IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE - MAKHANDIA & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 374 OF 2019

BETWEEN

ATHI RIVER STEEL PLANT LIMITED.....APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO.....1ST RESPONDENT

COMMERCIAL BANK OF AFRICA LIMITED.....2ND RESPONDENT

KCB BANK OF KENYA LIMITED.....3RD RESPONDENT

BANK OF AFRICA LIMITED.....4TH RESPONDENT

I & M BANK LIMITED.....5TH RESPONDNET

(Being an application for an order of injunction under Rule 5(2)(b) of the Court of Appeal Rules pending the hearing and determination of an appeal from the ruling and orders of the High Court of Kenya at Machakos (Kemei, J.) dated 26th September, 2019 in Insolvency Cause No. 16 of 2018)

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RULING OF THE COURT

On diverse dates between 2010 and 2015, the 2nd - 5th respondents advanced loan facilities to the applicant, which were secured by debentures. It would appear that subsequently the applicant defaulted in repayment causing the 2nd -5th respondents to appoint the 1st respondent on 18th May, 2018 as a receiver and manager of the applicant.

It is the receivership and appointment of the 1st respondent which provoked the applicant to institute High Court Insolvency Cause No. 16 of 2018 challenging both as unlawful. According to the applicant, the appointment was not only made under a non-existent

statute, the repealed Companies Act, but was also not recognized in the current applicable law, the Insolvency Act, 2015. What was more, the applicant alleged that contrary to the provisions of the Insolvency Act, the 1st respondent was not running the applicant as a going concern but had instead shut down its production and stopped sales. As far as the applicant was concerned, the respondents conduct was calculated to ground it and the sale of its assets at an undervalue.

Towards that end, the applicant, in a motion dated 20th July, 2018, sought a number of interim and final orders, including an injunction to restrain the respondents from selling and/or disposing of the applicant's assets; and an injunction restraining the 1st respondent from acting as the receiver/manager of the applicant.

In response, the respondents contended that as at June, 2017, the applicant was indebted to them to the tune of over 6.45 billion; that due to the applicant's default, the respondents' were left with no option but to appoint the receiver manager; and that the appointment was above board, done in accordance with the debentures.

Kemei, J. by a ruling dated 26th September, 2019 found that the 1st respondent's appointment was in line with the debentures and that there was no evidence of the 1st respondent disposing of the applicant's assets. In the end, save for directing that the applicant's board of directors were at liberty to propose a voluntary arrangement with the applicant's creditors, the learned Judge dismissed the other prayers.

Aggrieved by this, the applicant instituted the instant motion for an interim injunction under **Rule 5(2)(b)** of this Court's Rules; to restrain the respondents, whether by themselves or their agents, from disposing of or alienating its properties, equipment, assets or stock of any nature, pending the hearing and determination of the appeal, Civil Appeal No. 592 of 2019, against the impugned ruling.

The applicant argued that the appeal raised arguable points as set out in the memorandum of appeal; and that there was real and imminent danger of its assets, valued at over Kshs.10 billion being disposed of by the respondents thereby rendering the appeal nugatory. Further, the applicant would be deprived of its property through an unlawful process and invalid debentures. In any event, the applicant urged that any prejudice which may be occasioned to the respondents on account of the injunction could be compensated by way of damages.

On the respondents' part, it was contended that the applicant did not deserve the injunctive relief since, firstly, it had admitted having defaulted in its loan repayment obligations. Moreover, the respondents were of the view that issuance of the injunction would inflict greater hardship to them than the applicant; that the 2nd respondent had already invested over 1.24 billion to revive the operations in the applicant's steel plant and therefore an injunction would bring the revived operations to a halt.

Secondly, they have argued that the appeal was frivolous for the reason that the applicant's claim was based on a misconception of the law; that is, that the 2nd – 5th respondents could not appoint the 1st respondent as a receiver as had been agreed by the parties in the debentures.

In order for this Court to exercise its discretionary jurisdiction under **Rule 5 (2) (b),** the applicant should satisfy us, firstly, that the appeal is arguable and, secondly, that the appeal, if successful, would be rendered nugatory unless the injunction is granted. See **Juanita Adhiambo Otieno (Suing on behalf of the Estate of Solomon Ochieng Oyoko (Deceased)) vs. Martin Ouma Okumu & 2 others** [2021] eKLR

Without making definitive findings on the merits of the appeal, we are doubtful of its arguability. The applicant has not disputed the fact that it owed the 2nd - 5th respondents colossal amounts of money in banking facility, just as it has not denied defaulting in the repayment. See **Bio Corn Products (EPZ) Ltd vs. Diamond Trust Bank Kenya Ltd**. [2020] eKLR. Further, the applicant did not deny that the debentures in issue were the securities for the loan facilities.

Equally, we are not satisfied that the applicant has demonstrated the nugatory aspect. The receivership and appointment of the 1st respondent took place on 18th May, 2018. The respondents have averred, without rebuttal, that a lot of restructuring has been undertaken. Besides, the injunction sought, if granted, would have a mandatory effect of reversing the receivership of the applicant and ultimately disposing of the appeal. We are not prepared to take that route at this stage. See **African Safari Club Limited vs. Commissioner of Police & 6 others** [2013] eKLR. In the circumstances of this case, it would be prudent for the parties to

pursue the determination of the appeal, Civil Appeal No. 592 of 2019.

Accordingly, we find that the motion dated 28th November, 2019 lacks merit and is hereby dismissed. Costs shall abide by the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR