REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E084 OF 2021

GULF ENERGY LIMITED.....APPLICANT/PETITIONER

VERSUS

RUBIS ENERGY KENYA PLC.....RESPONDENT/RESPONDENT

RULING

[Notice of Motion dated 22nd June, 2021]

1. The Petitioner, Gulf Energy Limited, is through the application dated 22nd June, 2021 seeking orders against the Respondent, Rubis Energy Kenya Limited, as follows: **"**

a) Spent.

b) Pending the hearing and determination of this application, the Respondent be restrained, whether by itself, its servants or agents or otherwise howsoever from using the Petitioner's confidential information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Petitioner's audited financial statements for the financial year 2016, 2017 and 2018; the Petitioner's management accounts dated November 2019; e-mails and letters, retrieved from the server or the laptops of the Petitioner's former employees or howsoever otherwise obtained, or any part thereof, for any purpose whatsoever including but not limited to the arbitral proceedings commenced against the Petitioner.

c) Pending the hearing and determination of this application, the Respondent be retrained from taking any further action with respect to the arbitral proceedings commenced on 27th May, 2021 based on the Petitioner's confidential information including but not limited to pursuing the claim for at least USD 41 million, damages, interest and costs of the arbitration or any monetary claim whatsoever against the Respondent; demanding for the Respondent's books and records or any other documents whatsoever, with regard to the issues alleged in the notice of warranty claim dated 3rd March 2021 or any other notice issued based on the Petitioner's confidential information.

d) Pending the hearing and determination of the intended appeal, the Respondent be restrained whether by itself, its servants or agents or otherwise howsoever from using the Petitioner's confidential information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Petitioner's audited financial statements for the financial years 2016, 2017 and 2018; the Petitioner's management accounts dated November 2019; emails and letters, retrieved from the server or the laptops of the Petitioner's former employees or howsoever otherwise obtained, or any part thereof, for any purpose whatsoever including but not limited to the arbitral proceedings commenced against the Petitioner.

e) Pending the hearing and determination of the petition, the Respondent be restrained from taking any further action with respect to the arbitral proceedings commenced on 27th May, 2021 based on the Petitioner's confidential information including but not limited to pursuing the claim for at least USD 41 million, damages, interest and costs of the arbitration or any monetary claim whatsoever against the Respondent (sic), demanding for the Respondent's (sic) books and records or any other documents whatsoever, with regard to the issues alleged in the notice of warranty claim or any other notice issued based on the Petitioner's confidential information.

f) The costs of this application be provided for.

2. The application is supported by the grounds on its face and an affidavit sworn in support thereof by Francis Njogu, the Managing Director of the Petitioner/Applicant.

3. In brief, the Applicant seeks conservatory orders in respect of the decision of this Court issued on 31st May, 2021 allowing the Respondent's preliminary objection and striking out its notice of motion for conservatory orders and the petition. The Applicant avers that it intends to appeal the decision of this Court and has since lodged a notice of appeal dated 4th June, 2021.

4. The Applicant's case is that on 27th May, 2021, the Respondent commenced the arbitral process before the London Court of International Arbitration (LCIA) by filing a request for arbitration. It is deposed that the LCIA is required to appoint the arbitral tribunal promptly following the delivery to its Registrar of the Applicant's response to the request for arbitration. Further, that the Applicant's response was due by 24th June, 2021. The Applicant deposed that the parties had already commenced discussions on the nomination of arbitrators for appointment.

5. The Applicant states that unless conservatory orders are granted there is a real and immediate apprehension that the Respondent will rely on its private and confidential information to pursue the warranty claim issued on the 3rd March, 2021 which carries a claim of at least USD 41 million, damages, interest and costs of the arbitration. According to the Applicant, it will suffer prejudice, substantial and irreparable harm and loss unless the orders sought are granted since the arbitral process may proceed to conclusion before its intended appeal is heard and determined thereby rendering the appeal nugatory. Further, that there is no provision for appeal or review of the award of the arbitral tribunal because the dispute resolution clause invoked by the Respondent provides *inter alia* that all awards shall be final and binding on the parties.

6. The Applicant's case is that because it will not be able to appeal or review any adverse arbitral award based on the confidential information it seeks to exclude from the arbitral proceedings, there will be a miscarriage of justice resulting in irreparable loss.

7. The Applicant contends that it has an arguable appeal with reasonable prospects of success as can be seen from the draft memorandum of appeal exhibited before this Court. It is averred that it is therefore in the interest of justice that the subject matter of the intended appeal be preserved by granting the orders sought.

8. The Respondent filed a preliminary objection dated 28th June, 2021 opposing the application on the grounds that:

a) That the application is incompetent and an abuse of the process of the court for the reasons:

i) It is in effect an application for the stay of the orders made by the Hon. Mr. Justice W. Korir on 31st May, 2021 in a similar application;

ii) The application is bad for limitation as it should have been filed within 14 days of the decision appealed from, in the absence of any other or contrary direction made by the court under Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ('The Rules');

iii) As it stands the application is in substance a repetition of the application dated 16th March, 2021, which was canvassed before and determined by Hon. Mr. Justice W. Korir and orders made accordingly on 31st May, 2021, and accordingly the issues are *res judicata* and the court is *functus officio.*

b) Notwithstanding and without prejudice to the foregoing, the parties hereto having consented and participated in arbitral proceedings already commenced before the London Court of International Arbitration, this honourable court is prohibited by Section 10 of the Arbitration Act from intervening in any sense in those proceedings or any other governed by the Act.

c) The parties hereto having by agreement opted to resolve any dispute arising from or in connection with their commercial agreements through arbitration cannot be allowed to bypass the arbitration clause by alleging violation of constitutional rights and fundamental freedoms and are bound by the Arbitration Act, and cannot forestall arbitration in the guise of protecting any rights. The Petitioner does not invoke any provision of the Arbitration Act.

d) Accordingly, this Court has no jurisdiction to issue the orders sought.

e) This Court has already found that the arbitral tribunal is master of its own procedure and can determine whether to admit the evidence or not.

9. The Respondent in the Further Preliminary Objection dated 21st September, 2021 asserts the application is an abuse of the court process and should be struck out on the ground that the Applicant has filed an application similar to the instant one in the Court of Appeal vide Civil Appeal No. E447 of 2021. Further, that the application was certified urgent on the 19th August, 2021 and all parties had filed their responses and written submissions pursuant to the Court's directions and the application is therefore squarely before the Court of Appeal for determination.

10. When the matter came up for hearing on 22nd September, 2021, the parties adopted their written submissions and only made oral arguments in respect of the Respondent's Further Preliminary Objection.

11. Through submissions dated 13th July, 2021 the Applicant reiterated the contents of its application. The Applicant commenced by offering a correction to the effect that the reference to Rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, popularly known as the Mutunga Rules, was inadvertent and should be disregarded because what is before this Court is an application for conservatory orders under the inherent powers of the Court and not for stay of execution. The Applicant relied on the decisions in **Edward Muchiri Ituma v Beatrice Wangigi & 9 others [2019] eKLR** and **Joshua Otieno Buyu v**

Petro Ochieng Wasambwa [2003] eKLR, and submitted that failure to cite the correct provision under which an application is made is not fatal to the application.

12. It is the Applicant's submission that its application simply seeks conservatory orders to preserve the subject matter of the appeal and there is a real risk of its confidential information being used by the Respondent in the arbitral proceedings. According to the Applicant, if the Respondent is allowed to use the confidential information, the appeal will be rendered nugatory as its constitutional rights will have been violated by the placement of its confidential information on record in the arbitral proceedings.

13. The Applicant states that the suggestion by the Respondent that it is improper for it to seek conservatory orders from this Court that are similar to those in the application dated 16th March, 2021 is without basis as the instant application seeks to stop the Respondent from using the confidential information prior to the hearing and determination of the appeal.

14. In opposing the assertion by the Respondent that a court which has dismissed an application for injunction does not have jurisdiction to grant injunction pending appeal, the Applicant relied on the English case of **Orion Property Trust v Du Cane Court Ltd & Others [1962] 3 All ER 466** for the proposition that the court would intervene by granting an injunction pending appeal to restrain an act that might deprive the appellant the results of the appeal. Also cited in support of the argument is another English case of **Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448** where it was held that a judge who has dismissed an interlocutory motion for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against the dismissal.

15. It is the Applicant's contention that as was held in **Republic v Kenya Urban Roads Authority & 3 others Ex-parte Cytonn Investments Management Limited [2018] eKLR**, the main consideration by the court in deciding whether to grant a conservatory order is to ensure that if the intended appeal is successful it will not be rendered nugatory.

16. On the allegation by the Respondent that the application is *res judicata* on the ground that it is similar to the application for conservatory orders dated 16th March, 2021 which was struck out on 31st May, 2021, the Applicant submitted that the application is not *res judicata* since the application dated 16th March, 2021 sought conservatory orders pending the hearing and determination of the petition whereas the present application seeks conservatory orders pending the hearing and determination of the appeal. It is the Applicant's case that the Respondent has not shown in what way *res judicata* arises in this case as there has never been any other application between the parties herein for conservatory orders pending the hearing and determination of the appeal. This Court is therefore urged to find that the application does not meet the *res judicata* test as set out by the Court of Appeal in **Kenya Commercial Bank v Benjoh Amalgamated Limited [2017] eKLR.**

17. As to whether the application offends Section 10 of the Arbitration Act, the Applicant argues that the matters over which the Court's intervention is sought are not matters governed by the Arbitration Act, nor do they fall within the remit of an arbitral tribunal. It is submitted that the jurisdiction to hear and determine violations of the Bill of Rights is a preserve of the High Court under Article 23 of the Kenyan Constitution.

18. The Applicant urges that a distinction is to be drawn between the arbitral tribunal's jurisdiction to make a determination as to the admissibility of the evidence sought to be produced before it, and the determination by the High Court on the issue of violation of constitutional rights that are guaranteed to the Applicant by the Constitution. According to the Applicant, only the High Court has jurisdiction to deal with the constitutional questions raised in its struck out petition.

19. The Applicant asserts that nothing turns on the statement that an arbitral tribunal is the master of its own procedure and can determine the question of admissibility of evidence. The Applicant stresses that its claim in the dismissed petition and the intended appeal relate to the violation of its rights through unconstitutional access to its confidential information by the Respondent which it intends to use in the arbitral proceedings. According to the Applicant a miscarriage of justice will occur if it is denied the opportunity to pursue the appeal and to prove the violation of its rights.

20. The Applicant concluded by stating that this Court has jurisdiction to grant the prayers sought and that it has made out a case for the grant of the orders pending the hearing and determination of the intended appeal.

21. In response to the Applicant's submissions, the Respondent filed submissions dated 21st July, 2021. The Respondent's starting point is that this Court lacks jurisdiction to entertain the instant petition since it is barred by Section 10 of the Arbitration Act from intervening in matters governed by the Act. The Respondent argues that this position of the law has been affirmed in the cases of **Ann Mumbi Hinga v Victoria Njoki Gathara [2014] eKLR** and **Civicon Limited v Kivuwatt Limited [2013] eKLR.**

22. The Respondent stresses that in the case at hand, the parties in the commercial agreements contracted that all disputes shall be resolved by way of arbitration and it is not in dispute that the Applicant has already consented and participated in the arbitral proceedings already commenced before the LCIA. Further, that the Applicant has indeed confirmed in its pleadings that it has already made an advance payment of costs to the LCIA.

23. The Respondent dismisses the Applicant's claim that constitutional issues cannot be determined by an arbitrator and relies on the holding by the Court of Appeal in **Kenya Breweries Limited & another v Bia Tosha Limited & 5 others [2020] eKLR** that where the relationship between parties is contractual, any disputes have to be determined by the contractual process, even where constitutional questions arise. It is additionally submitted by the Respondent that in any event the arbitral tribunal has jurisdiction to determine the admissibility of the challenged evidence.

24. The Respondent further submits that since the Applicant is seeking an equitable remedy in the form of an injunction, this Court cannot grant such a remedy where doing so would contravene the express provisions of a statute namely the Arbitration Act which prohibits courts from intervening in arbitrations.

25. The Respondent holds the view that the Applicant's appeal would not be rendered nugatory by the continuation of the arbitral proceedings. According to the Respondent, whether the appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible and whether damages will reasonably compensate the aggrieved party. Reliance is placed on the decision in **David Morton Silverstein v Atsango Chesoni [2002] eKLR** where the Court of Appeal declined to stop proceedings before the High Court stating that the appeal would not be rendered because the proceedings of the High Court would simply be rendered unnecessary and an appropriate order of costs could be made to remedy that state of affairs.

26. Finally, the Respondent urges the Court to dismiss the application stating that Rule 32 of the Mutunga Rules upon which the application is premised requires the application to be filed within 14 days of the decision appealed from and there has been unexplained delay in making this application as it was filed 22 days from the date of the ruling the Applicant intends to appeal.

27. In the oral submissions on the Respondent's Further Preliminary Objection, the Respondent's counsel submits that the objection is premised on the fact that the Applicant had lodged two concurrent applications for conservatory orders before this Court and the Court of Appeal. It is contented that the Applicant's action of filing concurrent applications before the two courts amounts to an abuse of the court process. The Respondent relies on a further list of authorities filed on 22nd September, 2021 in support of its argument that the co-existence of the two applications is an abuse of the court process. The cited authorities are: **Nishith Yogemdra Patel v Pascale Mireille Baksh & another [2009] eKLR; Gathara Chuchu & 473 others v Gititu Coffee Growers Co-operative Society & another [2008] eKLR;** and **African Banking Corporation Limited v Intex Construction Limited & another [2021] eKLR.** Relying on the stated authorities, the Respondent submits that courts must at all times avoid the possibility of making conflicting decisions by not having parallel applications before court of independent jurisdiction.

28. In response, the Applicant contends that the Court of Appeal has independent jurisdiction to grant stay pending appeal. Counsel for the Applicant states that the application before the Court of Appeal has not been allocated a hearing date. Further, that the filing of the application before the Court of Appeal was necessitated by the adjournment of the application before this Court in July.

29. The question for the determination of this Court is whether this Court has jurisdiction to determine the instant application, and if so, whether the Applicant has met the conditions for the grant of the orders sought in the application.

30. The Respondent challenges the jurisdiction of this Court on the grounds that the application is *res judicata* as it raises similar issues to those addressed by this Court in its ruling of 31st May, 2021; that this Court cannot intervene in arbitral proceedings as this would offend the provisions of Section 10 of the Arbitration Act; that the application is bad for limitation as it was not filed within 14 days from the date of the decision sought to be stayed; and, that the application is an abuse of the court process since the Applicant has filed concurrent applications for the same orders before this Court and the Court of Appeal.

31. The Respondent contends that the current application is in substance a repetition of the application dated 16th March, 2021 which was struck out by this Court on 31st May, 2021 and the issues are therefore *res judicata* and the Court is *functus officio.* According to the Respondent the application dated 16th March, 2021 sought conservatory orders in regard to violation of the Bill of Rights and the instant application seek the same orders.

32. The Applicant's response is that the conservatory orders it seeks in the instant application are meant to preserve the subject matter of the appeal as it fears that the Respondent may use its confidential information in the arbitral proceedings before the LCIA. The Applicant submits that the application that was addressed in the decision of 31st May, 2021 is not similar to the instant application as that particular application sought conservatory orders pending the hearing and determination of the petition whereas this application seeks conservatory orders pending the hearing and determination of an appeal.

33. In order to successfully invoke the defence of *res judicata,* a party must meet the conditions that were set down by the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** as follows:

> ***"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> ***(a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***(b) That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***(c) Those parties were litigating under the same title.***
>
> ***(d) The issue was heard and finally determined in the former suit.***
>
> ***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

34. Although the instant application seeks similar orders to those sought in the application dated 16th March, 2021 the circumstances under which the current orders are sought are different. As correctly pointed out by the Applicant, the application of 16th March, 2021 sought conservatory orders pending the hearing and determination of the petition that was struck out on 31st May, 2021. On the other hand, the instant application seeks to preserve the substratum of the dispute pending the hearing and determination of the Applicant's appeal. The question whether the Applicant should be granted conservatory orders pending the hearing and determination of the appeal has not been

heard been heard before a court of competent jurisdiction. It is thus a novel matter and the doctrine of *res judicata* cannot be used to impede the Applicant's prosecution of the current application. I therefore find no merit and reject the argument by the Respondent that this Court is *functus officio* because the issues raised in the application are *res judicata.*

35. It is appropriate at this point to address the claim by the Respondent that this application is an abuse of the court process by virtue of the fact that the Applicant has filed parallel applications before the Court of Appeal and this Court seeking the same orders. With utmost respect to the advocates for the Applicant, their response that the Court of Appeal has independent jurisdiction to grant the orders it seeks before this Court does not answer the Respondent's submission that their action of filing concurrent applications is an abuse of the court process. The authorities cited in support of the Applicant's contention that the Court of Appeal has independent jurisdiction to grant orders to preserve the subject matter of the appeal are therefore not relevant to the issue raised by the Respondent.

36. The Respondent is correct that the filing of similar applications before courts with distinct but competent jurisdiction is an abuse of the court process. This position finds support in decided cases. In **Nishith Yogendra Patel v Pascale Mireille Baksh & another [2009] eKLR,** an application had been filed before the Court of Appeal seeking stay of execution of the High Court's decree. When the matter came up for hearing it was disclosed that there was an application pending before the High Court seeking stay of execution of the same decree. In striking out the application, the Court of Appeal stated that:

> **"On that admission, we are of the view that the application before us is an abuse of the court process, as stated earlier, by pursuing the same remedies in parallel courts which are competent to deal with the application. Such conduct must be deprecated and discouraged. It is for that reason that we order that the notice of motion dated 25th October, 2007 be and is hereby struck out.**
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> **As there is a similar application before the superior court which may be prejudiced, we make no pronouncement on the possible merits of the application even if we were to consider it."**

37. In **African Banking Corporation Limited v Intex Construction Limited & another [2021] eKLR** it was held that:

> **"Whereas it is clear from the cited legal provisions that this Court and the Court of Appeal have concurrent jurisdiction to grant stay of execution, that jurisdiction cannot be exercised at the same time. A party who has a pending application for stay in the High Court must await its outcome before moving to the Court of Appeal to seek similar orders."**

38. The same position was also stated in **Gathara Chuchu & 473 others v Gititu Coffee Growers Co-operative Society & another [2008] eKLR** thus:

> **"In this court's construction of the Court of Appeal case law on concurrent jurisdiction of the superior court and the Court of Appeal, on the granting of the relief of stay pending appeal, it does not mean that both courts can become seized of the matter, handle it simultaneously and rule on it differently at the same time. It simply means that both courts are competent to grant the relief in their respective jurisdictions. And as per the provisions of Order 41 rule 4(1) Civil Procedure Rules, if the superior Court is the one seized of the matter it can grant the stay of execution pending hearing and determination of the appeal. However where the superior court declines to grant the same or gives unfavourable terms, the aggrieved party can move to the Court of Appeal and seek the same relief."**

39. The requirement that an applicant should not at the same time seek stay of execution before the High Court and the Court of Appeal is to avoid the embarrassment that may arise were the two courts to issue contradictory decisions.

40. The question therefore is whether the instant application should be struck out. It seems that the right course of action is to strike out one application and let the Court seized of the other application proceed to determine it. In the case at hand, counsel of the Applicant explained that the filing of the application before the Court of Appeal was necessitated by the adjournment of the application before this Court in July.

41. It is therefore apparent that in lodging the application before the Court of Appeal, the Applicant did not intentionally seek to abuse the court process. It was reacting to a situation where the interim protective measures that had been issued in its favour were lifted and the instant application adjourned to September. The Applicant was therefore seeking for a remedy from the next available provider being the Court of Appeal.

42. The Applicant informed this Court during the hearing of this application that the application before the Court of Appeal had not been given a hearing date. There is therefore no risk that contradictory decisions may issue from this Court and the Court of Appeal. It is highly likely that the decision of this Court will be made before the matter in the Court of Appeal is heard. The outcome of this application will guide the Applicant on what to do with its application before the Court of Appeal.

43. The Court of Appeal in **Madhupaper International Ltd v Kerr [1985] eKLR** did indeed propose that an application like the one before this Court should first be heard by this Court. This is what the Court of Appeal said:

> **"It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs."**

44. Striking out this application would amount to taking the Applicant in circles and frustrating its right to access justice which is guaranteed

by Article 48 of the Constitution. I therefore decline to strike out the application on the ground that the Applicant's act of filing the same applications before courts of concurrent jurisdiction is an abuse of the court process.

45. Another argument advanced by the Respondent in regard to the alleged impropriety of the instant application is that it contravenes Rule 32(3) of the Mutunga Rules which states that a **"formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct."** The Applicant's response is that Rule 32 was cited in error and that the application has actually been brought under the inherent jurisdiction of the Court.

46. What is before this Court is actually not an application for stay of execution pending appeal which is the subject of Rule 32. The Applicant's petition was struck out and there is no executable decree or order which can be stayed. I am thus in agreement with the Applicant that this is an application for which Rule 3(8) of the Mutunga Rules was promulgated. The Rule states:

> **"Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."**

47. The final ground upon which the Respondent has asked this Court to decline jurisdiction is the assertion that this Court is barred by Section 10 of the Arbitration Act from intervening in arbitral proceedings. The question whether the Applicant's petition, which has already been struck out, is asking this Court to intervene with arbitral proceedings is a matter to be addressed by the Court of Appeal. Indeed, the petition was struck out by this Court on the ground that issue as to the legality and constitutionality of the evidence the Respondent intended to use in the arbitral proceedings would be determined by the arbitrator. The correctness of the decision of this Court is what the Applicant has escalated to the Court of Appeal.

48. This Court has already made its decision and whether the appeal filed by the Applicant has high chances of success is a matter that this Court, being the Court that made the decision being appealed, cannot comfortably discuss as it would amount to questioning its own decision. The protection of the substratum of the appeal cannot be said to be an intervention with the ongoing arbitral proceedings. If this Court finds that the appeal will be rendered nugatory if orders are not granted, then it has a duty to protect the Applicant's right of appeal by issuing the necessary orders. In summary therefore I find that this Court is fully clothed with the jurisdiction to entertain the instant application.

49. I now turn to the merits of the application. The nature of the application before this Court is akin to an application for stay of execution pending appeal. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** appreciated that the purpose of an application like the one before this Court is to preserve the subject of the dispute so as to give the appellate court an opportunity to give its opinion on the decision appealed from. This is what the Court said:

> **"[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by *injunctions, orders of stay, conservatory orders* and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light."**

50. The Court went ahead to highlight the principles governing the issuance of conservatory orders by stating that:

> **"[86] *"Conservatory orders"* bear a more decided *public-law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest.* Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest, the constitutional values,* and *the proportionate magnitudes, and priority levels attributable to the relevant causes.***
>
> **[87] … The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:**
>
> > ***(i) the appeal or intended appeal is arguable and not frivolous; and that***
> >
> > ***(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***
>
> **[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:**
>
> > **(iii) that it is *in the public interest* that the order of stay be granted.**
>
> **[89] This third condition is dictated by the *expanded scope of the Bill of Rights,* and the *public-spiritedness that run through the Constitution*."**

51. The conditions to be met by an applicant seeking an order of injunction or stay have been stated in numerous cases. In **David Morton**

Silverstein v Atsango Chesoni [2002] eKLR, the Court of Appeal reiterated those conditions as follows:

> **"It is now trite law that an applicant under rule 5(2)(b) must satisfy the Court that: (i) his intended appeal is an arguable one or, put another way, the intended appeal is not frivolous; (ii) unless the Court grants an order of stay to him, his intended appeal, if successful, will be rendered nugatory.**
>
> **An applicant such as the one before us is obliged to prove not only one, but both of these requirements before he can hope to obtain an injunction or an order of stay from the Court."**

52. Even though I have stated my discomfiture with making any finding on the issue as to whether the appeal is arguable, the issue raised by the Applicant in the appeal as to whether evidence obtained in violation of the Constitution can be used in a trial is not a flimsy one. The Applicant should therefore be allowed to test the decision of this Court without suffering the risk of the appeal being rendered nugatory.

53. As to whether the appeal will be rendered nugatory if conservatory orders are not granted, the Respondent relied on the decision in the case of **David Morton Silverstein v Atsango Chesoni [2002] eKLR** and argued that allowing the arbitration proceedings to continue to conclusion will not render the Applicant's appeal nugatory. In the cited case, the Court of Appeal in declining to stay High Court proceedings pending the hearing and determination of the appeal before it held that:

> **"What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory."**

54. The authority cited by the Respondent is, in my view, not relevant to the circumstances of this case. The Applicant has painted a picture before this Court to the effect that allowing the impugned evidence to be produced before the arbitral tribunal is likely to result in irreversible outcomes since there is no provision for seeking review or appealing against the award of the LCIA. This argument points to a very high likelihood that were the Applicant's appeal to succeed it would be rendered nugatory. There is no way that evidence already used in determining an arbitration can be extricated and the matter determined afresh minus the impugned evidence. Even if there was such a procedure it would be unnecessarily tedious and expensive for the parties.

55. On the other hand, holding off the impugned evidence would mean that the Respondent can pursue the arbitration or await the determination of the appeal. Awaiting the determination of the appeal, which appears to be the most sensible thing to do, will apart from delay in the determination of the arbitration not cause any prejudice. The operation of the Respondent's business is continuing and will not be hamstrung by the delay in the arbitral proceedings. In the circumstances I am convinced by the Applicant that its appeal will be rendered nugatory if the Respondent is allowed to adduce the impugned evidence in the arbitral proceedings.

56. The Applicant having met the conditions for grant of stay pending appeal, the application succeeds and a conservatory order is issued that pending the hearing and determination of the intended appeal, the Respondent be restrained whether by itself, its servants or agents or otherwise howsoever from using the Applicant's confidential information including working papers allegedly used for the preparation of the KPMG Report and the 2019 Specific Accounts; the Applicant's audited financial statements for the financial years 2016, 2017 and 2018; the Applicant's management accounts dated November 2019; emails and letters, retrieved from the server or the laptops of the Applicant's former employees or howsoever otherwise obtained, or any part thereof, for any purpose whatsoever including but not limited to the arbitral proceedings commenced against the Applicant.

57. Additionally, a conservatory order is issued that pending the hearing and determination of the petition, the Respondent be restrained from taking any further action with respect to the arbitral proceedings commenced on 27th May, 2021 based on the Applicant's confidential information including but not limited to pursuing the claim for at least USD 41 million, damages, interest and costs of the arbitration or any monetary claim whatsoever against the Applicant, demanding for the Applicant's books and records or any other documents whatsoever, with regard to the issues alleged in the notice of warranty claim or any other notice issued based on the Applicant's confidential information.

58. On the issue of costs, I direct each party to meet own costs in respect of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 29TH DAY OF OCTOBER, 2021.

W. Korir,

Judge of the High Court