



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Miscellaneous Application 742 of 2008**

**PINNACLE PROJECTS LTD.....CLAIMANT/APPLICANT**

**VERSUS**

**DICKSON MATU.....RESPONDENT**

**RULING**

The application before this court is brought by way of a Chamber Summons dated 4<sup>th</sup> May, 2009, and taken out under Sections 3, 3A and 75 of the Civil Procedure Act; Order XLII Rules 2, 3 and 4 of the Civil Procedure Rules; Section 35 of the Arbitration Act, No.4 of 1995; and all other enabling provisions of the law.

By the application, the applicant seeks leave to appeal the ruling/decision of the High Court in this matter dated 30<sup>th</sup> January, 2009, and that the costs of this application be provided for.

The application is supported by the annexed affidavit of David Kabubii Kuria, the applicant's Managing Director, and is based on the grounds that the applicant is aggrieved by the court's decision allowing the respondent's application to set aside the arbitral award; that the applicant's intended appeal is arguable and is not frivolous but has high chances of success; that the ends of justice will be met by the grant of leave sought; and that the respondent will not be prejudiced in any way if the leave sought is granted.

Opposing the application by his replying affidavit sworn and filed in court on 28<sup>th</sup> January, 2010, the Respondent deposes that granting this application will cause him great prejudice and loss as it will delay the award in his favour, and that such delay goes against the spirit of the arbitration process which puts a premium on speedy resolution of disputes. It is also the deponent's belief that the Memorandum of Appeal has no chance of success as none of the grounds therein raises an important issue of law that warrants them to go to the Court of Appeal. He therefore urges this court to dismiss the application with costs.

The background to this application is that the arbitral award made in this matter on 5<sup>th</sup> September, 2008 was filed in court on 7<sup>th</sup> October, 2008. In that award, the Applicant/Respondent was awarded a sum of Kshs.4,851,097.35 together with interest and costs. The Respondent in the arbitral proceedings then filed an application seeking the setting

aside of the arbitral award made in favour of the Applicant to the extent of the award amounting to Kshs.4,851,097.35. The High Court granted the orders and set aside the arbitral award as prayed. The applicant in the arbitration process has now filed this application seeking leave to appeal against the setting aside of the order made by the High Court.

According to the Applicant in that matter, the fees payable to the Respondent was clearly set out in Clause 1.4 of the Agreement and Schedule of Contract between the parties a copy of which agreement is on the record. Apparently they met on 23<sup>rd</sup> February, 2007 in the presence of a Mr. Peter Maina Mukoma, Advocate, with a view to ironing out their differences, and various courses of action were agreed upon which Mr. Mukoma reduced into writing in a letter of the same date. Clause 12 of the Agreement between the parties and dated 10<sup>th</sup> June, 2005 is worded as follows:-

*“12. ENTIRE AGREEMENT*

*12.1 This Agreement, its Schedules and the documents expressly referred to herein constitute the entire agreement between the Parties and, save as otherwise expressly provided, no modification, amendment, alteration, or waiver of any of the provisions of this Agreement shall be effective unless made in writing specifically referring to this Agreement and duly signed by the Parties (or their respective duly authorized representatives).”*

The court held that the letter dated 23<sup>rd</sup> February did not specifically refer to the 10<sup>th</sup> June, 2005, nor did it state in what respects the said agreement was modified, amended, altered or waived. Consequently, the court found that the aforesaid letter dated 23<sup>rd</sup> February, 2007 was beyond the Scope of the Reference before the arbitrator. On that finding, the application succeeded. It was against that decision that the Respondents in that application have applied for leave to appeal.

During the oral canvassing of the application, Mr. Otieno appeared for the Applicant and Mr. Burugu for the Respondent. After considering their submissions which included several authorities cited by each Counsel, I find that the main criteria for granting the leave sought is whether an applicant has realistic chances in the proposed appeal. In SANGO BAY LTD. v. DRESDNER BANK [1971] EA 17, Spry, the Vice-President of the then Court of Appeal for East Africa observed at pages 20-21:-

*“...As I understand it. Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where ... the order it is sought to appeal was made in the exercise of judicial discretion, a rather stronger case will have to be made out ...”*

In the more recent case of MACHIRA T/A MACHIRA & COMPANY ADVOCATES v. MWANGI & ANOR [2002] 2 KLR 391, the Court of Appeal stated at page 392:-

*“The consideration for the grant or refusal of an application for leave to appeal (a matter for the discretion of the court) are few but familiar and we consider it desirable and useful to have them briefly stated.*

*The Court will only refuse leave is satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success (sic). For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits a serious judicial consideration ...”*

I have perused the draft Memorandum of Appeal. Most of the grounds raised therein do not stand a realistic chance of success. However, one ground raises an interesting point by alleging that the Respondent did not raise the issue of the arbitrator exceeding the scope of his authority during the arbitral proceedings. If indeed that was the case, this would be a point that merits a serious judicial consideration as it would be a contravention of express statutory provisions.

For that reason, the application succeeds and the applicant is hereby granted leave to appeal. The costs of this application will abide the judgment of the Court of Appeal. It is so ordered.

DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of April, 2010.

**L. NJAGI**

**JUDGE**