REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Ouko SCJJ)

PETITION (APPLICATION) NO. E012 OF 2023

AND

APPLICATION NO. E017 OF 2023

-BETWEEN-

DARI LIMITED ..... 1ST APPLICANT

RAPHAEL TUJU ..... 2ND APPLICANT

MANO TUJU ..... 3RD APPLICANT

ALMA TUJU ..... 4TH APPLICANT

YMA TUJU ..... 5TH APPLICANT

S.A.M COMPANY LIMITED ..... 6TH APPLICANT

VERSUS

EAST AFRICAN DEVELOPMENT BANK ..... RESPONDENT

Being applications for Conservatory Orders and to strike out supplementary affidavits

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Representation:

Paul Muite, SC and Mr. Nyamodi for the Applicants
(*V. A. Nyamodi & Co. Advocates*)

Prof Githu Muigai SC and Mr. Wakhisi for the Respondent
(*Mohammed Muigai LLP*)

RULING OF THE COURT

[1] This ruling will dispose of three applications that are before the Court. The first is by the applicants who seek conservatory orders, while the other two are by the respondent and seek to strike out the applicants' supplementary affidavits sworn on 12th June 2023 by Raphael Tuju, Amos Oketch and Edward Kenneth Okundi. The correlation of the applications, as will be seen, has necessitated a consolidated determination.

a) Petition (Application) No. E012 of 2023

[2] In a Motion by the applicants dated 25th April 2023, and filed on 26th April 2023 pursuant to Sections 21 and 24 of the Supreme Court Act, 2011 and Rules 31 and 32 of the Supreme Court Rules, 2020, the applicants seek amongst other orders:

1. ***THAT** this Honourable Court be pleased to issue conservatory orders staying the execution of the judgment dated 20th April, 2023 in **Civil Appeal No.70 of 2020: Dari Limited and 5 Others -versus- East African Development Bank** pending the hearing and determination of this Appeal.*
2. ***THAT** this Honourable Court be pleased to issue a stay of the following proceedings pending the hearing and determination of this Appeal:*
    - *(i) Milimani High Court Commercial Cause No. E469 of 2019 between Dari Limited & 5 others vs. EADB & 2 others.*
    - *(ii) Milimani High Court Commercial Insolvency Cause No. E001, E002, E003, E004 all of 2020; Raphael Tuju, Yma Tuju, Alma Tuju, Mano Tuju -vs- East African Development Bank.*
    - *(iii) Enforcement proceedings of the notice of appointment of receivers and managers dated 23rd December 2019,*

appointing George Weru and Muniu Thoithi as Receiver Managers of Dari Limited.

(iv) *Any enforcement proceedings emanating from the Facility Agreement of 10th April, 2015.*

3. ***THAT*** *this Honourable Court be pleased to grant such other appropriate relief as it may deem fit to give effect to the Orders sought herein; and*

4. ***THAT*** *the costs of this application be provided for.*

[3] The application is supported by the 2nd applicant's affidavit sworn on 25th April 2023; and written submissions dated 25th April 2023 and filed on 26th April 2023.

[4] The applicants contend that they were directed to pay USD 15,162,320.95 to the respondent for default in repayment of a loan arising from a facility agreement dated 10th April 2015. This was through the orders issued by Daniel Toledano QC sitting as a Deputy Judge of the High Court in Claim Number CL-2018-000720 in High Court of Justice Business and Property Courts of England and Wales, Queens Bench Division, Commercial Court. They further contend that the High Court dismissed the applicants' application to set aside its ruling of 7th January 2020 that recognized and registered the English Court judgment as a judgment of the High Court of Kenya despite it being issued by a judge who shared the same chambers with the respondent's counsel, Michael Sullivan, SC.

[5] The applicants fault the appellate court for failing to appreciate the jurisdiction of the High Court as set out in section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, on account that the English Court judgment was obtained in a manner that violates Article 50 as read with Article 25 of the Constitution of Kenya. Consequently, they assert that the Court of Appeal failed to appreciate and give effect to the supremacy of the Constitution and sovereignty of the people as enshrined in Articles 2, 3, 4 and 159 of the Constitution and disregarding the finding of this Court in ***Elly Okong'o Ing'ang'a & 3 others v James Finlay Kenya (Limited)*** SC Petition No. 7 (E009) of 2021 thereby rendering Kenyan law subservient to English law.

[6] The applicants also contend that the appeal would be rendered nugatory unless the orders sought are granted, since the respondent has instituted various insolvency proceedings, issued statutory demand notices, and appointed receiver managers to the charged properties; that, in any event, the respondent will not suffer any prejudice since it holds securities being charges over LR No. 1055/165 and LR No. 11320/3. Also, in compliance with stay orders issued by the Court of Appeal on 19th June 2020, the applicants deposited Kshs. 50,000,000/- in a joint interest earning account in the names of both parties' advocates which continues to be held by the advocates on record. In the alternative, the applicants contend that in the event the appeal succeeds, they will not be able to recover monies from the respondent as it is established by a Treaty between East African States and enjoys immunity from legal proceedings.

[7] The applicants urge that it would be in public interest that the prayers sought be granted because there is need to set Precedent regarding the application of Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act. Accordingly, the applicants affirm that they have met the threshold for issuance of the conservatory orders sought as set out in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR.

[8] In response and in opposition to the application, the respondent filed a replying affidavit sworn on 9th May 2023 by Justa Kiragu, the Principal Investments Officer at the respondent's Country Office in Kenya; and written submissions dated 9th May 2023, and filed on 24th May 2023. The respondent argues that the applicants have not laid down a basis that they have an arguable appeal for the grounds raised in the Petition are not substantiated; that the applicants submitted to be governed by English law and gave English courts exclusive jurisdiction for the resolution of any dispute arising in the facility agreement; that any challenge as to the impartiality of the English courts has no basis for the reason that this aspect was not raised in the proceedings before the superior courts; moreover, that any allegation of bias cannot be raised before

this Court since it is not a constitutional issue under section 15A of the Supreme Court Act No. 7 of 2011.

[9] It is the respondent's further argument that the appeal would not be rendered nugatory because no evidence has been tendered of any threat, immediate or otherwise of execution of the impugned judgment since no final decree has been issued. The respondent, however, points out that the applicants' continued defiance of court orders of 2nd and 23rd March 2020 in ***HCCC No. E469 of 2019*** denies access to the charged properties to the respondents' receivers and managers. Be that as it may, the respondent contends that even if the matter proceeds to execution, the same can be reversed and the applicants be adequately compensated by damages given that the respondent is an international bank with financial capacity and resources. On the other hand, the security deposited by the applicants is insufficient compared to the outstanding debt which is now at USD 29,253,298.98; that it is only fair that the applicants be directed to add further security in the circumstances. Hence, a dispute having originated from an agreement between the parties, there is no nexus whatsoever with the public. Accordingly, the respondent affirms that the application fails to meet the prerequisite principles set out in ***Haki Na Sheria Initiative v Inspector General of Police & 2 Others; Kenya National Human Rights and Equality Commission (Interested Party)*** (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR).

[10] In rejoinder, the applicants filed three supplementary affidavits, all sworn on 12th June 2023 by Raphael Tuju, Mr. Edward Kenneth Okundi (Chief Executive Officer of Maxwell Stamp Kenya) and Amos Oketch; and further written submissions dated 12th June 2023 and filed on 14th June 2023.

[11] The 2nd applicant avers that the respondent's perspective of the contextual background leading to the signing of the facility agreement is inaccurate, prejudiced and one-sided. He affirms that the applicants were lured into the agreement by Ms. Vivienne Yeda and Mr. David Odongo using undue influence. This is corroborated by Amos Oketch who was the senior investment

officer – portfolio management of the respondent when the parties entered into the facility agreement. That despite the respondent having appointed Maxwell Stamp Kenya to look for an alternative financier for the 1st applicant, the respondent frustrated the negotiation process and then resorted to filing its dispute at the English Court.

[12] In light of the assertions made in the supplementary affidavits and documents adduced in the annexures, the respondent proceeded to file the subsequent applications hereinbelow.

b) Petition (Application) No. E012 of 2023

[13] In a Motion by the respondent, East African Development Bank, dated 23rd June 2023 and filed on 27th June 2023 under Article 50 (4) of the Constitution of Kenya, 2010, Section 3A of the Supreme Court Act No. 7 of 2011, Rules 3, 31, 40 (1) & (3) of the Supreme Court Rules 2020 and pursuant to the directions of Hon. L. M. Wachira, the Registrar of the Supreme Court, made on 16th June, 2023, the respondent seeks, *inter alia,* that this Court strikes out the applicants' supplementary affidavits by Raphael Tuju, Amos Oketch and Edward Kenneth Okundi sworn on 12th June 2023. The application is predicated on the supporting and supplementary affidavits sworn on 23rd June, 2023 and 21st July, 2023 respectively, by Justa Kiragu; written submissions dated 23rd June, 2023 and supplementary written submissions dated 24th July, 2023.

[14] In making this application, the respondent is apprehensive that the applicants' conservatory and stay application shall be determined on the basis of documents which this Court lacks jurisdiction to consider and/or interrogate; on privileged documents which have been improperly and or unlawfully obtained by Amos Oketch to the respondent's detriment and contrary to Article 50 (4) of the Constitution; on averments which are *res judicata* having been determined by the English Courts; raising fresh matters beyond the jurisdiction

of this Court; and founded on averments that are unsupported by evidence, scandalous, frivolous and vexatious.

[15] The respondent, relying on ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** SC Application 2 of 2011 [2012] eKLR, further submits that consideration of the documents contained in the supplementary affidavits would amount to improper arrogation of jurisdiction beyond that conferred to the Court under Article 163 (4) (a) of the Constitution and section 15A of the Supreme Court Act; and as held in ***Mike Mbuvi Sonko v County Assembly of Nairobi City & 11 others*** (Petition 11 (E008) of 2022) [2022] KESC 76 KLR that matters of fact that touched on evidence without any constitutional underpinning were not open for the Supreme Court's review on appeal. The respondent relies on the decisions of ***Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others*** SC PEP 4 of 2017 [2017] eKLR; and ***Paul Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others***, SC Petition No. 45 of 2018; [2020] eKLR to buttress its averments.

[16] The applicants oppose the application through the replying affidavit sworn on 12th July 2023 by Raphael Tuju and written submissions dated and filed on 12th July 2023. They contend that the application has no foundation in law and should be dismissed with costs; that jurisdiction which is derived from the Constitution and the law is determined by reference to the cause of action tabled in a petition of appeal and not by reference to individual documents; that the respondent has not established that the evidence adduced by Amos Oketch is illegally obtained and the documents were already in the possession of the applicants who shared them to Amos. Consequently, that the respondent has not established the prejudice likely to be suffered should the evidence remain as tendered.

[17] Citing ***Board of Governors, Moi High School Kabarak & another v Malcom Bell*** [2013] eKLR, the applicants assert that this Court has power to make any ancillary orders so as to sustain its jurisdictional

mandate under the Constitution. Therefore, the test to be applied is not whether or not the documents are in the record of appeal but the relevance of the said documents to the application dated 25th April 2023 before the Court.

