft memorandum of appeal containing six grounds of appeal does raise several other issues of law

not least of which is whether a Court can rewrite the terms of a contract between parties at the invitation of one party where the other party does object.

40. It was contended by counsel for the respondent that no appeal ensues as the decision contained in the ruling of 4th July, 2014 by the superior court in respect of the applicant's notice of motion dated 16th June 2014 was for review and effectively shut the applicant from appealing when the application was disinclined (in relation to the orders sought, other than the order for recusal of the Judge) because no notice of appeal was given. We observe that the appeal which has now been filed as civil appeal No.158 of 2014 relates to the ruling dated 11th March 2014 made in the respondent's notice of motion dated 30th July 2013. The argument by the respondent's counsel does not in our view hold good.

41. The appeal is already in place and it is our finding that it is arguable and there need not be a plethora of points to demonstrate its arguability as even one point of law is sufficient.

42. If stay is not granted, will the appeal become nugatory in the event that it succeeds? Learned Senior Counsel Mr. Ahmednasir says it will. But learned counsel Mr. Nyachoti says it will not. What is the nature of the transaction and what is at stake? If stay is disinclined, the respondent will proceed with the sale which the applicant states has been rescinded. If this happens, it will entail the performance of the terms of the consent decree on a sale which the applicant contends has ceased to exist. This will in effect mean that the appeal, if successful, will be rendered an exercise in futility. It will be to no avail if the sale will have taken place. **Black's Law Dictionary** (Ninth Edition) defines "nugatory" (adj) as-

"of no force or effect; useless; invalid;"

e.g. the Supreme Court rendered the statute nugatory by declaring it unconstitutional.

43. Clearly, if stay is not granted and the applicant succeeds in the appeal, the appeal will be rendered useless (and of no effect) if sale will have proceeded to completion. In short, the appeal will become nugatory or useless.

DECISION

44. We are satisfied that the applicant has fulfilled the twin principles in this application by showing that the appeal is arguable and that if it succeeds it will be rendered nugatory if stay is not granted.

45. Accordingly, we find merit in the application. We allow it. We grant the applicant orders in terms of prayer 4 of the notice of motion dated 11th April 2014.

46. The costs of the application shall abide the outcome of the appeal now filed and allocated Civil Appeal No.158 of 2014.

Dated and delivered at Nairobi this *28th day of November 2014*.

R. N. NAMBUYE

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR