



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC. CAUSE NO. 41 OF 2019

IN THE MATTER OF THE ARBITRATION ACT 1995 (AMENDED 2009, 2012) AND THE RULES OF THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH)

AND

IN THE MATTER OF ARBITRATION

BETWEEN

KENARD LIMITED.....APPLICANT/ RESPONDENT

AND

JULIUS MWANGI KIHARA.....RESPONDENT/ APPLICANT

RULING

The matter for determination is the **Notice of Motion Application** dated **13th November 2020**, bought under **Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The Respondent/Applicant sought the following Orders;

- 1. That there be Stay of Execution of the Ruling dated 24th September 2020, the Orders issued thereunder and all consequent Orders pending the hearing and determination of this Application.***
- 2. That there be Stay of Execution of the Ruling dated 24th September 2020, the Orders issued thereunder and all consequent Orders pending the hearing and determination of the Applicant's Appeal.***
- 3. Costs be provided for.***

The Application is premised on the grounds that by a Ruling delivered on **24th September 2020**, by this Court, the Arbitrator's finding were adopted as an Order of this Court and that the Applicant was condemned to pay a sum of **Kshs.1,736,290/=** to the Respondent, interest from **2013** and Arbitrator's Costs of **Kshs.311,850/=** and that he has initiated an Appeal against the said Ruling of **24th September 2020**.

The Application is also supported by the Supporting Affidavit sworn by **Julius Mwangi Kihara**, who deponed that he is dissatisfied with the Ruling of the Court allowing **Chamber Summons Application dated 4th September 2020**, and wishes to Appeal against the said Ruling. That his Advocate on the date of the Ruling attended a funeral of his Law Firm Partner and did send another Advocate to hold his brief, but forgot to apply for Leave to Appeal.

He further deponed that he is required by law to lodge a Notice of Appeal within 14 days, which ran out on **8th October 2020**, hence the Application for Leave to Appeal is Urgent.

It was his contention that he offers education training and any execution will greatly interrupt the scheduled examinations to the detriment of many candidates who will suffer irreparably.

The Application is opposed vide a Replying Affidavit filed on **11th December 2020**, Sworn by **Esther W. Mbugua**, who averred that an Advocate holding brief is presumed to have full instructions and therefore the Applicant cannot purport to claim that the Advocate on the date of the Ruling failed to seek Leave to Appeal and that in any event, the Application seeks **Stay of Execution not Leave to Appeal**. That the Honorable Court Lacks Jurisdiction to entertain the Application on account of Court being *Functus Officio*. She further contended that the Application offends **Rule 5(2)(b)** of the Court of Appeal Rules.

The Respondent also filed **Notice of Preliminary Objection** dated **24th November 2020**, on the grounds that;

1. *The Court lacks Jurisdiction to entertain the Application on account of the Court being Functus Officio having already made final determination on this matter.*
2. *That the Application offends Rule 5(2) (b) of the Court of Appeal Rules.*
3. *That the Application is frivolous, vexatious and only calculated to waste the time for the Honorable Court and deny the Applicant the fruits of its Judgement.*

Parties were directed to file Written Submissions to canvass the instant Application and Notice of Preliminary Objection. The Applicant through the **Law Firm of Wachira Ndungu & Co. Advocates**, filed his submissions dated **17th December 2020**, while the Respondent's submissions are dated **20th January 2021**, filed through the **Law Firm of Mereka & Co. Advocates**.

The Court has carefully considered the instant Application, the **Notice of Preliminary Objection**, the pleadings in general and the submissions filed and renders itself as follows;

The Main issues for determination are;

- a) *Whether the Applicant's Application dated 13th November 2020, is merited.*
- b) *Whether the Respondent's Preliminary Objection dated 24th November 2020, is merited*

(a) Whether the Applicant's Application dated 13th November 2020, is merited

The principles that guide Court when deciding on Application for Stay of Execution pending Appeal are clearly set out under **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules**, which provides:-

(1) No appeal 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 sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.

ON SUFFICIENT CAUSE

The purpose of an Application for Stay Pending Appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising his right of appeal are safeguarded. Therefore, this should be clearly demonstrated that there is indeed reason to preserve the subject matter upon which failure to do that would render the Appeal nugatory. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

The Applicant herein has contended that **he offers education training and any execution will greatly interrupt the scheduled examinations to the detriment of many candidates who will suffer irreparably. On the other hand, the Respondent contends that the Applicant is making unsubstantiated statements without evidence.**

In the instant matter, the Court notes that there is no draft Memorandum of Appeal which has been attached as a measure of the Applicant's commitment. The issue of success of the Appeal is not for this Court to determine and if the Applicant still argues that he has an arguable Appeal, he has to point the same by relying on the face of its Memorandum of Appeal which essentially has not been attached. In the case of **Mohamed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat (2013) eKLR**, where the Court upheld the decision of **M/S Portreitz Maternity –vs- James Karanja Kabia Civil Appeal No. 3 of 1997** and stated that:-

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the Plaintiff of that right....”

Further, no security has been offered, nor proposal on how to settle the Respondent’s claim nor single coin has been paid since the delivery of the Ruling or deposited in the parties joint account or deposited with the Court. There is no commitment exhibited by the Applicant and as such, the Court finds that the Applicant has not provided nor demonstrated sufficient cause and has been applying delaying tactics to destroy the Respondent’s prompt disposal of this matter.

ON SUBSTANTIAL LOSS

The Applicant contends, in paragraph 9 to 15 of his Supporting Affidavit that should execution be carried out, it will greatly affect him. In ***Silverstein –vs- Chesoni [2002]1 KLR 867*** the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

The Arbitration cause gave an award in the year 2019. The Respondent has since then been deprived of its money for a period of over two years. The Applicant has the burden to prove that by refusal to grant Stay of Execution, it stands to suffer substantial loss. The Court finds that the Applicant has failed to avail evidence to support its alleged claim of substantial loss, should the Application for stay of execution be denied.

ON INORDINATE DELAY

The Ruling of this Court was made on **24th September 2020**, and this Application for Stay is dated **13th November 2020**. The Notice of Appeal was filed on **1st October 2020**. The delay for more than one month in filing the instant Application has not been explained. The Court finds that the Applicant’s Application is inordinately delayed and no sufficient explanation has been offered for such inordinate delay.

ON FURNISHING SECURITY

Under the provisions of **Order 42 Rule 6 (1) (2)** of the **Civil Procedure Rules**, a party seeking a stay must offer such security for the due performance of the Orders as may ultimately be binding on the Applicant. The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the Applicant, and it should not be inferred or implied or left to the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute.

The Court, is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the Applicant has not satisfied any of the conditions set out under **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules 2010**.

(b) Whether the Respondent’s Preliminary Objection dated 24th November 2020 is merited

The Applicant opted to apply for Stay of Execution and not file an Appeal to the High Court for the determination of any question of law arising in the course of the Arbitration or out of the Arbitral Award. Perusal of the **Section 39(3)(b)** of the **Arbitration Act** reveals that an appeal to the Court of Appeal from the High Court will lie where:-

“The Court of Appeal, being of the opinion that a point of law of general importance is involved in 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)”

Without any fear of contradiction, this Court’s jurisdiction is ousted when one looks at the Applicant’s prayers in the Application herein. It seeks a Stay of Execution of the Ruling dated **24th September 2020** to enable it Appeal against that decision. Under **Section 35 (2) (b)** of the **Arbitration Act**, the Arbitral Award may also be set aside where the High Court finds that:-

a) The subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya; or

b) The award is in conflict with the public policy of Kenya.

Arbitration is a consensual process. This means that once parties choose Arbitration as their preferred mode of settlement of their dispute, the Court can only intervene as provided by the law. Section 10 of the Act which clearly stipulates that:- **“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”**

The Applicant has also relied on Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. However, in light of provisions of Section 10 of the Arbitration Act, all the provisions including the Civil Procedure Act and Rules do not apply to Arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act.

It is clear from the Arbitration Act that no further action was required to be done by the High Court or this Court essentially bringing the matter to a close after delivery of the **Ruling dated 24th September 2020**. The Arbitral Award became final and binding upon the Applicant

and the Respondent.

Section 35 of the **Arbitration Act** is silent on Appeals against High Court decisions thereunder. Further, the Court's conviction on this issue is reinforced by **Section 32A** of the said Act which provides as follows:-

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.”

Nowhere in the Arbitration Act does it state that an Appeal to the Court of Appeal would be on the decision of the High Court for having refused to set aside the arbitral award.

This Court should not grant orders in futility or where they are not supported by the law and litigation must come to an end. For above reasons, this Court's hands are tied for lack of Jurisdiction in this matter.

Consequently, the Court finds that the Applicant's Application dated **13th November 2020**, is **not** merited, and further, the Respondent's **Preliminary Objection** dated **24th November 2020** is hereby upheld.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 1ST DAY OF JULY 2021.

L. GACHERU

JUDGE

1/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Njoroge holding brief for Mr. Mereka for the Applicant/Respondent

Mr. S. N. Nganga for the Respondent/Applicant

L. GACHERU

JUDGE

1/7/2021