REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

MISCELLANEOUS APPLICATION NO. 442 OF 2011

IN THE MATTER OF THE ARBITRATION ACT, 1995 AND THE ARBITRATION RULES, 1997

AND

IN THE MATTER OF AN APPLICATION FOR THE ADOPTION OF AN ARBITRATION AWARD DATED 5TH NOVEMBER 2009 AND AN AWARD ON ASSESSMENT OF COSTS DATED 21ST JANUARY 2011

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

KILIMANJARO SAFARI CLUB LTD. ..... APPLICANT

V

COUNTY COUNCIL OF OL. KEJUADO ..... RESPONDENT

R U L I N G

1. Before the court is a Notice of Motion application dated 2nd March 2012 brought under Order 22, Rule 22 (1), Order 42 Rule 6 (1) and (2), Order 43 Rule 1 (2) and (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A, 63 (e) and 75 of the Civil Procedure Act. The application seeks various reliefs among them:-

1) *(Spent). A consent was recorded in court on 12th June 2012 thereby comprising prayers (2), (3) and (4).*

5) *That this Honourable Court be pleased to grant a stay of execution pending the hearing and determination of this application.*

6) *(Spent).*

7) *That there be a stay of execution of the orders made on 13th December, 2011 pending the lodging, hearing and determination of the Applicant's intended appeal.*

2. The application is based on the grounds set out therein and on the affidavit of **JOHN H. GIKINGO**

dated **2nd March 2012** with annextures thereto.

3. The application is opposed by the Plaintiff/Respondent through a Replying Affidavit sworn by **SANDEEP R. DESAI**, on the **16th April 2012** and Grounds of Opposition of even date.

4. The brief history of the application is that the Plaintiff was a tenant of the Defendant council where it was running a hotel business and a lodge. Certain events took place resulting in the Plaintiff filing suit and eventually the matter being referred to Arbitration under a sole arbitrator, Mr. John M. Ohaga. The Arbitration took place on diverse dates leading to the Award dated 5th November 2009 being made. The Plaintiff's advocates subsequently applied for their costs and an Award on Assessment of Costs was made by the Arbitrator.

5. By an application dated 26th April 2011, the Plaintiff sought to have the Award and the Assessment of Costs converted into a decree of the court and thereafter enforce the same against the Defendant/Applicant.

6. The said application was vigorously contested by the Defendant/Applicant and was heard on 14th November 2011 and the Ruling reserved for 15th December 2011. However, the said date was brought forward and the Ruling was actually rendered on 13th December 2011 in the absence of the Defendant/Applicant but in the presence of the Plaintiff/Respondent. In the circumstances, the Defendant/Applicant was not able to make the application for stay pending appeal timeously, hence this application.

7. On submission on the law both parties relied on the same provisions of the law but interpreted the same differently. For that reason I will restate the position of the law in this matter before I proceed any further.

Order 42 Rule 6 (1) of the Civil Procedure rules, 2010 in so far as it is applicable, provides as follows:-

"no aspect or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficiently cause order stay of execution of such decree or order . . ."

Order 42 Rule 6 (2) of the said Rules provides as follows:-

"No order for stay of execution shall be made under sub-rule (1) unless-

(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

Under Order 42 Rule 6 (4) of the said Rules, an appeal to the Court of Appeal shall be deemed to have been filed when, under the Rules of that Court, notice of appeal has been given.

The Applicant has deponed in its Supporting Affidavit extensively on why it did not make the application earlier. The Ruling and Order sought to be appealed against was delivered on a date earlier than the one initially recorded, and efforts by the Applicant's counsel to obtain the court file for perusal and further action were hampered until much later. However, upon obtaining the same, the Applicant took immediate action and has to-date done the following:-

(a) Applied for copies of the proceedings and Rulings on 25th January 2012;

(b) Filed the Notice of Appeal on 14th June 2012 after obtaining leave by consent of the parties

herein on 12th June 2012;

(c) Filed the present application for stay in conformity with the provisions of Order 42 Rule 6 (4) of the Civil Procedure Rules, 2010.

The Applicant submitted that there was no unreasonable delay in making this application considering the circumstances of this case.

Mr. Onduso for the Applicant cited the case of **TROPICAL COMMODITIES SUPPLIERS LTD. – VS – INTERNATIONAL CREIDT BANK LTD. (IN LIQUIDATION) [2004] 2EA 331**, where, the High Court of Uganda, while interpreting similar provisions, held that a party must satisfy three conditions in order to obtain an order of stay of execution:-

(i) That substantial loss may result unless the order of stay is made;

(ii) That the application has been made without unreasonable delay; and

(iii) Security for costs has been given (or offered) by the Applicant.

The court noted that substantial loss does not represent any particular size or amount but refers to any loss, great or small, that is of real worth or value as distinguished from a loss that is merely nominal. The applicant further cited the case of **NEW STANLEY HOTEL LTD. – VS – ARCADE TOBACCONISTS LTD. [1986] KLR 757** where High Court held that before making an order staying the execution of the Judgement (or order), the Court has to be satisfied that substantial loss may result to the Applicant unless the order was made and that the application was made without unreasonable delay.

8. In response to the Grounds of Opposition raised by the Respondent, the Applicant submitted that:-

(i) The provisions of Order 22 Rule 22 (1) of the Civil Procedure Rules, 2012 are very wide and are applicable to the circumstances of this case. However, the provisions of Order 2 Rule 6 (1), (2) and (4) are more appropriate and have been incorporated by Order 43 Rule 2. But, this defect, if at all, is cured by the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act (Cap21) which have been invoked by the Applicant, and Article 159 (2) (d) of the Constitution by which courts are guided to administer justice without undue regard to procedural technicalities.

(ii) Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010, are explicit. They are most applicable Rules in support of the application for stay pending appeal.

(iii) Notwithstanding the fact that the application dated 26th April 2011 was brought under Section 36 (1) of the Arbitration Act and Rules 6 and 9 of the Arbitration Rules, 1997, Order 43 Rules 1 (2) and (3) of the Civil Procedure Rules, 2010 in conjunction with Section 75 of the Civil Procedure Act (Cap 21) are relevant as leave of the court to appeal against its decision can only be invoked by the said provisions. They provide the correct procedure in seeking the relief of stay pending appeal no matter how the suit was commenced.

9. I have carefully considered the application and the submissions of the parties. I am satisfied that the Applicant will suffer loss should this application be refused, and its appeal succeed. I am also satisfied that this application has been filed without undue delay.

10. On the issue of depositing security, the Applicant submitted that the decree is in the sum of Kshs.76,290,307.40 and US Dollars 2,844,563.00. The Applicant stated that it cannot make these payments from its coffers. The Respondent also concurs on the issue of depositing security. The only point of departure is the nature of security to be given. It is my view that the Applicant should provide some sort of security. That security, if it is monetary should not necessarily equal the decretal sum, but should, where the decretal sum is a hefty sum, be enough to demonstrate good faith on the part of the Applicant that it will settle the entire decree if the appeal fails. Putting the amount of security too high

would deny the Applicant its constitutional right of appeal. Putting it too law may deny the Respondent the fruit of its Judgement should the appeal fail.

In the case of **NEW STANLEY HOTEL LTD. – VS ARCADE TOBACCONISTS LTD.** (supra) the court observed that to deposit any real security for the intended appeal would be to deprive the Applicant its right of appeal.

11. The question still remains, "***what kind of security can the Applicant give to secure the stay of execution?"***

It is true that the Applicant is entitled to a right to appeal and that right might be impaired if the application for stay is dismissed. However, I am also satisfied that the Respondent has by dint of the process herein acquired a right which also needs to be protected by the law. It may not seem good order that a court should deny the Respondent the chance for immediate enjoyment of the fruits of the Judgement or Ruling. The court should not be seen to give by one hand and at the same time take away by the other hand.

12. Under the circumstances, the only order which pleases me, and which I deem fair for all the parties is that which preserves the prevailing status quo for the parties. Such an order must ensure that if the intended appeal succeeds the Applicant's appeal shall not have been rendered nugatory because the suit property has been wasted. The order should also ensure that should the intended appeal fail the Respondent would be assured that the suit property remains substantially preserved and intact.

13. However, it would be punitive to require the Applicant to deposit in court the entire decretal sum as security. In my view, the Applicant should demonstrate good faith that appreciates the legitimate apprehension of the Respondent. In that regard I rule that one third ($^1/_3$) of the entire decretal sum or Kshs.105,000,000/= whichever is the higher, inclusive of costs be deposited within 45 days in an interest earning account of both counsel.

14. In the upshot, I make the following orders:-

a) The Notice of Motion application dated 2nd March 2013 is allowed in terms of prayer 7 on the condition that the Applicant shall within 45 days from today deposit one third ($^1/_3$) of the entire decretal sum due with costs or Kshs.105,000,000/= whichever is the higher, in an interest earning account in the joint names of the parties' counsel.

b) The costs of this application shall be for the Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Oenge holding brief for Onduso for the Applicant

M/s Wanyoike holding brief for Mccourt for the Respondent

Teresia – Court Clerk