



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. SHAH.....1ST DEFENDANT

PANAKAJ MEGHJI SHAH.....2ND DEFENDANT

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

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

RULING NO. 3

1. This is Ruling No. 3. The 4th Defendant (“the Defendant”) has moved the court by the Notice of Motion dated 3rd March 2021 invoking section 7 of the *Appellant Jurisdiction Act*, sections 1A, 1B, 3, 3A and 75 of the *Civil Procedure Act*, Order 43(2) and (3) of the *Civil Procedure Rules* (“the Rules”) and Rule 7 of the *Arbitration Rules 1997*. It seeks several orders as follows:

- 1. Time be extended for filing this application seeking leave to Appeal to the Court of Appeal to be filed out of time and for this application be deemed as properly on record.*
- 2. There be a stay of execution of the Ruling delivered by the Honourable D. S. Majanja on 15th January 2021 and any consequential orders pending hearing and determination of this application.*
- 3. The Applicant be granted leave to Appeal to the Court of Appeal against the Ruling delivered by Honourable D. S. Majanja on the 15th January 2021 and all consequential orders.*
- 4. Pending the hearing and determination of the intended appeal there be a stay of execution of the Ruling Delivered by the Honourable D. S. Majanja on 15th January 2021 and all consequential orders.*
- 5. The Notice of Appeal dated 24th February 2021 and filed on 24th of February 2021 be deemed as properly on record.*
- 6. Costs.*

7. Any other orders that this Honourable Court is pleased to grant in the interests of justice.

2. The application is supported by the affidavit of the Defendant's director, Dilip Shah, sworn on 3rd March 2021. The application is opposed by the 2nd Plaintiff ("the Plaintiff") through the Grounds of Opposition dated 18th March 2021. Both parties have filed written submissions.

3. Before I deal with the issue raised in the application, a brief background of the matter will suffice. By the ruling dated 15th January 2021, I struck out the 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** ("the **Arbitration Act**"). I also allowed the 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**.

4. Thereafter, the Defendant filed a 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. I struck out the application by the ruling delivered on 22nd February 2021 on the ground that the court lacked jurisdiction to entertain the application as the Defendant had not filed a Notice of Appeal.

5. The Defendant filed a Notice of Appeal on 24th February 2021, about 40 days from the date the ruling to be appealed from was rendered. The Defendant argues that the delay was not inordinate and the failure to file the same timeously was a result of its counsel's misapprehension of the law that it required to obtain leave first. It urges that an order extending time would not prejudice the Plaintiff. The Defendant further argues that since the earlier application was not heard on merits, it is in the interests of justice that the court re-consider the grant of leave to appeal as the issues raised in the intended appeal are substantial. The Defendant further contends that it is in the interest of justice for the court to grant an order of stay pending appeal.

6. In response to the application, the Plaintiff asserts that the application is res judicata as the court struck out the earlier application seeking leave and stay. The Plaintiff contends that the Defendant does not have automatic right of appeal and that no exceptional grounds have been set out within the directions of the Court of Appeal in the case of **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party) SCK Petition No. 16 of 2016 [2019] eKLR**. The Plaintiff submits that the Defendant has not made out a case for the grant of stay pending appeal.

7. The Defendant's application has two aspects. The first aspect relates to the grant of leave to file the application for leave and to file the Notice of Appeal out of time. The second aspect relates to the grant of leave and stay.

8. Whether or not to extend time for doing an act either under the **Rules** or **section 7** of the **Appellant Jurisdiction Act** is within the discretion of the court. In **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others SCK Application No. 16 of 2014[2014] eKLR**, the Supreme Court stated that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; and that whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and that public interest are considerations to be borne in mind.

9. Since the application for leave and stay was struck out for lack of jurisdiction, I reject the Plaintiff's argument that the application is res judicata as the issue of leave and stay was not determined on merit. I am also prepared to accept that the Defendant's explanation that the Notice of Appeal was not filed on time due to misapprehension on the part of its advocate. This is because the application for leave was filed timeously and the issue resolved by the ruling striking out the application. The Plaintiff will not be prejudiced if the court allows the application for leave to be filed out of time and the Notice of Appeal filed be deemed as duly filed.

10. The issue of leave directly implicates the right of appeal to the Court of Appeal in matters arising from the **Arbitration Act** as it is clear that there is no right of appeal to the Court of Appeal conferred by statute. However, in **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party) (Supra)**, the Supreme Court held that the Court of Appeal has residual jurisdiction to entertain appeals from the High Court arising from **section 35** of the **Arbitration Act** in certain instances. The court observed 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. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration.

[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is 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 completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction. [Emphasis mine]

11. What emerges from the aforesaid *dicta* from the Supreme Court, is that it is the Court of Appeal that must determine whether the case before it meets the grounds for it to exercise the residual jurisdiction. This jurisdiction is not conferred upon the High Court. Further, the provisions of **section 75** of the **Civil Procedure Act** and **Order 43** of the **Rules** which regulate the right of appeal against certain orders made under the **Rules** do not apply to the **Arbitration Act**. The **Arbitration Act** is a complete code that excludes the application of the **Civil**

Procedure Act unless otherwise incorporated (see *Kamconsult Ltd v Telkom Kenya Ltd & Another* NRB CA Civil Appeal No. 92 of 2009 [2016] eKLR). **I therefore hold that High Court lacks jurisdiction to grant leave to appeal to the Court of Appeal under the Arbitration Act.**

12. The final issue is whether the court should grant stay pending appeal having validated the Notice of Appeal. The principles governing the grant of an order for stay pending appeal are set out in **Order 42 Rule 1 and 2** of the **Civil Procedure Rules** which provides that the Appellant has to demonstrate that it stands to suffer substantial loss unless the stay order is made, that the application has been made without unreasonable delay and that it has provided security or is ready to provide such security as the court may order.

13. In order to satisfy the principles for the grant of stay, the applicant must set out facts upon which the court may conclude that it shall suffer substantial loss unless a stay is ordered. In this case, Mr Shah, in his deposition, states that, *“If a stay is not granted and execution proceed, the intended appeal will be rendered nurgatory.”* This bland statement is not supported by any facts from which the court may conclude that the Defendant will suffer substantial loss. Further, the Defendant has not offered any security. I therefore find that the application lacks merits.

14. For the reasons I have set out above, I now make the following orders:

- (a) The 4th Defendant be and is hereby granted leave to file the application for leave out of time and this application be and is hereby deemed as duly filed.
- (b) The application for leave is hereby struck out as this court lacks jurisdiction to grant leave to appeal to the Court of Appeal.
- (c) The time for filing the Notice of Appeal from the ruling and order dated 15th January 2021 be and is hereby extended and the Notice of Appeal dated 24th February 2021 be and is hereby deemed as duly filed.
- (d) The application for stay pending appeal is dismissed.
- (e) The 4th Defendant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH 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.