IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & KIAGE, JJ.A.)

CIVIL APPLICATION NO. NAI. 40 OF 2013

BETWEEN

PRINTING INDUSTRIES LIMITED.……1ST APPLICANT

MULTIPLE INDUSTRIES LIMITED.……..…..2ND APPLICANT

VERSUS

BANK OF BARODA KENYA LIMITED.……..…….RESPONDENT

(Application for stay of any further proceedings in Nairobi HCCC No. 335 of 2008 under Rule 5 (2) (b) of the Court of Appeal Rules pending the filing, hearing and determination of an intended appeal from the Ruling and/or orders of High Court of Kenya at Nairobi, (Havelock, J.) dated 30th January, 2013

in

HCCC. No. 335 of 2008)

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RULING OF THE COURT

This is an application under **rule 5(2) (b)** of the **Court of Appeal Rules** brought by the applicants seeking an order of stay of further proceedings in Nairobi HCCC No. 335 of 2008, pending the hearing and determination of an intended appeal. What gave rise to the application is a ruling delivered on 30th January, 2013 by Havelock, J. vide which he granted the respondent leave to re-amend its defence and include a counterclaim in the sum of **Kshs.52,425,394.25** against the applicants. The applicants were aggrieved by the said decision and filed a notice of appeal.

The application was supported by an affidavit sworn by **Horatius Da Gama Rose,** a director of the second applicant. He deposed that the applicants filed the High Court case on 20th June, 2008 and subsequently amended the plaint on 30th July, 2012. The respondent filed its defence on 10th July, 2008 and subsequently filed an amended defence on 10th August, 2010. Thereafter, parties complied with all requirements respecting discovery and agreed on issues for determination and exchanged documents. The hearing commenced on 20th March, 2012 and 3 witnesses have so far testified on behalf of the applicants (plaintiffs). The suit was fixed for further hearing on 8th October, 2012 when the applicants intended to

call their final witness. However, on 2nd October, 2012 the respondent filed the application seeking leave to re-amend its defence and introduce the aforesaid counterclaim.

The application was opposed by the applicants. The trial court allowed it and the applicants, being aggrieved by the decision, intend to prefer an appeal to this Court.

In his written submissions, **Mr. Kosgey** for the applicants stated that the appeal is arguable in that:

i. ***The learned trial Judge erred and misdirected himself in law in allowing the respondent to re-amend its defence at an advanced stage of the proceedings despite the respondent's failure to adduce any reasons for the inordinate delay in making the proposed re-amendments before the close of pleadings and before the hearing commenced.***

ii. ***That the learned trial Judge erred in law in allowing the respondent to re-amend its defence and introduce a new cause of action in the form of a counterclaim against the applicants.***

iii. ***That the learned Judge erred in law in failing to consider the legal authorities furnished to the court by the applicants providing principles that govern courts in determining whether or not to allow applications seeking leave to amend pleadings at advanced stages of proceedings.***

iv. ***That the learned trial Judge erred and misdirected himself in fact and in law by not appreciating that the conduct of the respondent exhibited gross abuse of the process of court in seeking to re-amend its defence after an inordinate delay thereby occasioning delay and disruption in the administration of justice.***

Regarding arguability of the intended appeal, Mr. Kosgey cited the case of **REPUBLIC v KENYA ANTI CORRUPTION COMMISSION & 2 OTHERS [2009] KLR 31** as well as **KARUTURI NETWORKS LTD & OTHERS v DALY & FIGGIS ADVOCATES [2010] 2 E.A. 205.**

Counsel further submitted that the intended appeal, if successful, will be rendered nugatory unless this application is allowed. He stated that if the application is not granted the respondents will proceed to fix the matter for further hearing, relying on their amended defence and counterclaim, and that would significantly prejudice the rights of the applicants. The applicants would be forced to alter their position and defend the counterclaim and that will occasion significant damage and potential risk of substantial loss.

The respondent opposed the application. **Mr. Murugara**, learned counsel for the respondent, submitted that the intended appeal is not arguable, but even if it was, it has not been demonstrated that the same, if successful, would be rendered nugatory unless the orders sought are granted. Those are the twin principles set out by this Court in a plethora of authorities, among them, **SILVERSTEIN vs CHESONI [2002] 1 EA 296.**

On the first limb, that is, whether the appeal is arguable, counsel submitted that the four grounds that are intended to be raised by the applicants reveal that the trial Judge's exercise of his discretion will be the main contention in the intended appeal. However, it has not been shown that the Judge exercised his discretion in a manner that is not judicial. It is trite law that this Court can only interfere with a trial Judge's discretion if it is demonstrated that the same was not exercised judicially. The respondent's counsel cited the case of **MBOGO & ANOTHER v. SHAH [1968] EA 93,** to buttress his submission on the issue.

