



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & OUKO, J.J.A.)

CIVIL APPLICATION NO. NAI 66 OF 2013 (UR 44/2013)

CMC HOLDINGS LIMITED.....1ST APPLICANT

CMC MOTORS GROUP LIMITED.....2ND APPLICANT

AND

JAGUAR LAND ROVER EXPORTS LIMITED.....RESPONDENT

(An application for an injunction pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Lady Justice Kamau) given on the 19th day of March, 2013

in

HCCC NO. 752 OF 2012

RULING OF THE COURT

CMC Holdings Limited and CMC Motors Group Limited (applicants) have moved this Court by way of the Notice of Motion dated 21st March, 2013 primarily seeking an order of injunction restraining the respondent, **Jaguar Land Rover Exports Limited**, either by itself, assigns, representatives or otherwise howsoever from interfering with the exclusive distributorship agreement between the parties either in terms of the letter dated 26th November, 2012 or in any way further publishing or acting in furtherance of the notices dated 3rd August, 2012 which purported to terminate the Overseas Distributor Agreement (ODA) dated 12th December, 1985 and Importer Agreement dated 1st February, 2009 pending the hearing and determination of an intended appeal against the whole of the ruling and order made by Hon. Lady Justice Kamau on 19th March, 2013. They also seek costs of the application.

The Notice of Motion is premised on the various grounds on its face and supported by the fifty three (53) paragraph affidavit of *Joel Kibe*, the chairman of the 1st applicant sworn on 21st of March 2013.

In order to put this application in clear perspective, a recapitulation of the circumstances leading to this application is necessary:-

On 12th December 1985, the then Cooper Motor Corporation (Kenya) Limited (CMC) which has in the

course of time mutated into the two applicants herein, entered into an agreement with Land Rover Exports Limited, (the respondent). By the said agreement, the applicants were given the franchise to distribute, sell and service the respondent's various brands of motor vehicles outside the United Kingdom. Understandably, the applicants have since established sale and service networks of Land Rover and other selected motor vehicles and parts not just in Kenya but in other countries in the region as well.

The said agreement contained a clause (1)(iii) which stipulated the mode of dispute resolution in case any dispute arose between the parties in the following terms:-

“In the event that any dispute or difference arises between the parties which cannot be settled by them amicably, then the company shall be entitled to require that such dispute or difference be referred to and finally settled by arbitration.....”(Emphasis applied)

This was without a doubt a very important clause because in the normal course of business, disputes are likely to occur and it is in the interest of both parties that the same be resolved in the manner that will be the most expedient and least disruptive to the company business. We shall come to that clause and its import later.

Another important clause for purposes of this ruling is 2(A) which provides for the mode of termination of the agreement by either party who may wish to bring to an end the said business relationship which was otherwise open ended. The said clause provides that the agreement may be ‘terminated by either party giving the other six months prior notice to that effect expiring on any date.’ This is what the parties referred to as the ‘no fault termination clause.’ Other instances when the agreement could be terminated are contained in clause eight (8) but they are not relevant to the present circumstances. This agreement gave exclusivity to the applicant to import, distribute and service the respondent's motor vehicles, the flagship of which was the popular “Land Rover” brand.

The business appears to have flourished unabated without any problems and on 1st February 2009, a second agreement was entered into between the parties, this time on a non-exclusive distributorship of Jaguar vehicles, Jaguar parts and Jaguar accessories. This agreement was for a fixed term of three (3) years ending on 30th January, 2012. In case any party wanted to terminate this agreement, it was required to give the other six (6) months' written notice and under clause 20.5, such a party would not be required to provide reasons for its decision to terminate the said agreement.

According to the applicants, even though the second agreement was supposed to lapse on 31st January 2012, the parties continued their working relationship even after that date as if nothing had happened; but on 3rd August, 2012 the respondent by a letter dated the same date, invoked clause 20.1 of the agreement and gave the applicants six (6) months' notice of termination of the agreement. The agreement was therefore, expected to terminate on 2nd February 2013.

In another letter dated the same day, the respondent wrote to the applicants citing clause 2A of the agreement and gave six (6) months' termination notice of the first agreement. According to that notice which invoked the no fault termination clause, the agreement was similarly supposed to stand terminated on 2nd February, 2013.

According to the applicants, they never accepted these termination notices claiming that they were invalid. Communication doors remained open between the parties and they also continued business as usual, the termination notices notwithstanding. This according to the applicants amounted to a waiver of the termination notices. When the parties failed to settle the termination issue amicably, the applicants sent a notice requesting that the dispute be referred to arbitration.

