



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. MISC. 166 OF 2009

IN THE MATTER OF THE ARBITRATION ACT (1995)

AND

IN THE MATTER OF ARBITRATION BETWEEN

SAMUEL KAMAU

MUHINDI.....CLAIMANT

VERSUS

BLUE SHIELD INSURANCE CO.

LTD.....RESPONDENT

AND

IN THE MATTER OF AN APPLICATION TO SET ASIDE ARBITRAL AWARD

BETWEEN

BLUE SHIELD INSURANCE CO,

LTD.....APPLICANT

VERSUS

SAMUEL KAMAU
MUHINDI.....RESPONDENT
RULING

The Applicant herein, Blue Shield Insurance Co. Limited has filed two applications as follows:-

1. A Notice of Motion dated 14th December 2010, praying inter alia, that leave be granted to the Applicant to appeal against the Ruling of Honourable Justice Kimaru of 3rd December 2010, in dismissing the Applicant's application for the setting aside of an arbitral award dated 6th February 2009, made against the Applicant in favour of the Respondent and instead allowing the Respondents parallel application for the enforcement of the award
2. A Notice of Motion dated 19th January 2011, praying that the execution and/or enforcement of the award and any proceeding and/or action towards the enforcement or giving effect to the arbitral award be stayed either; pending the hearing and determination of **H.C.C.C No 594 of 2009 SAMUEL K. MUHINDI V BLUE SHIELD INSURANCE CO. LIMITED** or generally.

The Applicant prays for costs in both applications.

The application dated 14th December 2010, is supported by an affidavit sworn by the Applicant's advocate Mbigi Njuguna, while the second one is supported by an affidavit sworn by its director, Jean Mumbi.

Both the applications are opposed on the Respondent's Ground of Opposition filed on 10th February 2011 (in response to the Notice of Motion of 14th December 2010) and the Respondent/Claimant's Replying Affidavit of 24th February 2011, filed on the same date (in response to the Notice of Motion of 19th January 2011).

Written submissions were filed in the two applications, which were heard together, followed by brief oral highlights. There is no dispute as to the background to these proceedings, the facts as set out in the various affidavits and submissions filed and supported by the record.

The Notice of Motion of 14th December 2010, is said to have been brought under **Section 75 of the Civil Procedure Act, Order XL11 Rule 1 (3) of the Civil Procedure Rules (2009 Revised Edition), The Arbitration Act 1995 and 2009, Section 3A of the Civil Procedure Act** and all enabling provisions of the law. The Notice of Motion of 19th January 2011, is brought under **Order 22 Rule 25 of the Civil Procedure Rules 2010.**

In summary, the Applicant states that his intended to appeal against the Ruling of 3rd December 2010, is based purely on points of law and falls under the Court of Appeal's jurisdiction to interfere and that leave is required. The stay of enforcement/execution proceedings is predicated on the grounds that the intended appeal is arguable and that the Applicant would suffer substantial loss if the stay is denied, given that the award granted the Respondent is colossal and that the Respondent is not known to have any assets in Kenya.

Being, as it were, that no dispute arises as to the facts, I find that, the only issues arising out of the submissions filed herein and which I must determine are purely matters of law. The same are as follows:

1. Whether the Applications are meritorious in view of the provisions of the **Arbitration Act and Rules** which primarily governs the dispute between the parties.
2. Whether this court has the jurisdiction to entertain the applications and/or to grant the orders sought.
3. Whether the provisions of **Order 22** of the **Civil Procedure Rules** have been properly invoked.
4. Whether sufficient grounds have been established for the granting of the leave and stay order sought.

In arguing its case for leave to appeal, the Applicant relies mainly on the decision in **SANGO BAY ESTATE LTD V DRESDNER BANK AG [1971] E. A. 17**, wherein it was held that leave to appeal from an order in Civil proceedings will ordinarily be granted whenever it appears, prima facie, that there are serious grounds of appeal worthy of serious judicial consideration.

As regards the stay, the Applicant's position is that the same is available under **Order 22 Rule 25** which empowers a court to grant such stay, on such terms as to security or otherwise as the court thinks fit, where a suit is pending against the holder of a decree of such court in the name of the person against whom the decree was passed and that a stay of execution may be made to last until the pending suit is determined. To support this argument, the Applicant relies on the decision in **NATIONAL INDUSTRIAL CREDIT BANK V JOHN MWAURA KINUTHIA 2005 eKLR**.

The main objection to these proceedings is one of jurisdiction and is predicated on the fact that these proceedings arise out of arbitration proceedings, which in effect constitute a specialized independent process of dispute resolution. Counsel for the Respondent (Claimant) has sought to demonstrate that the court has no jurisdiction to entertain these applications firstly, because, the arbitral process ought be deemed as having been finalized with the Ruling of Justice Kimaru, in view of the fact that under the arbitration clause, the parties herein had agreed that, the decision of the arbitrator shall be final and conclusive and that the window to appeal against the same was closed, once the Ruling of 3rd December 2011 was delivered. Pertinent to the applications before court is the fact that the Applicant attempted to set aside the arbitral award and to thwart the Respondent/Claimant's efforts to enforce it but failed in both endeavours.

That the issue of jurisdiction is paramount in any litigation was clearly spelt out in the Court of Appeal decision of **OWNERS OF THE MOTOR VESSEL**

"LILLIAN S" V CALTEX OIL (KENYA) LTD 1989 KLR 1, wherein it was held inter alia, as follows:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction----“

The Claimant/Respondent has taken the position that the jurisdiction of the Court of Appeal in arbitration process is only as granted to it by statute and that the relevant statute herein is the **Arbitration Act 1995**. He cites **ATTORNEY GENERAL V SHAH (NO. 4) 1971 E. A. 50**, to support the proposition that appellate jurisdiction stems only from statute. He has submitted that the appeal to the Court of Appeal can only be entertained if the requirements of **Section 39 (3)** of the **Arbitration Act** have been fulfilled. The said section provides as follows:-

“Notwithstanding the provisions of Section 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under sub-section (2)

(a) If the parties have so agreed that an appeal shall lie; prior to the delivery of the arbitral award; or

(b) The Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).”

The Claimant/Respondent has submitted, and the court has not been told otherwise, that no agreement that an appeal shall lie was entered between the parties hereto prior to the delivery of the award herein. That being the case, the intended appeal can only be with leave being obtained from the Court of Appeal under **Section 39 (3) (b)** of the **Arbitration Act 1995**. It was so held in the celebrated case on this topic: **ANNE MUMBI HINGA V VICTORIA NJOKI GATHARA [2009] eKLR (Civil Appeal No. 8 of 2009)**, wherein the finding of the court on this point was stated as follows:-

“We therefore reiterate that there is no right for any court to intervene in arbitral process or in the award except in situations specifically set out in the Arbitration Act or as previously agreed 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.”

Guided by the above decision which is binding upon me, I find that I have no jurisdiction to entertain the two applications which seek to interfere with the award by opening it up for further litigation in circumstances which are clearly outside the provisions of the law. I have neither the jurisdiction to stay the enforcement of the award and cannot grant any leave to appeal in the absence of an agreement of the parties to that effect.

In light of the holding in **THE OWNERS OF MOTOR VESSEL “LILLIANS” (Supra)**, I need not enter into other issues raised herein, having considered myself to have no jurisdiction in the matter.

Accordingly the two applications filed herein are dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of SEPTEMBER, 2011

M.G. MUGO

JUDGE

In the presence of :

For the Applicant
For the Respondent