[18] In response, the respondent through the supplementary affidavit and supplementary written submissions referred to above reiterates its earlier averments. The respondent maintains that the allegations raised with regard to the affidavits of Amos Oketch and Edward Kenneth Okundi cannot be rebutted by the 2nd applicant. Thus, they urge this Court to find that no response has been filed to challenge their striking out. It is also argued that the documents that seek to be adduced through the supplementary affidavits did not form part of any record in the English courts and superior courts; in that regard, the deponents have not satisfied the requirements for admission of additional documents as they have not complied with the procedure under Rule 26 of the Supreme Court Rules 2020. That in view of the foregoing averments, it follows that the respondent is entitled to a similar order to strike out the applicants further written submissions upon striking out the supplementary affidavits. The respondent affirms that the applicants have not demonstrated how and why the striking out of the supplementary affidavits will prejudice their right to fair hearing.

c) Application No. E017 of 2023

[19] This Motion by the respondent is dated 23rd June 2023 and filed on 27th June 2023 seeking the same orders as the above, that is, striking out of the applicant's supplementary affidavits by Raphael Tuju, Amos Oketch and Edward Kenneth Okundi sworn on 12th June 2023.

[20] As regards the proceedings before the Deputy Registrar on 21st July 2023, Mr. Wakhisi, counsel for the respondent, stated that the two applications are essentially one and the same. He added that they are not identical because the justifications for striking out are to a small degree different.

[21] We have perused and compared the two applications. The distinguishable difference between the two is that the additional ground that the respondent

has raised for striking out the supplementary affidavits is that the documents did not form part of the record of the High Court and Court of Appeal and as such ought not to be considered and or interrogated for purposes of determination of the petition as they do not form part of the record before this Court.

[22] We note that the applicants responded to this application by filing a replying affidavit sworn on 12th July 2023 by Raphael Tuju and written submissions dated 12th July, 2023 and filed on even date in opposition thereto. Their averments rehash what they had earlier submitted.

[23] In the above context, and noting the Court's order issued on 28th April, 2023 granting the applicants conservatory orders staying execution and stay of proceedings pending the *inter partes* hearing and determination, **WE NOW OPINE** as follows:

[24] Having considered the foregoing, we hold the considered view that it is apposite to deal with the striking out of the applicants' supplementary affidavits first, for their correlation to the application for conservatory orders. Thereafter, we will deal with the applications filed by the respondent contemporaneously. Cognizant that empowered by Rule 40(3) of the Supreme Court Rules on which the respondent's two applications are founded, the Court may, on application of any party, direct certain documents to be excluded from the record, and an application for such exclusion may be made orally.

[25] Turning to the matter at hand, it is not in contestation that the annexures adduced by the applicants in the supplementary affidavit were not produced in the superior courts below. It is a party's duty to satisfy all the elements under the provisions of Section 20 of the Supreme Court Act that guides the Court in admitting additional evidence as established in ***Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others*** [2018] eKLR.

[26] Under Rule 26 of the Supreme Court Rules, a party seeking to adduce additional evidence should make a formal application to the Court. We acknowledge that the supplementary affidavits seek to rebut averments made

by the respondent. However, this does not extend to allowing the applicants to introduce additional evidence through the backdoor. Proper procedures as prescribed by the law must be followed and this, the applicants failed to do. We therefore find merit in the respondent's applications to have the supplementary affidavits struck out.

[27] With the above finding, we now proceed to consider the application for conservatory orders. The Court has inherent power to make any ancillary or interlocutory orders that it deems fit to make as it may be necessary for the ends of justice or prevent abuse of the process of the Court. This power is derived from section 21 (2) of the Supreme Court Act and rule 3 (5) of the Supreme Court Rules; and the criterion we enunciated in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR. To consider whether to entertain the interlocutory relief sought, an applicant must demonstrate that the appeal is arguable and not frivolous; that if stay is not granted the appeal will be rendered nugatory; and that it is in the public interest that the order of stay is granted.

[28] The applicants' prayers are two pronged. First, they seek conservatory orders *staying the execution of the judgment dated 20th April, 2023 in* ***Civil Appeal No.70 of 2020: Dari Limited and 5 Others -versus- East African Development Bank*** pending the hearing and determination of this Appeal. Secondly, they seek stay of proceedings before the High Court in ***Milimani High Court Commercial Cause No. E469 of 2019 between Dari Limited & 5 others vs. EADB & 2 others consolidated with Insolvency Cause Nos. E001, E002, E003, E004 all of 2020;*** Enforcement proceedings of the notice of appointment of receivers and managers dated 23rd December 2019, appointing George Weru and Muniu Thoithi as Receiver Managers of Dari Limited and any enforcement proceedings emanating from the Facility Agreement of 10th April, 2015.

[29] In relation to the proceedings pending before the High Court, we note that they do not directly arise in the appeal before us. The impugned judgment

by the Court of Appeal makes no reference to these proceedings. Having interrogated the record, it is evident that the stay over these proceedings emanated from the Court of Appeal ruling in ***Civil Appeal No. 202 of 2020 consolidated with Nos. 203, 204, 205 & 206 of 2020*** that was necessitated by the ruling of *Kasango J* in ***HCCC E469 of 2019*** on 8th July 2020 that declined to extend that stay orders that had been issued by the Court of Appeal in ***Civil Appeal No.49 of 2020***. The applicants have not adduced any evidence of the existence of any appeal on these issues before the Court of Appeal. With the judgment having been made by the Court of Appeal on the main issue on recognition and enforcement of the foreign judgment, these pending proceedings before the High Court are beyond our remit.

[30] In saying so, we align ourselves to our findings in the ***Kenya Plantation & Agricultural Workers' Union v Kenya Export Floriculture, Horticulture And Allied Workers' Union (Kefhau); Represented By Its Promoters; David Benedict Omulama & 9 others***, SC Pet No. 4 of 2018; [2019] eKLR where we held as follows:

> ***"[23]*** *That the Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties since the alleged causes are live before it. Accordingly, that court should ideally be afforded the first opportunity to express an opinion as to whether the causes filed and being filed before it raise similar questions as to the ones being raised before the Supreme Court. Should the Applicants be dissatisfied with the decision of that Court, they shall be free to appeal that decision before the Court of Appeal and subsequently to this Court through the normal appellate mechanism. To allow the applicant disregard the courts below and come directly to this Court in search of stay orders, would amount to an abuse of the process of Court. This was the reasoning of this Court in the case of* ***Sum Model Industries Ltd v Industrial & Commercial Development Corporation, SC Application No. 1 of 2011; [2011] eKLR."***

It is our finding that since, the proceedings the applicants seek to be stayed are not in the purview of this Court, it would only be right to afford the trial court the opportunity to render its decisions and if necessary, the dissatisfied party to follow the appellate hierarchy. This leaves us with the sole prayer for conservatory orders staying the judgment of the Court of Appeal.

[31] On whether an appeal is arguable, we pronounced ourselves in ***Tanad Transporters Limited & 2 others vs. Laiser Communications Limited & 2 others***, SC Petition No. 7 (E009) of 2022 and ***George Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed)*** SC Misc. Application No. 7 (E011) of 2021 [2021] eKLR that this question does not call for the interrogation of the merits of the appeal and the Court, at this stage, must not make any definitive findings of either fact or law. An arguable appeal is not one which necessarily must succeed but one which ought to be argued fully before the Court. The applicants hinge their appeal on the question of recognition and enforcement of foreign judgments in Kenya that violate Article 50 as read with Article 25 of the Constitution. This is an issue that has transcended through the superior courts below as the applicants pursued their quest to set aside the adoption of a foreign judgment as a judgment of the High Court of Kenya. It is our view that this sufficiently demonstrates that the applicants have an arguable appeal, the merit of which can only be interrogated at the hearing.