In the meantime, they also filed, Nairobi HCCC No. 752 of 2012 along with an application requesting for orders of stay and preservation of the status quo pending arbitration. The learned Judge of the High Court (Kamau, J) heard the application and rendered a ruling dated 19th March, 2013 which now forms the subject of this application.

In her considered ruling, the learned Judge made a finding that the High Court had jurisdiction to entertain the matter notwithstanding the arbitration clause in the agreement of the parties. She also made a finding that since the suit before her was based on a contract, the contract would not be wasted if it was not conserved. She declined to grant the preservatory/injunctive orders sought and dismissed the application. The applicants intend to appeal against that ruling, but pending the hearing and determination of the said appeal, they have filed this application under **rule 5(2)(b)** of the **Court of Appeal Rules**.

We appreciate the fact that the subject matter herein is quite substantial and revolves around a business relationship that spans several decades and which also involves substantial investments in terms of capital and other resources. All counsel involved in this matter expended admirable energy and effort in preparing for it and made very incisive and detailed submissions. We are grateful to them for the able articulation of the issues at hand and for the several authorities they presented to us.

We may not be able to make reference to each and every one of them but we have certainly read them and considered them in this ruling.

At the end of the day however, this is an application under **Rule 5(2)(b)** of the **Court of Appeal Rules** and like any other application of similar nature, the applicants need to satisfy the well known twin requirements namely:-

1. ***That the intended appeal is arguable, i.e, that it is not frivolous while bearing in mind that an arguable appeal is not necessarily one that will succeed;***

and

2. ***Secondly, that if the orders sought are not granted, and the appeal succeeds, then the same would be rendered nugatory.***

We should point out however, that the twin principles are conjunctive and not disjunctive.

It is not enough for an applicant to prove either of them. An applicant who expects to benefit from an application under the **rule 5(2)(b)** must prove both limbs. See **Reliance Bank (in liquidation) vs Norlake Investments Ltd, Civil Application No. Nai 98 of 2003** (unreported) and **IL Nwessi & 2 Others vs Wendy Martin, Civil Application No. Nai 291 of 2010 (UR 203/2010)**.

This brings us to the two issues for determination before us. Do the applicants have an arguable appeal and are they entitled to the injunctive/stay orders they so ardently entreat this Court to grant them?

Mr. Ngatia, learned senior counsel for the applicants, submitted that the learned Judge erred when she declined to issue preservatory orders on grounds that a contract was something that could not be wasted and therefore, needed not be preserved. According to the learned counsel, there was nothing to remain static and the respondents would continue trading oblivious of any pending arbitral process.

On the issue of arguability of the appeal, *Mr. Ngatia*, also urged that the reasons for termination were wrong and the applicants would be challenging the termination in the arbitration or in court.

According to *Mr. Ngatia*, the termination was not done under the no fault clause but for other reasons which according to him kept mutating. For instance, at one point, the respondent claimed that there was a competitive tender floated to which the applicants were invited to bid but were unsuccessful hence they lost the franchise. The applicants denied that there was any such tender and that is why they have a quarrel with the letter dated 26th November, 2012 in which the respondent informed the applicants that their application for the franchise was unsuccessful.

The applicants will be asking the Court at the hearing of the appeal to determine whether the termination was pursuant to the no fault clause or after an unsuccessful tendering process.

Learned counsel referred us to several authorities, amongst them this Court's decisions in **Tononoka Steels Limited vs The Eastern and Southern Africa Trade and Development Bank [2000]2 EALR 536**, **Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others, Nairobi Civil Application No. 237 of 2009** and the decision from the Supreme Court of India, **M/s Sundaram Finance Ltd vs M/s Npc India Ltd, Supreme Court of India (AIR 1999 SC 565)**.

These cases dealt with the issue of jurisdiction ouster clauses in arbitration agreements. Counsel urged us to find that the High Court has jurisdiction to deal with their dispute. We do not wish to go into the depth of this issue as we believe it is one of the issues to be canvassed before the bench that will hear the appeal.

On its part, the respondent opposed the application through the replying affidavit of *Mr. Nigel Clarke*, the respondent's Operations Director of Sub-Saharan Africa based in South Africa, sworn on 8th April, 2013. According to Mr. Clarke, the contract between the parties lapsed upon expiry of the notice duly issued in accordance with the contract. He depones that the injunction sought has already been overtaken by events as the respondent had moved on and signed other contracts with 3rd parties who are not parties to this application or the suit.

