REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION No. 305 OF 2017

ACORN PROPERTIES LTD.....APPLICANT/ RESPONDENT

VERSUS

ENG. ISAAC GATHUNGU WANJOHI.....1ST RESPONDENT/ APPLICANT

ISABELLA NYAGUTHII WANJOHI.....2ND RESPONDENT/ APPLICANT

GUMBA INVESTMENTS LTD.....3RD RESPONDENT/ APPLICANT

RULING

Introduction

1. On **4th** of October 2019 by Honourable Lady Justice Maureen A. Odero dismissed the Respondents' application dated **25th** September 2017 in which they sought orders to stay these proceedings pending the hearing and determination of their intended appeal. They also prayed for costs of the application. However, the court allowed an application filed on **15th** June 2017 by **Acorn Properties Ltd,** the applicant herein in which it sought an order for Award rendered on **27th** May 2016 to be adopted as a judgment of this court and leave to enforce the award.

2. The Respondents (herein after referred to as the applicants for the purposes of this ruling) filed an application in the Court of Appeal, *Eng. Isaac Wanjohi & 2 Others v Acorn Properties Ltd*[1] for leave to appeal against the ruling of Honourable Lady Justice Olga Sewe dismissing their application to set aside the arbitral award and stay of execution of the arbitral award. The said application is pending determination before the Court of Appeal.

3. The Respondent's obtained Warrants of Attachment to enforce the judgment entered on **4th** October 2019 triggering the applicant's Notice of Motion dated **23rd** December 2019, the subject of this ruling.

The application

4. The applicants' application is expressed under the provisions of Sections **1A**, **1B**, and **3A** of the Civil Procedure Act,[2] Order **45** Rule **1** and **51** Rules **1** to **3** of the Civil Procedure Rules, 2010 and Article **159** of the Constitution. The applicants seek orders that this court suspends/ stays the implementation of the warrants of attachment issued against the Respondents on **20th** December, **2019**, until further orders of this court and or pending the hearing and determination of Nairobi Civil Application No. NAI 137 of 2017: Eng. Isaac Wanjohi & 2 Others v Acorn Properties Ltd.

5. Further, the applicants also pray for orders that this court reviews the ruling delivered on **4th** October, **2019,** and the ensuing decree; that this court allows the applicants' Notice of Motion dated **25th** September, **2017** sets aside its order confirming the Arbitral Award; that this court grants prayers **1** and **2** of the Chamber Summons dated **15th** June, **2015**.

6. Additionally, the applicants pray that the Warrants of Attachment issued against them on **27th** December, **2019**, be permanently stayed or quashed and that the costs of this application do abide the outcome of the applicants' intended appeal.

7. The core ground relied upon is that the ruling delivered on **4th** October, 2019 and the ensuing decree are based on a contradictory law governing the rights of appeal under Section **35** of the Arbitration Act[3] (herein after referred to as the Act), which has since been clarified

by the Supreme Court in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Anor**[4]*(herein after referred to as the *Nyutu case*) as follows: -

> *[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness.*

8. It's their case that the Apex Court in the *Nyutu case* set aside a Court of Appeal order striking out an appeal on the ground that there is no right of appeal and allowed the appeal to proceed. They contend that in the impugned ruling the court stated that the question whether or not a right to appeal from the decision of the High Court revoking or endorsing an arbitral award exists is still a grey area in our law. It is their position that in anticipation of the position stated by the Apex Court, they filed an application in the Court of Appeal on **16th** June, 2017 seeking leave under Section **39 (4)** of the Act to appeal against the ruling of Hon. Lady Justice Sewe delivered on **2nd** June, **2017** now pending hearing.

9. The applicants state that in the impugned ruling, the court relied on Court of Appeal decisions in *National Oil Corporation of Kenya Ltd v Prisco Petroleum Network Ltd**[5]* and *Anne Mumbi Hinga v Victoria Njoki Gathara**[6]*which wrongly held that there is no right of appeal from a decision of this court under Section **35** of the Act. They state that the court declined to follow the Court of Appeal decisions *DHL Excel Supply Chain Kenya Limited v Tilton Investments Ltd**[7]* and *Kenya Shell Limited v Kobil Petroleum Ltd**[8]* which upheld the right to appeal to the Court of Appeal with leave. They cited paragraph **51** of the *Nyutu case* which reads: -

> *[51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.*

10. The applicants contend that had court acted on the view of the law propounded by the Apex Court, it would have appreciated that what was before it was an application by a party exercising rights to access justice under Article **48** of the Constitution by exercising their right to appeal and the court would have appreciated that a party is entitled to a stay of proceedings and execution if it satisfies the requirements in *Sango Bay Estates and Another v Dresdner Bank**[9]* and the tests for a grant of a stay of execution formulated by the Court of Appeal in *Butt v Rent Restriction Tribunal,**[10]* and *African Safari Club v Safe Rentals Ltd.**[11]* Also, they argue that in an application for a stay of execution of a judgment, the court exercises its discretion in a way which does not impede the right to appeal. Further, they contend that under the doctrine of precedent, this court ought to have dismissed the applicant's application dated **15th** June, 2017, and allow its application dated **25th** September, 2017.

11. They also state that in an application for stay, the court should consider substantive justice and the relative hardships on the parties. (Citing *African Safari Club v Safe Rentals Ltd*.[12]). Referring to *Reliance Bank Ltd v Norlake Investments Ltd**[13]* and *Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell**[14]* they contended that the court has power to prevent possible destruction arising from its orders and to prevent an appeal from being rendered nugatory.

12. Lastly, they states that acting on the impugned ruling, the Respondent has obtained warrants of attachment and proclaimed their goods, hence, it is in the interests of justice that the application be allowed.

The Respondent's Reply

13. The Respondent's opposition to the application is contained in the Replying Affidavit of Peter Njenga, its Chief Operations Officer dated **7th** February 2020. Its argument is that the applicant's applications to set aside the award and to stay the proceedings pending the hearing of its application were dismissed on merits, and the Respondent's application for adoption of the award was allowed.

14. The Respondent contends that the application aims at defeating the arbitral proceedings and preventing it from realizing the fruits of a 4-year-old award. It is also contended that the application does not meet the threshold for review, and that the Act is a complete code and it does not provide for review of a decision under section **37**, nor does the Civil Procedure Rules apply to the extent that the applicant seeks to review the impugned decision.

15. The Respondent maintains that that the applications were determined in accordance with the applicable law then, and that the applicant is inviting this court to sit on appeal on its own decision nor are there proceedings to be stayed. Additionally, the Respondent states that the *Nyutu case* did not grant dissatisfied parties an automatic right of appeal to the Court of Appeal on decisions arising from applications for setting aside arbitral awards under section **35** of the Act, rather, the Supreme Court held that the right of appeal shall be exercised in narrow and exceptional circumstances.

16. Further, the Respondent argues that the court should only grant leave and entertain an appeal where the High Court grossly overstepped the provisions of section **35** of the Act rendering the decision manifestly wrong. It contends that the applicants have not demonstrated exceptional circumstances or grave irregularities, and, that the court can only intervene in arbitration proceedings under circumstances specifically provided for under the act. Lastly, that since the arbitral award has been adopted as a judgment of this court, the applicant is enjoined to furnish security for the entire decretal sum before the court can consider an order of stay.

Applicant's further affidavit

17. Eng. Isaac Gathungu Wanjohi swore the further affidavit dated **6th** March 2020. He described the Respondent's Reply as based on a misapprehension of both the law as stated in the *Nyutu case* and the doctrine of precedent, and that it ignores the post-2010 jurisprudence on the stay of execution as stated in *African Safari Club v safe Rentals Limited* which favours preservation of the subject matter of litigation. That, the Respondent ignores the law as stated in *Madhupaper International Limited v Kerr* that the judge whose decision an appeal is preferred should bear in mind the fact that the Court of Appeal might have a different view on the matter**.**

Applicants' advocates submissions

18. The nub of the applicant's counsel's submissions is that had the court acted on the view of the law stated by the Supreme Court it would have appreciated that the applicants were essentially exercising the right to access justice under Article **48** of the Constitution by way of an appeal. Viewed from the said perspective, counsel submitted that a stay of proceedings and execution was merited provided the applicant satisfied the tests in *Sango Bay Estates and Another v Dresdner Bank,**[15]** Butt v Rent Restriction Tribunal**[16]*** and *African Safari Club v Safe Rentals Ltd.**[17]*** It was his submission that the court ought to have exercised its discretion in a way which does not prevent the right to appeal. He also argued that had the court adhered to the doctrine of precedent and applied the law as stated by the Supreme Court, it would have dismissed the Respondent's application dated **15th** June, 2017 and allow the applicants' application dated **25th** September, 2017.

19. Citing *African Safari Club v Safe Rentals Ltd,* [18] he submitted that the law requires the court to act fairly and to have regard to the substantive justice of the case including weighing possible hardships to the parties. He relied on *Reliance Bank Ltd v Norlake Investments Ltd**[19]*** in support of his submission that the court has a duty to prevent hardship arising from its orders. Also, he cited *Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell**[20]*** which held that a court has inherent jurisdiction to protect the right of appeal and *Butt v Rent Restriction Tribunal**[21]*** which laid down the considerations for granting stay pending an appeal.

20. Counsel argued that it is not clear whether the Respondent will be able to refund the decretal amount if the appeal succeeds. He cited *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another**[22]*** to buttress his argument that the onus lies on a respondent to show proof of ability to refund the decretal sum should the appeal succeed. He also relied on *National Industrial Credit Bank Limited* (supra) which held that it is unreasonable to expect an applicant to know in detail the resources owned by a respondent or lack of them, and that once an applicant states that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.

21. Also, he relied on *Kenya Hotel Properties Limited v Willesden Properties Limited**[23]*** which emphasized that even in an application involving a money decree a stay of execution pending appeal may be granted so as to alleviate undue hardship to the applicant if stay is refused.

22. Counsel submitted that the applicant has a right of appeal to the Court of Appeal in line with section **39** of the Act and the *Nyutu case* which held that the right of appeal can either be conferred by the Constitution or a Statute and that promoting the core tenets of arbitration should not be done at the expense of real and substantive justice, because there may be legitimate reasons seeking to appeal High Court decisions. He submitted that the Supreme Court stated that in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness but such jurisdiction should be carefully exercised so as not to open a floodgate of appeals undermining the very essence of arbitration and that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself.

23. Counsel also cited *Synergy case* which held that in the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar, the court should have residual jurisdiction but only in exceptional and limited circumstances, and that there exists a right of appeal and that to deny a party the said right would be inimical to the spirit and tenor of the Constitution.

24. Submitting on the question whether this court can review its decision dated **4th** October 2019, the applicants' counsel submitted that the court in its ruling observed that whether the right of appeal from a decision of the High Court revoking or endorsing an Arbitral Award exists is still a grey area in our law, but the Nyutu case has since clarified the position. He argued that it was a misdirection for the court to dismiss its application. He argued that its application was dismissed because of lack of clarity on the interpretation of section **35** of the Act, which has since been interpreted by the *Nyutu Case* and *Synergy Case* both of which stated that the Court of Appeal had limited jurisdiction to entertain matters appealed from the High Court under section **35** of the Act. He argued that if the court had the benefit of considering the Supreme Court interpretation of section **35** of the Act, its decision would have been different.

25. Additionally, counsel submitted that in the event its appeal fails, the Respondents can be compensated by an award of damages. He cited *Kenya Hotel Properties Limited* (supra) which emphasized that in a money decree a stay of execution pending appeal may be granted so as to alleviate undue hardship an applicant may suffer if stay is refused.

26. He argued that since there was a pending application in the Court of Appeal, it is only prudent that the Court allows the stay pending its determination. He submitted that by dismissing the application for stay, this court prematurely determined the appeal which was not before it and therefore infringed the Respondent's right of appeal as enunciated under section **39** of the Act.

27. Counsel submitted that the power to review must be exercised within the framework of Section **80** Civil Procedure Act[24] and Order **45** Rule **1**. He relied on *Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad**[25]*** which that: -

> *'A clear reading of the above provisions shows that section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds:-*
>
> *a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*

b) On account of some mistake or error apparent on the face of the record, or

c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.'

28. Lastly, counsel submitted that the *Nyutu Case* and *Synergy case* were not available to the applicant and court at the time the orders were made, which he argued is a sufficient ground to warrant this court to review its decision dated **4th** October 2019.

Respondent's advocates submissions

29. The Respondent's counsel argued that the applicant's application is based on misapprehensions of the *Nyutu case* and the *Synergy case*. He submitted that this court has no jurisdiction to grant an order for stay of execution, and that the parameters within which the court can intervene after delivery of an award in arbitral proceedings are limited to the circumstances provided for in the Act which is the operative law and not the Civil Procedure Act. He cited *Erad Suppliers & General Contracts Limited v National Cereals & Produce Board**[26]*** in which the court declined to grant an order of stay for want of jurisdiction and argued that one of the core purposes of arbitration was its flexibility and expedient nature, and that the applicants are violating the agreement by trying to litigate issues which have already been determined by the Arbitrator. He urged the court not grant orders in futility or orders not supported by the law. He relied on *Anne Mumbi Hinga v Victoria Njoki Gathara**[27]*** where the Court of Appeal emphasized the importance of courts supporting enforcement of arbitral awards.

30. Counsel argued that the *Nyutu case* struck a delicate balance between the right to appeal and maintaining the autonomy of the arbitral process, by stating that leave may only be granted in exceptional circumstances and this narrow jurisdiction ought to be exercised sparingly**.** He argued that the Supreme Court acknowledged that there could be an abuse of the limited right of appeal and courts must streamline the process to draw the line between legitimate claims and disgruntled parties who merely seek to defeat the arbitration process. He submitted that the right of appeal arising from the decision of the High Court in an application to set aside an arbitral award under Section **35** of the Act is exercised only in exceptional circumstances once a party has obtained leave.

31. He also cited the *Synergy case* for the holding that not every decision of the High Court under Section **35** is appealable to the Court of Appeal and submitted that that the applicants have not obtained leave to appeal, nor have they demonstrated an error of any nature on the part of the court or exceptional circumstances. He argued that the application for leave seeks to ventilate factual issues which are outside court's jurisdiction. To fortify his argument, counsel cited *Tersons Limited v Stevenage Development Corporation**[28]*** which held that all questions of fact are within the sole domain of the arbitrator save for a limited control in relation to questions of law.

32. Further, counsel argued that the decision whether or not to grant stay is discretionary exercisable after undertaking a delicate balance to ensure that such an order does not occasion a miscarriage of justice. He submitted that having failed to satisfy grounds to set aside the award, the applicant ought to satisfy the award. He relied on *Christ for all Nations v Apollo Insurance Co. Ltd**[29]***which held that: -

> *"Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust…in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act."*

33. He urged the court in the event the it is inclined to grant stay pending consideration of the application for leave it orders the applicants to furnish security. He relied on *Halai & another v Thornton & Turpin* (1963) Ltd[30] which held that enough security ought to be provided to ensure that should the appeal fail; the Respondent will get its money without undue delay. Additionally, he urged the court to exercise its discretion judiciously cognizant of the fact that the primary proceedings were arbitral proceedings and not court proceedings. He urged the court not to suspend the warrants.

34. Regarding the plea for review, counsel submitted that the applicants are pursuing both a review as well as an appeal which amounts to abuse of court process to delay and defeat enforcement of the award.

35. Counsel argued that this court has no jurisdiction to grant remedies under the Civil Procedure Act except where expressly permitted by the Arbitration Act. He cited *Anne Mumbi Hinga v Victoria Njoki Gathara* (supra) which held that the Civil Procedure Act and rules do not apply to arbitral proceedings because Section **10** of the Act makes it a complete code and rule **11** of the Arbitration Rules cannot override Section **10** of the Act.

36. Without prejudice to the foregoing, he argued that the applicants have not met the set threshold to warrant an order for review because they have not demonstrated an error apparent on the face of the record, or new evidence or any sufficient reason. He submitted that the issues in contention are purely questions of law and not facts.

37. He submitted that the application for review stems from partly mistaken view that the law has now changed and there exists a right of appeal from a decision of the High Court in setting aside awards. He argued that an interpretation of the law by a court is not a ground for review. To buttress his argument, he cited *National Bank Of Kenya Limited v Ndungu Njau**[31]*** which held that a Judge's finding on a question of law cannot be the subject of an application for review. He submitted that even if the Act had a provision permitting review, the applicant has not put forward any grounds warranting an order for review.

38. Regarding the prayer that this court allows the applications dated **27th** June 2015 and **25th** September 2017 for setting aside the award and stay proceedings pending appeal respectively, counsel argued that this court is *functus officio.* To fortify his argument, he cited

*Menginya Salim Murgani v Kenya Revenue Authority**[32]*** which held that a court cannot review its decision unless to correct errors under the slip rule.

Determination

39. The general approach on the role and intervention of the court in arbitration in Kenya is provided in section **10** of the Act which provides that except as provided in this Act, no court shall intervene in matters governed by the Act. In peremptory terms, the section restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section epitomizes the recognition of the policy of parties ? autonomy which underlie the arbitration generally and in particular the Act. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[33] The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

40. A literal reading of section **10** leaves no doubt that it permits two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially, but as the Supreme Court stated in the *Nyutu case*, this judicial intervention can only be countenanced in exceptional instances.

41. *The Supreme Court in the Nyutu case at paragraph **57** of the judgment stated that* Section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

*42. Regarding the prayer seeking review orders under Order **45** of the Civil Procedure Act and section **80** of the Civil Procedure Act, the Supreme Court in the Nyutu case, a decision extensively relied upon by the applicants was categorical on the circumstances under which an aggrieved party can approach the High Court. It stated that: -*

> *[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus, our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration…".*

*43. A reading of the above excerpt shows that review under Orders **45** of the Civil Procedure Act and section 80 of the Civil Procedure Act is not one of the permitted circumstances an aggrieved party can approach the High Court. On this ground alone, the prayer for review fails.*

44. It is also important to state that in addition to the prayer for review, the applicants also pray that this court suspends/stays the implementation of the warrants of attachment issued against them on **20th** December, **2019**, pending the hearing and determination of Nairobi Civil Application No. NAI 137 of 2017: Eng. Isaac Wanjohi & 2 Others v Acorn Properties Ltd. The said application in which they seek leave to appeal against the same ruling is pending before the Court of Appeal. Put differently, the applicants are pursuing both an appeal and an application for review. Section **80** of the Civil Procedure Act[34] provides : -

> ***80.** Any person who considers himself aggrieved-*
>
> > ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred**; or*
> >
> > ***(b)** by a decree or order from which no appeal is allowed by this Act,*
>
> *May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

45. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as: -

> ***45** Rule **1 (1)** Any person considering himself aggrieved-*
>
> > *(a) **By a decree or order from which an appeal is allowed, but from which no appeal has been preferred**; or*
> >
> > *(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."*

46. Section **80 (a)** and Order **45** Rule **1 (a)** and couched in identical language, that is, "*Any person who considers himself aggrieved **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred."***

47. The intention of the above provisions seems merely to prevent a party, against whom judgment has been passed, from availing himself of two remedies at the same time, that is appealing and applying for a review while the appeal is pending. The first part of the above provisions read "*by a decree or order from which an appeal is allowed, but from which no appeal has been preferred."* A proper construction of the said provision leaves no doubt that a person who is not appealing from a decree or order may apply for a review of the judgment or order provided no appeal has been preferred. This means that preferring an appeal, and nothing else, stands in the way of the application for review.

48. The implication of the foregoing is that the right to apply for review of a judgment or order is restricted under Section **80** and Order **45**, Rule **1** of the Civil Procedure Rules, 2010. This means that an application for review is incompetent where an appeal has been preferred. This proposition of the law was appreciated in *Serephen Nyasani Menge v Rispah Onsase**[35]*** in the following words: -

> *"In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order…The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail… Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to…"*

49. The uncompromising manner in which courts have construed the above provisions is evident from the fact that courts have held that even the mere filing of a Notice of Appeal is sufficient to render an application for review incompetent. In this regard, the Court of Appeal in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [36]said:-

> *"Section 2(2) of the Court of Appeal Rules defines an appeal to include an intended appeal. The respondent lodged a notice of appeal on 30th August, 2016. The appellant submitted that though no substantive appeal had been filed, a notice of appeal had been lodged. Mr. Ojuro on the other hand submitted that the appeal was intended for part of the ruling and as such the law did not bar the respondent from filing for review on the other part of the ruling. A perusal of the notice of appeal indicates that the respondent intended "to appeal to the Court of Appeal on dismissal of the client reference and allowing the advocates reference on taxation." A careful look at the ruling dated 17th August, 2016 shows that what the respondent intended to appeal against though phrased as part was the entire ruling delivered by the learned Judge**. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed**. In the case of **Karani & 47 Others v Kijana & 2 Others [1987] KLR 557** the court held that:*
>
> > ***"…once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."***
>
> ***(See also: African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1 (CAK)).***
>
> ***Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal.*** *(See: **Kamalakshi Amma v A. Karthayani [2001] AIHC 2264**). The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose off the appeal. However, for completeness sake, I will venture further."(emphasis added)*

50. By filing an application for leave to appeal and at the same time seeking to review the same decision they intend to appeal against, the applicants are pursuing both processes concurrently in contravention of the above provisions. On this ground, their plea for review collapses.

51. In any event, even if I were to consider the plea for review on merits, essentially, the application for review is anchored on an assault of the learned judges' findings and interpretation of the law which are essentially grounds for appeal as opposed to grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; ***(a)*** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* ***(b)*** *on account of some mistake or error apparent on the face of the record, or* ***(c)*** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

52. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule.[37] Where the application is based on sufficient reason it is for the Court to exercise its discretion. [38]

53. A review can be allowed upon discovery of new and important matter or evidence. An applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. The applicants' argument is that the law as at the time of the ruling was unsettled, and that it has since been clarified by the Supreme Court. To me, that is not a ground for review at all. It does not qualify to be discovery of new material or evidence which was not available to the applicants at the time of the trial. This is an issue of law. A subsequent determination by a superior court cannot be new matter. Whether the trial court erroneously construed the law is a ground for an appeal. It is not enough to state that the law was not settled.

54. Review can also be allowed for any other sufficient reason. The expression *'any other sufficient reason'* means a reason sufficiently

analogous to those specified in the rule.[39] Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgement.[40] The grounds cited here do not fall under "any other sufficient reason.'

55. An applicant has have to show that there was a mistake or error apparent on the face of the record. The power of review is available when there is an error apparent on the face of the record. It has not been demonstrated that the ruling has an error apparent on the face of the record. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law or exercised his discretion would amount to exercise of appellate Jurisdiction, which is not permissible.[41]

56. The other argument propounded by the applicants is that they have a right of appeal to the court of appeal in line with section **39** of the Act. They placed reliance on the *Nyutu case* and the *Synergy case.* Their application for leave to appeal is pending in the Court of Appeal.

57. Since the Arbitration Act was enacted in 1995, our superior courts consistently held that a party aggrieved by the decision of the High Court on an application seeking to set aside an award, has no right of appeal to the Court of Appeal. The Supreme Court in the Nyutu case settled the issue by returning a finding that that **an appeal can lie** *from the High Court to the Court of Appeal on a determination made under section* ***35*** *of the Act (an application to set aside an award) where the High Court, in setting aside an arbitral award has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which has closed the door of justice to either of the parties. The Apex Court stated: -*

> *[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle.*

58. What is pending before the Court of Appeal is an application for leave to appeal. The leave has not been granted. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The applicable tests were best explained by the Court of appeal in *Butt v Rent Restriction Tribunal*.[42]

59. Preferring of an appeal or filing an application for leave to appeal as has happened in this case does not operate as stay of the decree or order appealed against. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on an appellant. A court is not ordained to grant an order of stay merely because an appeal is intended to be filed or has been preferred and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the court, while passing an order of stay, must try and put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

60. *First*, the court must take into account all the circumstances of the case. *Second*, a stay is the exception rather than the general rule. *Third*, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. *Fourth*, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. *Fifth*, the court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.[43] In the instant case the appeal has not been filed, so, the court cannot consider its relative strength. What is pending before the Court of Appeal is an application for leave to appeal.

61. The proper approach is to make the order which best accords with the interest of justice.[44] If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.[45] Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.[46] This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.[47]

62. The grant of the order of stay pending hearing of an appeal is not as a matter of course, but a discretionary remedy[48] which must be exercised both judiciously and judicially.[49] The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do. There must therefore, in order to succeed in an application for stay pending appeal, be a cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.[50]

63. The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by special circumstances which render it inequitable for him to enjoy the benefit of his victory.[51] The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances which have received judicial approval are when execution would: -[52] ***(a).*** *Destroy the subject matter of the proceedings.* ***(b).*** *Foist upon the court a situation of complete helplessness.* ***(c).*** *Render nugatory any order or orders of the appeal Court.* ***(d).*** *Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal.* ***(e).*** *Provide a situation in which even if the appellant succeeds in his appeal there could be no return to the status quo.* Guided by these considerations, I find no difficulty concluding that the applicant has not established any basis for the court to grant the stay sought.

64. The applicants also pray that that this court allows its Notice of Motion dated **25th** September, **2017** sets aside its order confirming the Arbitral Award; and, that this court grants prayers **1** and **2** of the Chamber Summons dated **15th** June, **2015**. Clearly, this is an invitation to this court to exercise appellate jurisdiction on its own orders.

65. Considering the material before me, it is my finding that the applicant has not established any grounds for the court to grant any of the orders it seeks. The upshot is that the applicant's Notice of Motion dated **23rd** December 2019 is unmerited. Accordingly, I dismiss the said application with costs to the Respondent.

Orders accordingly

Signed and Dated at **Nairobi** this **28th** day of **January** 2021

John M. Mativo

Judge

---

[1] Nairobi Civil Application No. NAI 137 of 2017.

[2] Cap 21, Laws of Kenya.

[3] Act No. 4 of 1995.

[4] Petition No. 12 of 2016.

[5] {2014} e KLR.

[6] {2009} e KLR.

[7] {2017} e KLR.

[8] {2006} e KLR.

[9] {1971} EA 17.

[10] {1982} KLR, 417.

[11] Civil Application No. Nai. 53 of 2010

[12] Court of Appeal at Nairobi Civil Application No. Nai 53 of 2010.

[13] {2002} 1 EA 227.

[14] {2013} e KLR.

[15] {1971} EA 17.

[16] {1982} KLR 417.

[17] Court of Appeal at Nairobi Civil Application No. Nai 53 of 2010.

[18]Court of Appeal at Nairobi Civil Application No. Nai 53 of 2010.

[19] {2002} 1 EA 227.

[20] {2013} e KLR.

[21] {1982} KLR 417.

[22] Nairobi Civil Application No. 238 of 2005.

[23] Civil Application Nai. No. 322 of 2006.

[24] Cap 21, Laws of Kenya.

[25] {2019} e KLR.

[26] {2013} e KLR

[27] {2009} e KLR.

[28] {1963} 3 All ER 863.

[29] {2002} EA 366.

[30] {1990} e KLR.

[31] {1997} e KLR.

[32] {2014} e KLR

[33] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[34] Cap 21, Laws of Kenya.

[35] {2018} e KLR.

[36] {2020} e KLR.

[37] *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[38]*Tokesi Mambili and others v Simion Litsanga* {2004} eKLR.

[39]Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147.

[40] Ibid

[41] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.

[42]Civil App No. NAI 6 of 1979

[43]{2011} EWHC 3544 (Fam)

[44]*Philips LJ in Linotype-Hell Finance Limited v Baker* [1992] 4 All ER 887, at page 3

[45] Ibid

[46] Ibid

[47] Ibid

[48] *Vas wani Trading Company v Savalak & Co* (1972) 12 SC. 77

[49] *Mobil Oil (Nig) Ltd. v Agadowagbo* (1988) 12 NWLR (Pt 77) 383, *Marina v Niconnar Food Co. Ltd*. (1988) 2 NWLR (Pt 74) 75, *Balogun v Balogun* (1969) 1 All NLR 349, *Olunloyo v Adeniran* (2001) 14 NWLR (pt 734) 699, *Okafor v Nnaife* (1987) (1987) 4 NWLR (pt. 64) 129

[50]*Onzulobe v Commissioner for Special Duties Anambra State* (1990) 7 NWLR (pt 161) 252.

[51] *Fawehinmi v Akilu* (1990) 1 NWLR (Pt. 127) 450 @ 460.

[52] *UNIPORT v Kraus Thompson Organization Ltd*. (1999) 11 NWLR