[32] On the nugatory aspect, the concern is whether what ought to be stayed is allowed to happen is reversible, or not. To establish this, a Court has to balance the interest of the applicant *vis a vis* that of the respondent who is seeking to enjoy the fruits of its judgment. (See ***Tanad Transporters Limited Case (supra)***). The applicants assert that there is imminent danger of eviction from LR. No. 1055/165 and LR. No. 11320/3 which the respondent currently holds as securities. That in the event their appeal succeeds, the respondent's immunity may prevent the applicants from recovering their monies. Conversely, the respondent contends that the amount in question

which is owed to them is considerably substantial, and in any case, the applicants can be compensated by way of damages.

[33] Matching the competing arguments under the circumstances, the balance of probability favours the respondent. We say so because, though the respondent currently holds securities being charges over LR. No. 1055/165 and LR. No. 11320/3 which are located in a suburb area in Nairobi in their favour; as well as the security of Kshs. 50,000,000/- deposited in the joint names of the parties' advocates in an interest earning account; the amount owed to the respondent is colossal with a decretal sum of USD 15,162,320.95 that continues accruing interest. The appeal before us is founded on the enforcement and recognition of a foreign judgment as against our judgment in ***Elly Okong'o Ing'ang'a case***. The money decree issued is a result of the findings on the primary dispute as already stated. The enforceability and validity of the Facility Agreement dated 10th April 2015 as between the different parties is, in our view, a distinct issue whose determination accrues from a different course of action. The parties are, in any event, still engaged before the High Court including in ***High Court Insolvency Cases E001, E002, E003, and E004 of 2020, as consolidated with E469 of 2019***.

[34] We are satisfied that the respondent remains a reputable international bank that should have no difficulty compensating the applicants if the applicants succeeded in their claim. The applicants' apprehension as to the diplomatic immunity afforded to the respondent does not suffice. This is because the applicants have not demonstrated the extent to which, if at all, the alleged immunity accrues and applies to the present situation. Moreover, we cannot at this stage be called upon to make a determination on immunity or otherwise of the respondent, as the issue is not on appeal before this Court, having not been subject of judicial determination in the superior courts below.

[35] Lastly, on the public interest element, we note that although the intended appeal is on the recognition of the foreign judgment, the arguments raised by the applicant with respect to the present application revolve around their

grievances with the enforcement of the resultant money decree. Our perusal of the record reveals that the dispute between the parties arose out of the Facility Agreement entered into by the parties on 10th April 2015 and the terms thereunder. These are at best private interests that are at stake that do not have a bearing on public interest as the settings are specific to the parties in this dispute. In our view, enforcement of a foreign judgment is not in and of itself an affirmation of public interest until it is interrogated further as may be applicable on a case to case basis. We think that, *prima facie*, the applicants' dispute is a matter of "private international law" or "conflict of laws" as known in other jurisdictions.

[36] It is premature for the Court to wade into the merits of the international law aspect of the dispute as to satisfy the public interest threshold to warrant our intervention. This position extends to the applicability of Article 50 of the Constitution on the right to fair hearing in view of the purely private and/or commercial engagement between the parties. It is our inescapable conclusion that the applicants have not demonstrated to our satisfaction that they can surmount the public interest criteria for exercise of our discretion in their favour.

[37] Consequently, and for the reasons aforesaid we make the following orders:

(i) *The Notice of Motion Application dated 25th April 2023 and filed on 26th April 2023 be and is hereby dismissed.*

(ii) *The Notice of Motion Application* ***(Petition (Application) No. E012 of 2023)*** *dated 23rd June 2023 and filed on 27th June 2023 be and is hereby allowed.*

(iii) *The Notice of Motion Application* ***(Application No. E017 of 2023)*** *dated 23rd June 2023 and filed on 27th June 2023 be and is hereby allowed.*

(iv) *Costs of the application shall abide the outcome of the appeal.*

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 6th **day** of October, **2023.**

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....	.....
M. K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

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

REGISTRAR
SUPREME COURT OF KENYA