Case Number:	Civil Application Nai 158 of 2015 (UR 128/15)
Date Delivered:	04 Mar 2016
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Alnashir Ramazanali Magan Visram, George Benedict Maina Kariuki, Jamila Mohammed
Citation:	Gilgil Distributors Limited & 2 others v Kenya Breweries Limited & 2 others [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Case 451 of 2013
Case Outcome:	Application Allowed.
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G. B. M. KARIUKI & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI 158 OF 2015 (UR 128/15)

BETWEEN

GILGIL DISTRIBUTORS LIMITED …….……..... 1ST APPLICANT

VINCENT KARIUKI MBURU ……..……..……..... 2ND APPLICANT

LEAH WANGUI MBURU ……..…….. 3RD APPLICANT

AND

KENYA BREWERIES LIMITED ……..……..... 1ST RESPONDENT

UDV (KENYA) LIMITED ……..……..... 2ND RESPONDENT

BARCLAYS BANK OF KENYA LIMITED ……..……..... 3RD RESPONDENT

(An application for an injunction and stay of proceedings pending the filing, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Milimani, Nairobi (Kamau, J.) dated 30th January, 2015

in

H.C. C. C. No. 451 of 2013)

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RULING OF THE COURT

1. Before us is a notice of motion filed under ***Rule 5 (2) (b)*** of the **Court of Appeal Rules** (the Rules) wherein the applicants' seek *inter alia*:-

(i) A temporary injunction restraining the 3rd respondent by itself, agents, servants, employees or otherwise howsoever from advertising for sale, selling, alienating or in any other manner interfering with all properties known as Nyandarua/ Gilgil West/394, 395 and 396, Nyahururu Municipality Blocks 6/344, 5/345 and 4/7 (suit properties) pending the hearing and determination of the intended appeal.

2. The gravamen of the application is that the 1st applicant has been carrying out the business of distributing the 1st and 2nd respondents' brands of alcoholic and non-alcoholic beverages within designated areas since the year 1986. The said relationship was governed by distribution agreements extended from time to time. Pursuant to distribution agreements dated 1st October, 2009 the 1st applicant obtained a bank guarantee dated 30th January, 2012 from the 3rd respondent in favour of the 1st and 2nd respondents for the sum of Kshs.20,000,000/= to secure payments for products supplied on credit to the 1st applicant. The guarantee together with other financial facilities offered to the 1st applicant by the 3rd respondent were secured by charges over the suit properties.

3. Sometime in January, 2012 the 1st respondent began procuring the 1st applicant's services to transport empty bottles from its Kisumu depot to its Nairobi depot. The arrangement was on need basis and the parties continued with the same until January, 2013 when the 1st respondent terminated the arrangement, claiming that it had incurred huge losses arising from the 1st applicant's negligence in not delivering all the bottles.

4. The 1st applicant denied any liability on its part. Subsequently, the 1st and 2nd respondents begun reducing supply of their products to the 1st applicant under the guise that the 1st applicant needed to sort out the issue of lost bottles. Ultimately, in June, 2013 the 1st and 2nd respondents' stopped supplying products to the 1st applicant. At that time, the 1st applicant agreed to pay for the lost bottles in installments on condition that the 1st and 2nd respondents would resume supply of their products. However, according to the 1st applicant, the 2nd and 3rd respondents did not resume the supply and instead converted any monies paid by the 1st applicant in its account for supply of products towards payment of the bottles.

5. On 10th October, 2013 the 1st applicant learnt that the 1st and 2nd respondents by a letter dated 9th October, 2013 to the 3rd respondent had recalled and sought liquidation of the guarantee on the ground that the 1st applicant had defaulted in paying for products worth Kshs.20,286,612/=. By a letter and email dated 10th October, 2013 the 1st applicant informed the 3rd respondent that contrary to the 1st and 2nd respondents' allegations there was no outstanding amount in its distribution account which was the subject of the guarantee. It advised the 3rd applicant not to liquidate the guarantee.

6. According to the 1st applicant, the 3rd respondent was non-committal on the issue causing it to file a suit in the High Court and an interlocutory application dated 15th October, 2013 under certificate of urgency seeking:-

(i) An injunction be issued restraining the defendants' (respondents') jointly and severally by themselves, agents, servants, employees or otherwise howsoever from recalling, liquidating, paying and/or utilizing the proceeds of the Bank Guarantee No. 0770GGU120320001 issued to the 1st and 2nd defendants by Barclays Bank of Kenya on behalf of the plaintiff (1st applicant), pending the hearing and determination of the application.

(ii) A permanent injunction be issued restraining the 3rd defendant from charging any interest on the plaintiffs account in respect of the Bank Guarantee No. 0770GGU120320001 and/or interfering in any way with the plaintiff properties issued to the 3rd defendant as security for the Bank

Guarantee pending the hearing and determination of the application.

(iii) A permanent injunction be issued restraining the defendants jointly and severally by themselves, agents, servants, employees or otherwise howsoever from refusing to supply the plaintiff with sufficient and reasonable brands/stock for the plaintiff's operations and/or in any way terminating and/or breaching the distributorship agreement between them and the plaintiff pending the hearing and determination of the application.

(iv) An injunction be issued restraining the defendants jointly and severally by themselves, agents, servants, employees or otherwise howsoever from recalling, liquidating, paying and/or utilizing the proceeds of the Bank Guarantee No. 0770GGU120320001 issued to the 1st and 2nd defendants by Barclays Bank on the behalf of the plaintiff pending the hearing and determination of the suit.

(v) A permanent injunction be issued restraining the 3rd defendant from charging any interest on the plaintiffs account in respect of the Bank Guarantee No. 0770GGU120320001 and/or interfering in any way with the plaintiff properties issued to the 3rd defendant as security for the Bank Guarantee pending the hearing and determination of the suit.

(vi) A permanent injunction be issued restraining the defendants jointly and severally by themselves, agents, servants, employees or otherwise howsoever from refusing to supply the plaintiff with sufficient and reasonable brands/stock for the plaintiff's operations and/or in any way terminating and/or breaching the distributorship agreement between them and the plaintiff pending the hearing and determination of the suit.

7. Upon considering the application exparte the learned Judge (Kamau, J.) ordered that status quo as at 22nd October, 2013 be maintained pending interpartes hearing of the application. It appears that the guarantee was liquidated and paid to the 1st and 2nd respondents on 11th October, 2013 a fact which the applicants maintained they were unaware of at the time the suit was filed and the orders of status quo were issued. Thereafter, the 1st applicant was served with a statutory notice dated 17th February, 2014 for sale of the suit properties for an alleged sum of Kshs.60,028,381.10/= owing to the 3rd respondent. This instigated the applicants to file another interlocutory application dated 14th July, 2014 seeking *inter alia:-*

(i) A temporary injunction be issued restraining the 3rd defendant (3rd respondent) by itself, agents, servants, employees or otherwise howsoever from advertising for sale, selling, alienating or in any manner interfering with all the properties known as Titles Nos. Nyandarua/ Gilgil West/394, 395 and 396, Nyahururu Municipality Blocks 6/344, 6/345 and 4/7 pending the hearing and determination of the suit.

The learned Judge considered the two applications together and by a ruling dated 30th January, 2015 dismissed the same on the ground that the applicants' had not established a prima facie case

warranting the orders sought. It is that ruling that is the subject of the intended appeal.

8. Turning back to the application before us, the applicants have outlined several grounds in support of the same, namely that the presentment and payment of the bank guarantee was illegal and fraudulent; that statutory notice of sale of the suit properties dated 18th March, 2015 issued by the 3rd respondent followed the fraudulent presentment and payment of the bank guarantee hence unlawful; that the said notice was issued contrary to ***section 90*** of the Land Act, 2012; that, in the event that suit properties are sold pursuant to the said notice the applicants would suffer irreparable loss since the 1st and 2nd respondents' liability under the distribution agreements is limited to the cost of products supplied which is lower than the amount claimed in the statutory notice; that the 2nd and 3rd applicants would be denied the right to property contrary to ***section 40*** of the Constitution without being heard; and that the issuance of the statutory notice was deliberately intended to steal a match from the 1st applicant.

9. In opposition, the 3rd respondent filed an affidavit sworn by its Corporate Recoveries Manager, M/s Anne Mbatha. She deposed that the 3rd respondent had in the years 2010 and 2012 extended banking facilities in the form of overdrafts, loans and bank guarantees to the 1st applicant to finance its working capital. The facilities were secured by various charges over the 2nd and 3rd respondents' properties, and that the 3rd respondent acted lawfully in honouring the terms of the guarantee.

10. M/s Mbatha deposed that following the service of the statutory notice dated 17th February, 2014, the applicants and other guarantors made a proposal to dispose of one of the charged properties in part payment of the outstanding amount. Although the 3rd respondent accepted the same, the 1st applicant's account was still in default, hence the 3rd respondent issued a statutory notice dated 18th March, 2015. She stated that the amount owing is made up of an overdraft facility of Kshs.12,000,000/= and the guarantee.

11. At the hearing of the application, Mr. Ochieng held brief for Mr. Agwara for the applicants, while Mr. P. M. Gachuhi appeared for the 1st and 2nd respondents and Mr. J. M. Thiga appeared for the 3rd respondent.

12. Mr. Ochieng reiterated the grounds in support of the application stated on the body of the application, submitting that the applicants' had an arguable appeal. He argued that the 3rd respondent hurriedly paid off the guarantee without ascertaining the genuineness of the claim. He cited the United States District Court case of ***Dynamics Corporation of America -vs- The Citizens and Southern National Bank 356 F. Supp. 991 (1973)***. Mr. Ochieng argued that no prejudice would be occasioned on the respondents if the injunction is granted. On the other hand, if the properties are sold, the 2nd and 3rd applicants would lose their only source of income. He urged the court to allow the application.

13. Mr. Gachuhi argued that the guarantee had been discharged since the amount thereunder had been paid to the 1st and 2nd respondents on 11th October, 2013. He submitted that no orders were sought as against the 1st and 2nd respondent and urged for the dismissal of the application.

14. According to Mr. Thiga, the guarantee also covered the transactions relating to the empty bottles. He submitted that the 1st applicant authorized the 3rd respondent to pay any claim under the guarantee which it did. Placing reliance on the decision of ***Maithya -vs- Housing Finance Co & Another (2003) 1EA 133*** he argued that the issue of irreparable loss could not arise in this case because the applicants had offered the suit properties as security for a commercial loan. Mr. Thiga further submitted that pursuant to ***section 91(4)(a)*** of the Land Registration Act, 2012 the 3rd applicant is not suited to bring proceedings in respect of two of the suit properties namely Nyahururu Municipality Block 6/433 and Nakuru Municipality Block 4/7 which are jointly owned by her and one Martin Giathi Mburu who is not a party to the proceedings. He urged the Court to dismiss the application.

15. The jurisdiction of this Court under ***Rule 5 (2) (b)*** of the Rules is original and discretionary. Githinji, J.A reiterated this fact in ***Equity Bank Limited -vs- West Link Mbo Limited [2013] eKLR*** wherein he stated that:

"It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance….

It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

16. We have considered the pleadings filed before this Court as well as the rival submissions of the parties. In an application under this rule the applicants ought to establish two twin principles before the court can exercise its discretion in their favour. In ***Patrick Mweu Musimba -vs- Richard N. Kalembe Ndile & 3 Others [2013] eKLR*** this Court set out the twin principles as follows;

"The law applicable in respect of applications under Rule 5(2)(b) of the Court of Appeal Rules is well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which such discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective. Emphasis added.

17. In considering whether the intended appeal is arguable, we remind ourselves that an arguable appeal is not necessarily one that will succeed, but one that raises an issue that should be argued before the Court. This was the holding of the court in ***Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR*** where it rendered itself in the following manner:

"vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised....;

vii) 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....;"

18. Bearing in mind that we must not make definitive or final findings of either fact or law at this stage as doing so may embarrass the ultimate hearing of the main appeal we find that the intended appeal is arguable. Whether the 3rd respondent acted lawfully in paying out the guarantee, which according to the applicants did not secure transactions relating to 'empty bottles' is a major issue.

19. Secondly, it is the payment of the guarantee as admitted by the 3rd respondent which caused the 1st applicant's account to be in default. Whether or not the 3rd respondent was entitled to levy interest on the 1st applicant's account and issue statutory notices for sale of the suit properties on the basis of the presentment and payment of the guarantee is also an arguable point.

20. Finally, in determining the nugatory aspect, we remind ourselves that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See ***Reliance Bank Ltd -vs- Norlake Investments Limited (2000) 1 EA 227.***

21. The applicants' claim that the statutory notice is based on the illegal and fraudulent presentment and payment of the guarantee; the sale of the suit properties would cause them to lose their homes and livelihoods; the 1st and 2nd respondents liability is limited to the value of the purchase order which is way below the amount claimed by the 3rd respondent in the statutory notice. On the other hand, the 3rd respondent claims it is entitled to exercise it power of statutory sale since the 1st applicant's account is in default. Taking into consideration the foregoing we find that balance tilts in favour of the applicants in that unless the injunction sought is granted, the suit properties which are the substratum of the intended appeal will be sold by the 3rd respondent to the detriment of the 1st applicant rendering the appeal nugatory.

22. Consequently, we find that the application dated 11th June, 2015 has merit and is hereby allowed in terms of **prayer (c)** thereof. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 4th day of March, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR