**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 13 OF 2010**

**BETWEEN**

**KENYA PIPELINE COMPANY LIMITED.....APPELLANT**

**AND**

**KENYA OIL COMPANY LIMITED**
**KOBIL PETROLEUM LIMITED.....RESPONDENTS**

**R U L I N G**

This is the Appellant's (hereinafter the Applicant) Notice of Motion taken out pursuant to the provisions of Order 41 rule 4 and Order 50 rule 1 of the Civil Procedure Rules and the Inherent Power of the court. It seeks orders in terms of prayers 2 and 3 couched in the following words:-

***1.*** ***----------***

***2.*** ***Pending the hearing and determination of this application, the Honourable Court be pleased to stay further proceedings pursuant to the Final Award of the sole Arbitrator, Mr. Ahmednasir Abdullahi published on 10th December, 2009 in the matter of an Arbitration between Kenya Oil Company Limited and Kobil Petroleum Limited –versus- Kenya Pipeline Company Ltd.;***

***3.*** ***Pending the hearing and determination by this Honourable Court of the Appeal filed herein, this Honourable Court be pleased to stay further proceedings including the adoption by the High Court of the Final Award of the Sole Arbitrator, Mr. Ahmednassir Abdullahi published on 10th December 2009 in the matter of an Arbitration between Kenya Oil Company Limited and Kobil***

That Motion is premised on the grounds, *inter alia*, that the Final Award of the arbitrator directed that the Applicant pay the Respondents the sum of approximately Kes 4.8. billion as damages and that that amount is substantial and the Applicant considers that there was no justifiable basis for the Award and the same was arrived at on the basis of irrelevant considerations, grave errors of law and is consequently unlawful. That pursuant to the agreement between the parties the Applicant has a right of appeal against the decision of the Arbitrator limited to questions of law in terms of section 39 of the Arbitration Act, 1995. The further grounds are that the Applicant, in exercise of its statutory right of appeal, has lodged a Memorandum of Appeal setting out the grounds upon which it intends to seek the setting aside of the Award and the Applicant considers that its intended appeal has excellent chances of success and that unless an order staying further proceedings pursuant to the Award is granted, the damage and prejudice to the Applicant may be irreparable and since the Respondents have already filed the Award in the High Court vide High Court (Milimani) Misc. Case No. 1064 of 2009, they will no doubt be taking further steps towards the adoption of the Award as a decree of the court and subsequent enforcement of the same.

In the affidavit in support of the Motion sworn by one **SELEST NGATI KILINDA** described as the Managing Director of the Applicant, it is stated that, *inter alia*, a dispute arose under the agreement between the parties herein which dispute was referred to a sole Arbitrator and who published his Award on 10th December 2009. The Appellant has filed an appeal against that Award on points of law as is required since it was dissatisfied with the Award. He swears further that unless the Respondents are made not to proceed, they may so do and enforce the Award which would then render the Appeal nugatory. A further affidavit was sworn by the said Selest Ngati Kilinda, managing director of the Appellant and, in it is re-emphasized the Appellant's position

That Notice of Motion was opposed and the Respondents filed a Replying affidavit sworn by **JACOB ISRAEL SEGMAN**. He depones therein that the Applicant having rejected the Award as final and binding and filed an Appeal to have the Award set aside in its entirety, nevertheless brought a fresh suit and thereby acknowledged that the Award was final and binding on it and therefore the Appeal cannot stand and further such appeal is on issues of fact dressed up as issues of law. That the Appellant has taken a benefit from the Award and that is a further ground that the appeal cannot stand.

Submissions before me for the Appellant by learned counsel Mr. Ohaga were that the Respondents had started the process of adopting the Award and unless they were stopped they would proceed further to have the Award enforced. Counsel, placing reliance on the authority of **PRIME BANK LTD. –VS- JOSEPHAT OGOVA ESAGE CIVIL APPEAL NO. 812 OF 2004** set out the relevant considerations for stay of proceedings and submitted that the Appellant has shown that it had an arguable appeal and that unless the order of stay of proceedings was granted then that appeal would be rendered nugatory. He referred the court to the Respondents' three previous attempts to have the appeal struck out, all of which were unsuccessful. He concluded that the Respondents' enforcement of the Award would render the appeal nugatory and cause problems of accounting as the Respondents' conduct of deducting moneys at source was not only contrary to the Award but a cause of a new problem of accounting. He prayed that the orders sought be granted.

