



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPL.NO. 453 OF 2017

CONGRESS RENTAL SOUTH AFRICA.....APPLICANT

-VERSUS-

KENYATTA INTERNATIONAL CONVENTION CENTRE.....RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST GARNISHEE

KCB BANK KENYA LIMITED.....2ND GARNISHEE

RULING

1. The Notice of Motion before the Court is dated 16th August 2018, brought to the Court pursuant to Article 159 (2) of the Constitution of Kenya 2010, section 1A, 1B, and 3A of the Civil Procedure Act, 2010 and all other enabling. The Applicant prays for the following orders:-

- a) *That this application be certified as extremely urgent and heard ex parte in the first instance;*
- b) *That the Honourable Court do grant and/or extend stay pending the inter-parties hearing and determination of this application;*
- c) *That the Honourable Court do grant and/or extend stay pending the hearing and determination of the intended Appeal; and*
- d) *That the costs of this application be provided for.*

2. The 1st and 2nd prayers are spent and the only remaining prayers for determination are prayer number 3 and 4 of the Notice of Motion.

3. The Application is premised on the ground on the face of the Application and the Applicant's main ground is that it intends to appeal against the Courts ruling herein dated 19th July 2018, and for which the Applicant has caused an application for leave to appeal dated 23rd August 2018, that the intended appeal raises cogent points of law and that the orders of stay sought are the only way to balance the competing interests intends pending the hearing of the intended appeal. The application is further supported by an affidavit of Jane Francisca Mutio Mutisya, the Corporation secretary- Director legal services of the Applicant herein and several annexures attached thereto being JFMMI – JFMM-2.

4. The Application is opposed

5. The background of the matter is that the Court delivered its ruling on 19th July 2018, dismissed the Applicant's application dated 23rd November 2017 which had sought to set aside the final award dated 18th September 2017 and proceeded to recognize the final award as binding and ultimately granted leave for enforcement through a decree of this Court. The Applicant being aggrieved by said ruling proceeded to file Notice of Appeal dated 27th July 2018 on 30th July 2018 and the subsequent application dated 16th August 2018.

6. The Applicant subsequently filed submissions dated 13th November 2018 whereas the Respondent filed their responses on 20th November 2018. The counsel appeared before Court on 20th November 2018 for highlighting on their respective submissions.

7. I have very carefully perused and considered the Notice of Motion dated 6th August 2018, counsel rival submissions and the oral

submissions made before the Court; and from the above the issues arising for determination can be summed up as follows;

a) Whether the applicant is entitled to the right to appeal under section 39 of the Arbitration Act?

b) Whether the Application has satisfied the principles for granting stay of execution orders?

A. Whether The Applicant is Entitled to The Right to Appeal Under Section 39 of the Arbitration Act?

8. The Applicant urges that it filed Notice of Appeal dated 27th July 2018 on 30th July 2018 and thereafter an application for leave to appeal at the Court of appeal. There is no dispute that no application was filed at the High Court for leave to appeal against its ruling dated 19th July 2018.

9. **Section 39 (3) of The Arbitration Act (Cap 49) laws of Kenya** specifically stipulates the instances under which an appeal can lie to the Court of appeal in arbitral matters having been dealt with by the High Court. The said Section provides that:-

“(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).”

10. The right to appeal under section 39 of The Arbitration Act is defined by the statute and only applied in the confines of that Act. In observing these provisions the learned Judge in the case of *Kenyatta International Convention Centre –vs- Greenstar Systems Limited [2018] eKLR*; Court observed that:-

“My construction of the above provisions is that there are three ways in which a party can access the appellate jurisdiction of this Court in a matter arising from an arbitral process. The first is by way of provision of an agreement to that effect in the arbitration clause contained in the agreement pursuant to which the arbitral process is anchored, that a right of appeal to the Court of Appeal exists. Secondly, through leave granted by the High Court under the same provisions. Thirdly, through leave granted by the Court of Appeal under the same provisions.”

11. The above position was well established in the case of *Nyutu Agrovet –vs- Airtel Limited [2015] eKLR*;

“The Court was categorical that this Court’s right to intervene in matters arising from an arbitral process is limited to instances where the parties had either entrenched an automatic right of appeal to this Court in the arbitration clause or where necessary leave to that effect has either been granted by the High Court or this Court itself in the exercise of the respective Courts jurisdiction to do so under the provisions of section 39 of the Act.”

12. The same position was echoed in the case of *Micro- House Technologies Limited –vs- Co-operative College of Kenya [2017] eKLR* as follows:-

“8. We have considered the above submissions. There are several facts that are not in dispute:-

a) That prior to the delivery of the arbitral award, the parties had not agreed that an appeal shall lie to this Court;

b) That no application was made to this Court for leave to appeal on grounds that a point of law of general importance is involved, the determination of which would substantially affect the rights of one or both of the parties; and

c) No leave to appeal was granted by this court;

*d) The question that we must answer is whether, in light of the above summarized this appeal. Our simple answer is in the negative, that the Court lacks jurisdiction. The appellant had no right of appeal to this Court not having obtained leave under section 39 (3) (b) of the Arbitration Act. This Court emphatically so held in *Nyutu Agrovet Limited –vs- Airtel Networks Ltd.* (supra). Karanja, J. A. stated inter alia-*

“I hold the view that no right of appeal is provided for in arbitration awards save for matters pegged on section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be interfered.”

10. In the same decision, the Court also held that where a right of appeal does not lie to this Court in terms of section 39 (3) (b) of the Arbitration Act, a party cannot rely on either section 75 (1) of the Civil Procedure Act or Article 164 (3) of the Constitution to found and appeal to this Court.

*11. We have no reason to depart from the unanimous five Judges’ decision in *Nyutu Agrovet Limited –vs- Airtel Networks Limited.**

Consequently, this Court has no jurisdiction to entertain the appeal before it. Consequently, the appeal is struck out with costs to the respondent.”

13. I am of the considered view that a right of appeal is everything in lodging an appeal, where such right does not exist; the filing of Notice of Appeal does not give that right and as such where a right of appeal does not lie in terms of Section 39 (3) of the Arbitration Act, a party cannot purport to have filed a proper Notice of Appeal without first having obtained leave to file an appeal. I further find that the Arbitration Act is a special Act of parliament with its own regime governing its operation and a party cannot invoke the provisions of the Civil procedure Act and purport to rely on either Section 22 of the Civil procedure Act or Article 159 (2) of the Constitution in seeking orders of stay of execution. I have not been convinced why I should depart from the unanimous five Judges decision in Nyutu Agrovet Limited (supra). I find that leave to appeal is necessary as the Applicant in this matter was not entitled to a right to appeal under the provisions of section 35 of the Arbitration Act. The applicant has had no automatic right of appeal to the Court of Appeal as in the instant matter there was no agreement as between the parties as at the inception of the contract pursuant to the provisions of section 39 of the Arbitration Act No. 4 of 1995.

14. In Civil Appeal No. 86 of 2015 Peter Nyaga Murake –vs- Joseph Mutunga, the Court while making reference to failure to seek leave to appeal from an order, the Court expressed itself that:-

“without leave of the High Court, the applicant was not entitled to give notice of appeal where, as in this case, leave to appeal is necessary by dint of section 75 of the Civil procedure Act and order 43 of the Civil procedure rules. The procurement of leave to appeal is sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid Notice of appeal and without a valid notice of appeal the jurisdiction of the Court is not properly invoked. In short an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

15. The Court of Appeal underscored this prospect in Nyutu Agrovet case (Supra) where it stated:-

“Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference, is all about.”

16. In the case of owners of Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya Ltd [1989]KLR 1, Nyarangi J.A. (as he was then) had this to say:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. Having said that much, I find that this Court has no jurisdiction under the circumstances to determine the Applicant’s application. I am of the considered view that no right of appeal is provided for in arbitral awards save for matters set out under section 39 of the Arbitration Act. The right of appeal in my view is conferred by the statute and cannot be inferred or implied. I find therefore that the Applicant is not entitled to lodge an Appeal without the Courts leave as provided for under section 39 of the Arbitration Act.

B. Whether the Application has satisfied the Principles for Granting Stay of Execution Orders?

18. The principles that guide Court when deciding on application for stay of execution pending appeal are clearly set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which provides:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

19. In an application for a stay of a decree pending hearing and determination of the appeal, the Court of Appeal set out the guiding principles in the case of Butt –vs- Rent Restriction Tribunal [1979] eKLR (madam Miller and Porter JJA) who upon considering an Application of that Motion had the following to say:-

“i) The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii) *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

iii) *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

iv) *The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement."*

20. The same position was echoed in the case of *Global Tours & Travel Limited –vs-Five Continents Travel Limited [2015] eKLR* where it was held that:-

"... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously."

21. Further similar position was taken in *Tabro Transporters Ltd –vs- Absalom Dova Lubasis 2012 eKLR*; the Court held that the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court, as such order does not introduce any disadvantage, but administers the justice that the case deserves. Further *Elena Doudoladova Korir –vs- Kenyatta University [2014]eKLR* Justice Nzioki wa Makau had this to say:-

"the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another –vs- Thornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, Substantial loss would ensue from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay."

SUFFICIENT CAUSE

22. The purpose of an application for stay pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his right of appeal are safeguarded. Therefore this should be clearly demonstrated that there is indeed reason to preserve the subject matter upon which failure to do that would render the appeal nugatory. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

23. It is contended for the Respondent that he has suffered immense disadvantage at being denied what is owed to him rightly after performing his part of the agreement, which it is contended is of critical importance. It is on the other hand submitted for the applicant that prima facie case has been established to justify granting the application relying on the Notice of Appeal which is required for institution of the intended appeal. In the instant matter, I note no draft memorandum of appeal has been attached and as a measure of the applicant's commitment. I am alive that the issue of success of the Appeal is not for this Court to determine but the applicant urges that it has arguable appeal, has to point the same by relying on the face of its memorandum of appeal but not from supporting affidavit or submissions.

24. In the instant case, no evidence has been availed by way of affidavit to demonstrate that the Respondent will in case the amount is paid will be unable to repay the decretal sum should an order for stay of execution be denied. Secondly there is sufficient evidence that the applicant is still in possession of the Respondent's works which it continues to let out for rent. The question in such a situation is on what basis is it urged that the intended appeal would be rendered nugatory, if the Respondent was allowed to execute the lawful Court order. The applicant has failed to demonstrate any basis to such assertion.

25. In the case of *Mohamed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat (2013) eKLR*, where the Court upheld the decision of *M/S Portreiz Maternity –vs- James Karanja Kabia Civil Appeal No. 3 of 1997* and stated that:-

"That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the Plaintiff of that right....."

26. *Meteine Ole Kilelu & 10 Others –vs- Moses K. Nailole, Civil Appeal No. 340 of 2018*, the Court opined that where the decree appealed against is a monetary decree, the Applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large visa a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.

27. In the case of *Macharia t/a Macharia & Co. Advocates –vs- East African Standard (Supra)* the Honourable Court observed that:

"To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which

is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

28. In the instant matter, no security has been offered, nor proposal on how to settle the Respondent's claim nor single coin has been paid since the delivery of the Ruling or deposited in the parties joint account or deposited with the Court. There is no commitment exhibited by the applicant and as such I find that the applicant has not provided nor demonstrated sufficient cause and has been applying delaying tactics to destroy the Respondent prompt disposal of this matter. The discretionary relief of stay of execution pending appeal is designated for the benefit of both parties so that none of the parties would be worse off by virtue of an order of the Court, that none is disadvantaged but to ensure substantive justice is administered fairly and justly to all parties. This arises out of the Court's realisation that both parties have rights which the Court is bound by law to safeguard; the respondent's right to appeal which includes the prospect that the appeal will not be rendered nugatory or on successful appeal if the decretal amount has been paid; the Respondent would be able to repay and on the other hand the decree which includes the Respondent's enjoyment of the fruits of the judgement which includes all full benefits under the decree.

29. Having evaluated the submissions, and considering the nature of the subject matter, I find the Respondent stand to be worse off, having taken a loan in order to service the Contract subject of these proceedings, that will indeed subject the Respondent to economic hardship, if the orders of stay are granted as sought. I am persuaded that the Respondent should be left to enjoy the fruits of its judgement.

SUBSTANTIAL LOSS

30. The Applicant contends, that the determination of the court on whether substantial loss/irreparable injury shall occur is predicated upon the rights of the parties which ought to be examined in totality pursuant to the provisions of the law. It is submitted therefore if the court shall not grant stay of execution there will be a state of affairs, that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal shall occur by rendering the intended appeal nugatory, this being urged is a substantial loss as there will be no purpose of success at appeal.

31. In Silverstein –vs- Chesoni [2002]1 KLR 867 the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

32. The above position was further reinstated in the case of Shell Ltd –vs- Kibiru & Another, Civil Appeal No. 97 of 1986, Nairobi where it was stated that:-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

33. In dealing with issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of applicant as a successful party in the appeal. This cause arose in 2015. The Respondent has since then been deprived of it's money for a period of over 3 years. The applicant has the burden to prove that by refusal to grant stay of execution it stands to suffer substantial loss. In the instant application no such evidence has been produced; as the applicant has not discharged their duty to prove the nature of loss that they are likely to suffer should an order of stay be denied. It has not been demonstrated that if stay of execution is denied, that it would not recover its money if payment was made since the Respondent would be unable to repay the money. In short I find that the Applicant has failed to avail evidence to support its alleged claim of irreparable loss, should the application for stay of execution be denied.

34. In dealing with the issue of irreparable loss in the application for stay of execution, the Court in the case of Machira T/A Machira & Co. Advocates –vs- East African Standard (No. 2) [2002] 2 KLR 63, the Honourable Kuloa J. (as he was then) held as follows:-

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

35. The Court faced with a similar question, in Antoine Ndiaye –vs- African Virtual University [2015] EKLR; had the following to state:-

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

36. I have very carefully considered that the onus of proving substantial loss lies with the applicant, and while appreciating the applicant's undisputed right to appeal, I have to balance the applicant's right to appeal with the corresponding right of the Respondent to enjoy its fruits of its judgement; as well as the need to demonstrate that the Respondent couldn't repay the decretal sum if the appeal is successful. The burden of proof does not shift as he who alleges must prove. I find for the Court to find for the Applicant, it has to place before the Court specific relevant evidence demonstrating tangible loss and further that the Respondent is not able to refund the decretal sum should the appeal succeed. The decree herein is a money decree and upon success of the appeal the issue would be the refund and denying granting stay of execution in my view would not render the appeal nugatory.

37. Substantial loss in its various forms was stated to be a cornerstone of jurisdiction for granting a stay. In the case of Kenya Shell Limited –vs- Benjamin Karuga Kiburu & Another [1986] eKLR; Hon. Platt, Ag. JA stated as follows:-

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

38. In view of the above, the question of the amount notwithstanding. I am satisfied the Applicant has failed to prove, as it is required by law; and by evidence, that it shall suffer substantial loss, if the lawful Court’s order is enforced and stay of execution denied; therefore I have found its intended appeal would not be rendered nugatory by declining stay of execution and substantial loss being the cornerstone of the Court jurisdiction to grant stay having not been established. I find no basis for this Court, to proceed to hold that the Respondent should be denied the right to enjoy the fruits of its judgement the Respondent should not therefore be kept away from accessing its money.

INORDINATE DELAY

39. The ruling of this Court was made on 19th July 2018. This application is made under Order 22 of Civil Procedure Rules and on the material date no application for stay of execution was informally made following the delivery of this Court’s ruling. The formal application before Court was made on 17th August 2018; almost a months from the date of Court’s ruling. The Notice of Appeal was filed on 30th July 2018. The delay for 1 month in filing the application has not been explained. I find that the applicant’s application is inordinately delayed and no explanation has been offered for the inordinate delay.

FURNISH OF SECURITY

40. Under the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of Equity Bank Ltd –vs- Taiga Adams Company Ltd[2006] eKLR it was held that:-

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.

41. The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute. I find in this matter the applicant has failed to meet the four mandatory tenets under which this application is brought. The applicant has failed to satisfy any of the four mandatory tenets under which stay of execution can be granted. The Court, is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the application is not merited

42. The upshot is that the Applicant’s application dated 16th August 2018 is without merits and is dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018.

J. A. MAKAU

JUDGE