



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL APPLICATION NO. 1 OF 2020

LEOPARD ROCK MICO LIMITEDCLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF MERU.....APPLICANT

RULING

1. In this matter the court is called, upon by the application dated 22/07/2021, to issue orders that the plaintiff/decree holder be reinstated the suit premises as a tenant and for stay of execution of the decree herein pending the hearing and determination of an intended appeal to the Court of Appeal.

2. The grounds put forth to premise the application are that the recognition of the arbitral award has been challenged before the Court of Appeal against payment of the award, which is termed colossal against a county government whose operations would be disrupted to the disadvantage of its two million residents. It was also asserted that the decree holder is a non-citizen whose assets and financial abilities are unknown and therefore no ability to effect a refund can be demonstrated against the applicant a government with perpetual succession posing no threat of dissipation even if the appeal fails and the sums becomes recoverable. The offer to return the respondent to the premises was said to have been a sign of good faith and that no prejudice would be occasioned to the respondent if the order sought are granted.

3. The application was supported by the affidavit sworn by Kiautha Ariiithi which reiterated the grounds of the Notice of Motion then exhibited a report on the premises depicting dilapidation, together with the decree passed herein, the application seeking to enforce the decree and the county appropriation Act to show that the applicant has no ability to settle the decree as it has not been provided and budgeted for.

4. The application was resisted by the respondent/decree holder who filled notice of preliminary dated 29/7/2021 and filed on 9/9/2021 as well as grounds of opposition. In the preliminary objection and grounds of opposition the respondent attacks the application on the basis that there is no jurisdiction on this court to grant stay pending appeal since there is no right of appeal. That the court has no jurisdiction to order reinstatement of the decree holder to the premises after entry of a decree and that arbitration proceedings are governed strictly by the arbitration Act which diminishes the role of the court and excludes the application of Civil Procedure Rules as well as the Court of Appeal Rules. In addition it was asserted that when a government participates in legal proceedings and arbitration, it reserves no right to later retreat for the sole purpose of hiding behind and taking advantage of the Civil Procedure Provisions.

5. The application was directed to be canvassed by way of written submissions which were duly filed and for which I commend both counsel for the industry evident in the filed submissions. I have had the benefit of reading the submissions from both sides and drawn very valuable help.

6. Arising from the materials presented, the sole issue that present itself for determination is essentially whether the two prayers are available and in this determination, I wish to start with the request for reinstatement of the respondent to the premises which I consider straight forward and deserving not much endeavors.

7. The dispute as revealed is the record of this file is that there indeed existed tenancy between the parties which was terminated, the respondent ceased to have possession and was so dispossessed. The respondent resorted to the contractual recourse in arbitration, an award was made by the arbitrator which was subsequently made enforceable by the court. I understand the award was intended to compensate the respondent for the damages and injury suffered consequent to the termination. I find that currently there is neither privity of contract nor estate between the parties. If there was to be a new engagement, it must be left for the parties to negotiate the terms at arms-length and it cannot be for the court to impose or prescribe contractual relationship between the parties^[1]. The prayer for reinstatement is the kind that I deem as inviting the court to undertake the impermissible task of renegotiating terms of the contract between the parties. I find that prayer to be wholly misconceived and incapable of being granted. It is therefore dismissed

How about stay

8. Parties agree that there is indeed a pending **CA Civil Application E011 of 2021 (UR 7 of 2021) as well E012 of 2021 (UR 8 of 2021,**

between the parties, and seeking leave of that court to appeal against this court's decision enforcing the award. The two applications display a notice of appeal and seek leave from the court of appeal to appeal and challenge the decree for enforcement of the arbitral award. In those circumstances I do find that for purposes of the Civil Procedure Rules, Order 42 Rule 6(4) and Court of Appeal Rules, there is a pending appeal. With a pending appeal, my preoccupation is shifted to the question of how best to balance the delicate scale of justice between the right of the applicant to access justice by an appeal, unhindered, as against the right of the respondent to access and reap the fruits of his litigation as the successful party.

9. Before I delve into the merits of the application, the counsel for the respondent has raised the all-important question of jurisdiction. To answer that question one must go back to the question when this court is empowered to consider an application for stay. In proceeding thus, the court takes the position that it is the Civil Procedure Rules to apply because the Arbitration Act has no provision in that regard. In any event this court is sitting as a civil court and the rules of procedure must remain those under the Civil Procedure Act.

10. I read Order 42 Rule 6 to clothe this court with that jurisdiction once there is an appeal pending. As said before, under order 42 rule 6(4) an appeal to the court of appeal is deemed filed once a notice is given in terms of the Court of Appeal Rules.

11. I find that sitting as a civil court, this court has the requisite jurisdiction to entertain an application for stay pending appeal every time a notice of appeal is shown to have been filed it is not for this court to question the propriety or competence of such notice of appeal. That duty rests with the court of appeal.

12. Secondly, the decision in **Nyutu Agrovet Ltd Vs Airtel Networks (K) Ltd 2019 Eklr** has indeed set the law that there is no right of appeal to the Court of Appeal in arbitration matters but one needs to seek and be granted leave by the Court of Appeal. In Nyutu Agrovet's case the supreme court said-;

(69) The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdiction that grant leave to appeal, courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision making process and in order to protect the integrity of the judicial process. In addition leave would be granted in order to prevent an injustice for occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore courts, an intervention by the courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award'

13. I do find that while there is no right of appeal to the Court of Appeal on this court's decision of 22/01/2021 there is a recourse to seek leave from the Court of Appeal as has been sought by the applicant. It is therefore not correct to submit that there is no jurisdiction on the court to entertain an application for stay or grant same. I find that the court has the jurisdiction to entertain the application for stay and where merited grant same.

14. This takes me to the principles applicable on application for stay which are well crystalised as much as intended purpose of orders of stay. The principles to be considered by the court have since the decision in **Butt vs Rent Restriction Tribunal [1979]** remained to be that; **the power of the court to grant or refuse an application for a stay of execution is discretionary to be exercised in such a way as not to prevent an appeal; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion; stay should not be refused or withheld if there are good grounds for granting it merely because, in the judge's opinion, a better remedy may become available to the applicant at the end of the proceedings; and finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements including an order for furnishing security for the due performance of the decree if the appeal fails.**

15. **In his very forceful submissions, counsel for the respondent has urged the court to exercise restraint but not intervening in the parties agreement to have their dispute dealt with outside the court and to be bound by the award reached in arbitration. That the court need to exercise constant restraint in respecting the parties autonomy in choice of forum cannot be gainsaid. However, the restraint advised is never a bar to the court from performing its overriding mandate to do justice and enforce rights. Indeed the power of the court to intervene in arbitral proceedings is well circumscribed by the Act and clarified by the superior court, not just in Kenya but globally in jurisdiction which have embraced the model law on arbitration. As held by the supreme court in the Nyutu's case, some of the compelling reasons for intervention is the desire and obligation to enforce the integrity of the judicial processes and to obviate visitation of an injustice. In the circumstance of this case, I see there being an injustice if the respondent, a devolved government, was to be compelled to pay a sum, it says and evidently large, while an appeal challenging this courts decree is pending. I also consider it to be the law that even where I entertain no doubt in the correctness and unassailability of my decision, I bear in mind always that the appellate court may in its own discretion reverse my decision. In that event it is only just that the substratum of the dispute be preserved and the remedy of stay them becomes handy.**

16. Here I do find that the sum appealed is indeed colossal when one looks at the County Appropriations Act and the annual budget. I take notice that the county government has no money of its own to spend at whim but depends public money which must only be spent upon the established financial protocols of budgeting before expenditure.

17. On the basis of the foregoing appreciation, I do find that it having been shown that the sum has not been provided in the budget for this financial year, it would bring hardship and substantial loss to the county government of Meru if it was to be ordered to pay outside the budgetary allocations. The substantial loss I discern is the prospect of being put in a situation of having to appropriate government resources outside the requirement of the law.

18. For that reason I do grant stay on terms that the applicants does everything legal to have the appeal prosecuted within five months from

the date of this ruling. It follows therefore that once the application is prosecuted, the fate of the stay granted shall abide the outcome of that application before the court of appeal so that if the application for leave fails the stay granted here shall lapse for at that time there would be no appeal to premise stay.

DATED AND DELIVERED THIS 16TH DAY OF DECEMBER, 2021

PATRICK J. O OTIENO

JUDGE

In presence of

Miss Opiyo for the applicant/Judgment debtor

Mr Wanyama for the respondent

PATRICK J. O OTIENO

JUDGE