Learned counsel Mr. Oyatsi submitted for the Respondents that an order for stay of execution was not sought and he saw that as a misconception that the Award is not recognizable as binding in law pending further proceedings in court. He contrasted Arbitration under Order 45 of the Civil Procedure Rules and under the Arbitration Act, 1995 stating that under the latter the Award itself is a judgment which does not require adoption by the court as all the court gives is an order for enforcement and so the only proceeding left is to transform the Award into a decree for purposes of enforcement. He said that that enforcement is by way of execution by Notice to Show Cause which by itself does not mean that the Award is not binding and capable of execution. Counsel's further view was that the Award having ascertained the amounts due and defined the mode of execution, then in those circumstances what the Applicant should have done is to apply for stay of execution under S.40 of the Arbitration Act and the Civil Procedure

Rules do not apply. He therefore submitted that this court has no jurisdiction to stay the enforcement of the Award as none was sought. He did not see the issue of problems arising out of accounting as a ground for stay of proceedings as both parties have the ability to sort out payments and in any event, counsel did not see what accounting problem was seen by the Applicants. He saw nothing that could render the appeal nugatory and could not understand why the application was ever brought at all.

This is the stage at which this application must be determined. I see my duty as determining firstly, whether there is an arguable appeal and secondly whether if there be such an appeal, whether then the same would be rendered nugatory by my refusal to grant an order for stay of proceedings as sought.

Counsel for the Respondents contended that the application should have been brought under s.40 of the Arbitration Act and as it was not so brought, then the same must fail as the Civil Procedure Rules have no place in the instant circumstances. If that is so, what then are the relevant provisions? **Sections 36 and 37, Arbitration Act, 1995** provide for the recognition and enforcement of Awards by an application in the High Court.

In section 39 of the same Act the rules applicable are those in the High Court or the Court of Appeal as the case may be. The rules applicable to this court are the Civil Procedure Rules and hence Order 41 rule 4 (now order 42) are properly called to play. I find therefore that the application is properly before court and I am necessarily seized of the requisite jurisdiction.

I have found that order 41 rule 4(2) (b) of the Civil Procedure Rules properly applies. Having so found then the next step is to find out whether the Applicant has brought itself within the perview of that order. The order requires that the application will have been brought without undue delay – or without unreasonable delay – to use the exact words of the Order. The Award was read on 10/12/2009. This application was filed on 28/01/2010. I would not find that to be unreasonable delay.

Order 41 rule 4 (2)(b) has been equated to Rule 5 (2) (b) of the Court of Appeal Rules which requires that there be an arguable appeal and that the same be not rendered nugatory by a refusal to stay see **PRIME BANK LIMITED –VS- JOSEPHAT OGOVA ESIGE CA 812 OF 2001**. The requirement of the existence of an arguable appeal has in my view been fulfilled in this application. The Respondents have made three attempts to strike out the appeal for, *inter alia*, not being sustainable. My seniors, judges Okwengu J, Sitati J and Maraga J have all held that the appeal herein is not frivolous. I have on my part carefully read the proceedings and the Rulings by my learned seniors. I am in total agreement with their findings and I am similarly convinced and I find that there is a plausible and arguable appeal. Needless to say, there has been no appeal on the Rulings of my seniors above.

Having found, as I have, that there is an arguable appeal, would the same be rendered nugatory by the refusal of stay of proceedings? The Respondents correctly point out that there is no prayer for stay of execution. I note that at this stage there cannot be execution in any event as the Respondents have not yet applied to court for enforcement. Admittedly Milimani High Court Misc. Application No. 1064/2009 has been filed. That is the first step by the Respondents towards the direction of execution. The process of applying for the enforcement of the Award is an action in proceedings which this court can lawfully deal with under Order 41 rule 4 and indeed that is what Okwengu J did by her ruling on 20th April, 2010.

If enforcement of the Arbitral Award ensued then there would be nothing left of the Appeal which four judges, this court included, have found to be not frivolous. If enforcement ensued and the Arbitral Award amount was exhausted as ordered then the ground that such a finding as to the amount was arrived at against the provisions of the Contract between the parties, itself a point of law, would be lost forever. In these circumstances I find that the enforcement of the Award would render the appeal nugatory, and I am thereby empowered to exercise my judicial discretion so as to prevent that eventuality – that of rendering the appeal nugatory.

I am minded, for all the above reasons, to order a stay of proceedings as sought, and guided by the authority of **BUTT V RENT RESTRICTION TRIBUNAL [1982] KLR 417** as to security, being a condition for the grant of the stay of proceedings herein I order as follows:-

*That there will be stay of proceedings in terms of prayer 3 of the Notice of Motion now under consideration upon terms that the Applicant will deposit the Arbitral Amount in an interest earning account in a reputable banking institution in the joint names of both firms of advocates herein appearing within fourteen (14) days of the date hereof, in default of which the order granted for stay of proceedings shall automatically lapse. I order that the costs of this application shall be costs in the Appeal.*

It is accordingly so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2011**.

**P.M. MWILU**

**JUDGE**

**IN THE PRESENCE OF**
Mr. Kuyo Advocate for Applicant
Mr. Wananda holding brief for Oyatsi Advocate for Respondents
Ezekiel Kiprono Court clerk