Regarding the applicants' contention that they stand to be prejudiced if the orders sought are not granted in that there will be delay in finalization of the High Court case, Mr. Murugara submitted that the applicants are enjoying orders of injunction pending the hearing and determination of the suit and any delay in its finalization works to the detriment of the respondent and not the applicants.

We have considered the written submissions filed by the parties. The jurisdiction of this Court to grant

relief sought under **rule 5(2) (b)** of this **Court's Rules** is not in dispute and the principles governing the same are well settled. In **STANLEY KANGETHE KINYANJUI v TONY KETTER & 2 OTHERS [2013] eKLR,** this Court set out the guiding principles as follows:

> ***"(i) In dealing with rule 5 (2) (b) (applications) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court. See RUBEN & 9 OTHERS v NDERITU & ANOTHER [1989] KLR 365.***

(ii). The discretion of this Court under rule 5(2) (b) to grant stay or injunction is wide and unfettered, provided it is just to do so.

(iii) The Court becomes seized of the matter only after the notice of appeal has been filed under rule 75. HALAI & ANOTHER v THORNTON & TURPIN (1963) LTD [1990] KLR 365.

(iv) In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. DAVID MORTON SILVERSTEIN v ATSANGO CHESONI, Civil Application No. NAI 189 of 2001.

(v) An applicant must satisfy the Court on both the twin principles.

(vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. DAMJI PRAGJI MANDAVIA v SARA LEE HOUSEHOLD & BODYCARE (K) LTD, Civil Application No. NAI 345 of 2004.

(viii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. JOSEPH GITAHI GACHAU & ANOTHER v PIONEER HOLDINGS (A) LTD & 2 OTHERS, Civil Application No. 124 of 2008.

(viii) In considering an application brought under rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. DAMJI PRAGJI (supra).

(ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. RELIANCE BANK LTD v NORFLAKE INVESTMENTS LTD [2002] 1 E.A. 27 at page 232.

(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. INTERNATIONAL LABORATORY FOR RESEARCH ON ANIMAL DISEASES v KINYUA, [1990] KLR 403."

It is in the background of the above principles that we shall consider this application. As earlier stated, the ruling that gave rise to the application was instituted by the respondent seeking leave to further amend its defence and introduce a counterclaim. In a considered ruling, the learned Judge, exercising his discretion, granted the application. He cited the case of **DANIEL MIGWI NJAI v HIGHVIEW FARM LIMITED & ANOTHER, Civil Appeal No. 139 of 1989 (unreported),** where this Court delivered itself thus:

> ***"There is no question that the Court has power, under Order VIA rule 3(1) of the Civil Procedure Rules (as the order and the rule were) to allow an amendment at any stage of the proceedings, on such terms as to costs or otherwise as may be just and under rule 5(1) of the said order for the purpose of determining the real question in controversy between the parties. There is no doubt that an amendment can always be allowed if the interest of justice so requires.***

> ***…. But the power of the Court specifically provides that an amendment may be made at any stage of the proceedings."***

The Court then went on to add:

> ***"The amendment enables the Court to determine the real question in controversy between the parties. We are, therefore, inclined to think that the interest of justice was best served by allowing the application to amend. In any event, the grant of such an amendment is a matter of judicial discretion."***

Looking at the proposed grounds of appeal and the reasoning of the learned Judge in his determination of the application for amendment of pleadings, we entertain considerable doubt whether the appeal is arguable. We say so because the Judge exercised his discretion. The applicants did not demonstrate that in the exercise of its discretion the trial court misdirected itself in some matter and as a result arrived at a wrong decision. See **MBOGO & ANOTHER v SHAH (supra).**

We will say no more regarding arguability of the appeal.

Turning to the second condition that an applicant in a **rule 5 (2) (b)** application has to satisfy, the applicant submitted that:

> ***"…..if the application for stay of proceedings in NAIROBI HCCC No. 335 of 2008 is not allowed, the respondents will undoubtedly proceed to fix the matter for further hearing of that suit against the applicants while relying on their re- amended defence and the trial is likely to proceed on those terms which would significantly prejudice the rights of the applicants in this case."***

The applicants went on to state that if the suit in the High Court proceeds before the determination of the intended appeal, they would be forced to alter their position and defend the counterclaim and thus suffer significant damage and potential risk as to substantial loss.

In our view, the above submissions do not reveal that the intended appeal, if successful, shall be rendered nugatory if the order of stay of further proceedings of the High Court case is not granted. Perhaps the applicants can only argue that they shall have to spend resources in defending the counterclaim. That cannot render their intended appeal nugatory. Whatever loss they stand to suffer, in the event that they succeed in their intended appeal when they have already defended the counterclaim, can be compensated by an award of costs.

The upshot is that we decline to grant stay of further proceedings in Nairobi HCCC No. 335 of 2008 pending hearing and determination of the applicants' intended appeal. The application is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 7th day of November, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

……..……

JUDGE OF APPEAL

P.O. KIAGE

……...……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR