



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 550 OF 2006

BETWEEN

MERCANTILE LIFE AND GENERAL ASSURANCE

COMPANY LIMITED.....1ST PLAINTIFF

MOHAMMAD HASSIM PONDOR (Suing on behalf of

The International Air Transport –IATA).....2ND PLAINTIFF

AND

DILIP M. SHAH1ST DEFENDANT

PANAKAJ MEGHJI SHAH.....2ND DEFENDANT

KAMAL M. SHAH.....3RD DEFENDANT

FIVE CONTINENTS TRAVEL LTD.....4TH DEFENDANT

RULING NO. 2

1. By the ruling dated 15th January 2021, I struck out the 4th Defendant’s Notice of Motion dated 24th February 2020 seeking to set aside the Arbitral Award dated 13th August 2019 (“the Arbitral Award”) under **section 35** of the **Arbitration Act, 1995**. I also allowed the 2nd Plaintiff’s Chamber Summons dated 12th February 2020 for leave to enforce the Arbitral Award as a decree of this court under **section 36** of the **Arbitration Act**.

2. The 4th Defendant has now filed the Notice of Motion dated 28th January 2021 seeking leave to appeal to the Court of Appeal against the ruling dated 15th January 2021, leave to file the Notice of Appeal against the said ruling and an order of stay of execution of the decree pending hearing and determination of the intended appeal. It has invoked the provisions of **sections 1A, 1B, 3, 3A** and **75** of the **Civil Procedure Act, Order 43(2)** of the **Civil Procedure Rules**, the **Arbitration Act** and **Rule 7** of the **Arbitration Rules**.

3. The application is supported by the affidavit Dilip Shah, a director of the 4th Defendant, sworn on 28th January 2020. It is opposed by the 2nd Plaintiff through the replying affidavit of Allen Waiyaki Gichuhi, its advocate on record, sworn on 5th February 2021. The parties filed brief written submissions in support of their respective positions.

4. I have considered the application alongside the depositions and submissions and I propose to dispose of the matter on the basis of a preliminary and fundamental issue which the parties did not address or pay attention to but which nevertheless goes to the jurisdiction of this court to grant the orders sought. It is whether this 4th Defendant requires leave to appeal in order to file the Notice of Appeal.

5. In order to prefer an appeal to the Court of Appeal, a party who desires to appeal must lodge, in the Superior Court, a Notice of Appeal in

accordance with **rule 74** of the **Court of Appeal Rules** within 14 days of the decision appealed from. It is the filing of the Notice of Appeal which demonstrates that the party dissatisfied with the decision of the High Court intends to move the Court of Appeal.

6. It is not necessary for the party intending to appeal to seek leave in order to file the Notice of Appeal as the 4th Defendant's application implies. This issue is resolved by **Rule 74(4)** of the **Court of Appeal Rules** which states that:

When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

7. In **Judicial Commission of Inquiry into the Goldenberg Affair and Others v Job Kilach NRB CA Civil Appl. No. NAI 77 of 2003 [2003] eKLR**, the Court of Appeal, after setting out **Rule 74(4)** aforesaid observed as follows:

This rule clearly deals with two situations, namely:

(i) where leave to appeal is necessary; or

(ii) where a certificate that a point of law of general public importance is involved.

In either case, it is not required that before one files a notice of appeal, one must have obtained the leave or the certificate. One can file the notice of appeal and thereafter obtain the leave or the certificate as the case may be. Mr. Nowrojee did not show us any authority from this Court or from anywhere else where it has been decided that the obtaining of leave or a certificate is a condition precedent to the filing of a notice of appeal. We are not ourselves aware of any such authority and we would be surprised if there were to be one for such a decision would be clearly contrary to the plain meaning of the words in rule 74(4) of the rules. [Emphasis mine]

8. Although the Supreme Court was speaking of its own rules in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions and 7 Others SCK Appl. No. 16 of 2014 [2014] eKLR**, the following observation is relevant to the application of the **Court of Appeal Rules** and to this case. It stated that, "Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite."

9. Without the Notice of Appeal, this court lacks jurisdiction to grant leave to appeal against the ruling dated 15th January 2021 or to grant an order of stay pending appeal. Consequently, the Notice of Motion dated 28th January 2021 is struck out with costs to the 2nd Plaintiff.

DATED and DELIVERED at NAIROBI this 22nd day of FEBRUARY 2021.

D. S. MAJANJA

JUDGE

Mr Gichuhi instructed by Wamae & Allen Advocates for the 2nd Plaintiff.

Ms Kamau instructed by Wandabwa and Company Advocates for the 4th Defendant.