REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS SUIT NO. 232 OF 2014

JOSEPH NJOGU NJUGUNA…..PLAINTIFF

VERSUS -

KEVIN LEWIS SAFARI……..……...….DEFENDANT

RULING NO. 3

1. The application dated 18th February 2016 is for stay of execution pending the hearing and determination of an appeal.

2. The applicant holds the view that his appeal against the decision made on 19th January 2016 had high chances of success.

3. He also says that he was apprehensive that unless this court ordered the execution be stayed, the respondent would proceed to execute the Decree. And if the execution process was undertaken, the applicant believes that he stood to suffer loss as he was unaware of the respondent's financial ability to refund the decretal amount, if the appeal were to succeed.

4. On the other hand, the applicant feels that the stay of execution would not prejudice the respondent.

5. The applicant has shown to the court a letter dated 9th February 2016, through which the respondent's lawyers had forwarded a draft decree, to the applicant's advocates, for the approval or amendment. The contents of that letter are said to be proof that the respondent was already taking steps to execute the Decree.

6. When canvassing the application, the applicant pointed out that he had been condemned un-heard, because his advocate failed to file a defence when the matter was before the arbitral tribunal. In his considered view, therefore, the tribunal denied him a chance to present his evidence.

7. Secondly, the applicant asserted that he had come to court without unreasonable delay, and also that unless if execution was not stayed he would suffer substantial loss.

8. The basis for the contention pertaining to loss was that if the applicant was compelled to pay out to the respondent, a sum in excess of Kshs. 10 Million, the applicant would be totally paralysed.

9. The applicant added that the respondent had not demonstrated that if the decretal sum was paid to him, he could repay it to the applicant, if the appeal was successful.

10. According to the applicant, he had a right to pursue his appeal without any hindrance. Therefore, he requests that this court should insulate him from the rigours of execution of the decree, whilst he was pursuing his right of appeal.

11. But the respondent expressed the view that the applicant had not presented any competent appeal which could therefore form the basis for a stay of execution.

1**2.** As I understand it, the respondent's approach on the issue concerning the competence of the appeal was two – prolonged

> ***a) First, the respondent contends that by dint of the provisions of Section 10 of the Arbitration Act, no appeal lies to the Court of Appeal; and***
>
> ***b) The intended appeal was not challenging the court's decision to adopt the arbitral award as judgement of the court. It was actually an attempt to challenge the ruling dated 2nd June 2015.***

13. In my considered view, there is merit in the respondents second contention, because the applicant can be seen taking issue with the fact that the arbitrator condemned him unheard.

14. The applicant does not appear, on the face of the arguments advanced so far, to be questioning the decision by the court to adopt the arbitral award as a judgement of the court.

15. Meanwhile, as regards the issue about whether or not the appeal was competent, I hold the view that the proper Court to make a conclusive determination is the Court of Appeal. My own view on the matter is that the very foundation of the intended appeal was not firm. My said view is based upon the decision of the 5 – Judge bench in **NYUTU AGROVET LIMITED Vs AIRTEL NETWORKS LIMITED, CIVIL APPEAL No. 61 of 2012.**

16. Mwera J.A stated as follows;

> ***"In conclusion, I reiterate that the preponderance of existing material in law and case law to sustain the arbitration principle that intervention by the court's participation in arbitral matters be strictly limited, leaving the parties to the proceedings to map their own paths out of their disputes, should be sustained and I so find".***

17. The learned Judge proceeded to strike out the appeal.

18. On her part, W. Karanja J A reiterated the holding in **Anne Mumbi Hinga Vs Victoria Njoki Gathara, Civil Appeal No. 8 of 2009** in which the Court of Appeal had held as follows;

> ***"We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act".***

19. On the basis of that holding, the learned Judge pronounced that no appeal lies to the Court of Appeal from the High Court, under Section 35 of the Arbitration Act.

20. Musinga J.A. made a crisp declaration in the following words;

> ***"In conclusion, I am persuaded that the appellant herein has no right of appeal to this Court".***

21. And M'Inoti J.A. expressed a similar view, saying;

> ***"The bottom line then is that there must be a provision of law that allows a party to appeal either as of right or with the leave of the Court. In this case, in addition to there being no provision granting the right of appeal (as of right), there is also none granting the right of appeal to this Court with leave".***

22. In a nutshell, I find that, on a *prima facie* basis, the applicant's intended appeal does not have high chances of success. But on the other hand, it is not in my place to go so far as to say that the intended appeal was not arguable.

23. My take is that the intended appeal may possibly be arguable, but it is unlikely to get off the starting blocks.

24. In the result, the applicant has failed to meet the most important requirement for the grant of an order for stay of execution.

25. The applicant also failed to prove that he would suffer substantial loss if stay is not granted.

26. In the case of **ANTOINE NDIAYE Vs. AFRICAN VIRTUAL UNIVERSITY, Hccc No. 422 of 2006,** which was cited by the applicant, the court expressed itself thus;

> ***"The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum, should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.***
>
> ***This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund?.***

27. In my considered opinion, it cannot be enough for the applicant to express doubt about the ability of the respondent to refund the decretal amount. An expression of doubt cannot be **construed as proof that the applicant would suffer substantial loss.**

28. In **ABN AMRO BANK N.V. Vs LE MONDE FOODS LIMITED CIVIL APPLICATION No, NAI. 15 of 2002,** the Court said;

> ***"In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed?.***

29. The applicant did not discharge the legal burden.

30. Therefore, the application fails. It is dismissed, with costs being awarded to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of June 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Muchoki for the Applicant

No appearance for the Respondent

Collins Odhiambo – Court clerk.