In paragraph 8 of the said affidavit, he has explained that the contested termination of both contracts were pursuant to the no fault clause and the due notice of six (6) months was given. He has denied that the termination was pursuant to the remedial notices given to the applicant. Expounding on the said deponements, *Mr. Njogu*, learned counsel for the respondent, urged that the underlying issue in this entire matter is the issue of termination of the two contracts. He submitted that both contracts were terminated pursuant to the no fault clauses in the contract agreements and there were therefore no reasons that needed to be given before the respondent could invoke its right to terminate the said contracts. On that ground alone, he argued, there was no arguable appeal before the Court.

He submitted that the interim injunction was discharged by the High Court upon dismissal of the applicants' application and so in the intervening period the respondent had lawfully entered into agreements with other parties and that granting an injunction at this point would mean reviving a contractual relationship that does not even exist.

On his proposition, learned counsel referred us to the case of **Giant Holdings Limited vs Kenya Airports Authority (Civil Application No. 193 of 2005 and 139 of 2007)**.

It was the learned counsel's submission that the prayer of injunction has already been overtaken by events. Furthermore, the respondent operates from outside this Court's Jurisdiction and it would not be possible for this Court to order them to be supplying the motor vehicles in question to the applicants as this Court cannot supervise the respondents operations outside its jurisdiction.

The other important point raised is that the injunction sought is meant to preserve the subject matter – in this case the contract while the parties pursue the arbitral process as provided for in their agreement.

According to *Mr. Njogu*, however, under the agreement, it is only the respondent who can initiate the arbitral process. He drew our attention to clause

1.I (iii) which clearly states,

“In the event any dispute or difference arises between the parties which cannot be settled by them amicably then the company shall be entitled to require that such dispute or difference be referred to and finally settled by arbitration...”

The “company” described in the agreement is the respondent and the description does not extend to the applicant which is referred to in the agreement as the “Distributor”.

If this then is the position, and it is an issue we must eschew from determining for purposes of this

application, then it would mean that if preservative orders of any kind were to be issued by this Court, the same would be open ended as the respondent has no intention of referring the matter to arbitration.

Several other pertinent issues were raised by both parties. As we acknowledge elsewhere in this ruling, it is evident that a lot of meticulous work, research and preparedness went into this application. We cannot discuss all those issues but it will not be for reasons that we have not given them due consideration, or not found them helpful. We shall leave those issues for articulation before the bench that will be seized of the appeal.

As far as this motion is concerned, we have considered all the material placed before us which include the very able submissions of all counsel on record. On the issue of arguability, we find that it is not disputed that the interim order of injunction granted earlier by the High Court was discharged upon delivery of the impugned ruling. There being no stay, the respondent has moved on with its business lawfully as there was no legal impediment placed on its way. The question that therefore begs an answer is,

“Is there anything to injunct or preserve?”

we find this case in all fours with the Giant Holdings Limited case (supra) where this Court pronounced itself as follows:-

“Since the relationship of the parties was contractual in nature, it follows that the contract was terminated in accordance with the notice of termination from the date the superior court dismissed the application for interlocutory injunction and implicitly discharging the subsisting interim orders. The contract remains terminated in law until a court declares otherwise.

It means therefore, that there is no impediment to entering into a similar agreement with any other party. Thus an order of injunction to restrain KAA from granting an advertising concession to any other party would not only have no foundation but also it would have the effect of reviving a contractual relationship which does not now exist.” (Emphasis ours)

It would not in our view be tenable to grant the order of injunction sought.

The primordial issue for determination in the appeal is whether the contract was properly or lawfully terminated. Emphasis has been laid on whether the termination was based on the no fault clause, or on failure to meet remedial measures required of the applicant by the respondent; or if it was for failure to qualify in a competitive tender. Did the respondent waive the termination notice when they continued to trade as usual even after expiry of the termination notice? This has to be considered *vis a vis* clause 1(D) of the agreement. But again, that will be for the bench sitting on the appeal to determine as we cannot make any definitive findings at this stage.

We have considered all the issues raised on the limb of the arguability of the appeal. Our view of the matter is that we are not persuaded that the applicant has an arguable appeal which can give us the basis for granting the orders sought in this application.

That being so, and since the twin principles are conjunctive, we need not go into the nugatory aspect of the appeal.

Suffice it to say however, that the applicant is still at liberty to trade in and source similar vehicles from other sources and utilize its wide motor vehicle servicing network in the region to mitigate the loss it might suffer which *Mr. Ngatia* graphically described as *“loss beyond any mathematical articulation by any standard.”*

In view of the foregoing, we find that this application must fail. The same is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 7th day of June, 2013.

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR