IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, OUKO & J. MOHAMMED (JJ.A.)

CIVIL APPLICATION NO. NAI. 83 OF 2013

BETWEEN

FTG HOLLAND …… APPLICANT

VERSUS

AFAPACK ENTERPRISE LIMITED …… 1ST RESPONDENT

AFA CHEMICALS LIMITED ……..…..…. 2ND RESPONDENT

(Being an application for stay of execution pending the lodgment, hearing and determination of an intended appeal from the Ruling and Orders (Hon. G.K. Kimondo, J.) at High Court, Nairobi dated 19th March, 2013

in

H.C.C.C. No. 352 of 2012)

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RULING OF THE COURT

The applicant herein is a limited liability company incorporated in the Netherlands. Sometimes in May, 2012 the applicant filed a suit in the High Court against the respondents claiming a sum of **€314,660.20** on account of unpaid invoices for goods supplied to the respondents. The respondents filed a statement of defence and counterclaim. They denied that they were indebted to the applicant in the claimed sum and by way of a counterclaim stated that they had overpaid the applicant in the sum of **€118,731.50** which they sought to recover from the applicant.

On 20th July, 2012 the respondents filed an application under **Order 39 rules 1 (b) and 2** of the **Civil Procedure Rules** and **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** seeking orders that:

> ***"(1) The court issues warrant of arrest to the Directors of FTG Holland, the plaintiff and the defendant in the counterclaim/respondent, to show cause why the plaintiff and defendant in the counterclaim/respondent should not furnish security in the sum of €118,731.50:***

a. ***By depositing the same with the honourable court; or***
b. ***By way of bond or guarantee issued by a Kenyan bank acceptable and/or approved by this***

Honourable Court.

2. ***Costs of this application be provided for."***

The application was premised on grounds, *inter alia*, that the applicant is a foreign company with no known assets in Kenya and there was a real likelihood that in the event the respondents succeeded in their counterclaim they would be obstructed in execution of any decree against the applicant.

The respondents' application was supported by an affidavit sworn by one **Aleem Fazal,** a director of the respondents. Apart from making general depositions regarding business transactions between the parties, at paragraph 12 of his supporting affidavit, Mr. Fazal deposed as follows:

"12. That I am advised by Mr. Daniel Achach, Advocate, the Applicant's advocate on record for the Applicant, (sic) which advice I verily believe to be sound that the Respondent, being a foreign company, is likely to leave the jurisdiction of this Honourable Court and obstruct and delay execution of any decree that the applicant may get from this Honourable Court on the counterclaim."

In his ruling, Kimondo, J. stated, *inter alia*:

"7. As a general rule it is for the defendant to establish bona fide defence. In the present case, prima facie, the defendant has set up a counterclaim for €118,731.50 that seems to be bona fide. The plaintiff has not filed an affidavit to controvert the averments in the supporting affidavit. I am alive to the notion that the court should execute a delicate balancing act in order not to stifle the plaintiff's claim or prejudge the rights of the parties. But in a matter of this nature, it would have been incumbent upon the plaintiff company, which is domiciled abroad, to demonstrate its means to meet the counterclaim or costs. ….The apprehensions expressed by the defendants that the plaintiff may abscond or not meet the counterclaim and costs are not then far-fetched or ill founded. The burden of proof of course rests with the applicant……

8. The defendants have moved the court under Order 39 rule 1 for arrest of the plaintiff's directors to show cause why they should not furnish security. It was open to the defendants to move the court under Rule 5 for an order to furnish security. Under both rules the defendants required to show that the plaintiff has absconded, or about to abscond from local limits of the court, or disposed of its property with intent to delay or obstruct execution of a decree. But considering the plaintiff is domiciled abroad and has no attachable assets in Kenya, the defendants have laid a basis for furnishing of security but not for the arrest of the unnamed directors of the plaintiff. In the interest of justice, I would then avoid technicalities and order for furnishing of security as known under Order 39 rule 5 of the Civil Procedure Rules, 2010. I do so because the motion is also presented under sections 1A, 1B and 3A of the Civil Procedure Act. This is in tandem with the overriding objective of the court to do substantial justice without undue regard to technicalities."

Having so held, the learned judge ordered the applicant to furnish security in the sum of €118,731.50 or the equivalent thereof in Kenya shillings by either depositing the sum in court or by a bond or bank guarantee issued by a reputable bank in Kenya. In default, the applicant's movable properties to the value of said sum was ordered to be attached and held to the order of the court at the applicant's expense until conclusion of the suit. The applicant was also ordered to bear the costs of the application.

Being dissatisfied with the said ruling, the applicant filed a notice of appeal to this Court and also brought an application under **Rule 5 (2) (b)** of this **Court's Rules,** seeking stay of execution of the orders issued by the trial court, pending hearing and determination of an intended appeal.

The usual grounds in such an application were advanced, that is, the applicant's intended appeal is arguable and that the intended appeal will be rendered nugatory unless stay of execution is granted. The application was supported by an affidavit sworn by **Hans Vonk**, the Managing Director of the applicant.

Arguing the first limb of the twin grounds aforesaid, **Mr. Mwangi**, learned counsel for the applicant, submitted that the learned trial judge fundamentally misdirected himself by applying principles that relate to an application for security for costs under **Order 26** of the **Civil Procedure Rules** instead of the principles applicable in an application for arrest and attachment before judgment under **Order 39 rule 1** which was before the court. Counsel stated that the respondents had not satisfied the Court that the applicant was intending to leave the jurisdiction of the court or act in any other manner likely to obstruct or delay execution of any decree that the respondents were hoping to get from the High Court. But even if the learned judge treated the respondents' application before him as one for security for costs, which was not the case, Mr. Mwangi added, the respondents' costs could not be equated to the value of their counterclaim.

Regarding the second condition which the applicant had to satisfy, counsel argued that unless the order sought is granted, the intended appeal will be rendered nugatory since the amount of security ordered is a colossal sum, the payment of which may severely damage the applicant's business. Further, if the security ordered is not provided, the applicant's goods will be attached and its business operations in Kenya may ground to a halt and thus render it impossible to continue prosecuting its appeal.

Opposing the application, **Mr. Achach,** learned counsel for the respondents, contended that the intended appeal is not arguable. He stated that the applicant did not file a replying affidavit to the respondents' application and thus failed to controvert the respondents' contention that it had no attachable assets in Kenya. Counsel defended the trial judge's exercise of discretion to order provision of security, saying that the learned judge applied the correct principles. Mr. Achach further submitted that the intended appeal cannot be rendered nugatory if stay is not granted. In the event that the appeal is successful, counsel submitted, the amount ordered to be deposited in court as security will be refunded to the applicant. He added that the respondents are in a position to pay for any loss the applicant may suffer in the event that any of its perishable goods are attached for failure to provide security if the appeal is successful.

Both parties filed lists of authorities and made brief submissions on the same.

We have already set out the conditions which an applicant must satisfy in an application of this nature. In order to demonstrate that an appeal is arguable, the applicant needs to show the Court that at least one of the intended grounds of appeal is not frivolous. An arguable ground is not one which must succeed. It is one which is plausible. See **RELIANCE BANK LIMITED vs. NORLAKE INVESTMENTS LIMITED [2002] 1 EA 227.**

The application that was before the trial court was under **Order 39 Rules 1(b)** and **2** of the **Civil Procedure Rules** and the respondents had specifically asked the court to issue warrants of arrest against the directors of the applicant to show cause why the applicant should not furnish security in the sum of €118,731.50.

In **KURIA KANYOKO t/a AMIGOS BAR & RESTAURANT vs. MOSES KINUTHIA NDERU & OTHERS (1988) 2 KAR 126**, this Court stated that:

> ***"The burden of showing the appellant had disposed of his property or moved them from the court's jurisdiction or was about to abscond in either case with the object of defeating any decree that may be passed against him lay on the respondents."***

We think that it is an arguable ground whether the respondent satisfied the requirements for grant of the orders which they had sought.

Another arguable ground is whether it was right for the trial judge to treat the respondents' application which was clearly expressed as seeking an order for arrest and attachment before judgment under **Order 39 rule 1** as if it was one for furnishing of security under **Order 39 rule 5.**

We have said enough to demonstrate that the applicant's appeal is arguable.

As to whether the intended appeal may be rendered infructuous unless the order of stay is granted, we agree that the amount of security required to be provided is colossal and payment of the same may occasion severe hardship to the applicant's operations. In **RELIANCE BANK vs. NORLAKE INVESTMENTS LIMITED (supra),** this Court held that the factors that could render the success of an appeal nugatory had to be considered within the circumstances of each particular case.

In the application before us we are aware that the respondents' claim of €118,731.50 (which we were told is about Kshs.13 Million) has not yet crystallized. It is no more than an ordinary claim at its best. We do not therefore think that there is any basis for imposing any condition in granting the order of stay of execution as prayed by the applicant.

For the aforesaid reasons we grant the applicant's application together with costs against the respondents.

Dated and delivered at Nairobi this 20th day of September, 2013.

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

…….……

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/dkm