



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 371 OF 2018

LINDA BOMUAPPLICANT

VERSUS

KILUWA LIMITED.....RESPONDENT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 103 OF 2018

KILUWA LIMITEDPLAINTIFF

VERSUS

LINDA BOMU.....DEFENDANT

R U L I N G

1. On 14/11/2019, the Applicant as judgment-debtor, filed an application of the same day and sought orders to certify the matter agent, interim stay of execution of the judgement dated 25/10/2019 and ultimately pending the hearing and determination of an intended appeal.
2. The Application was supported by the Affidavit of HUSSEIN ALWYS and on the grounds that the Applicant had been aggrieved by the decision of the court dated 25/10/2019 and intended to file an appeal for which pursuit a Notice of Appeal had been lodged but feared that there were attempts at execution of the arbitral award yet the appeal had high chances of success. It was therefore contended that the Applicant stood to suffer irreparable damage unless the orders of stay are granted to the Applicant. The Applicant offered to provide security for grant of the stay of execution as directed by the court.
3. The same grounds were reiterated in the Affidavit in support it being stressed that the court ran into an error in law in failing to find that there existed no valid arbitral agreement on account of there having been no signed agreement and that the end result was that the court enforced an award of general damages in a contract contrary to the law. A specific offer for deposit of Kshs.25,000,000/= was made as security it being said that if execution was allowed to proceed the applicant would suffer substantial loss as the sum involved is huge being Kshs.25,00,000/=. The Applicant then exhibited as annexures to the Affidavit the Notice of Appeal, proclamation served by Makini Auctioneers as well as the warrants of attachment and sale in the sum of Kshs.26,439,595.00.
4. The Application was opposed by the Replying Affidavit sworn by one Linda Bomu as well as a notice of preliminary both filed on 18/11/2019. The decree-holder equally filed a copy of a decision in *Nyutu Agrovet Ltd vs Airtel Network Ltd [2015] eKLR* largely to support the preliminary objection that there being no right of appeal against an order recognizing an award, there was no jurisdiction to entertain and consider the Application for stay pending appeal.
5. The replying Affidavit asserted the position that the application for stay was utterly incompetent meriting being struck out and that the prerequisites of grant of stay pending appeal had not been met by the Applicant. It was particularly asserted that the delay in bringing the application, after 19 days, had not been explained and that no substantial loss had been demonstrated as the execution was only intended to

recover sums legally owed. To the contrary it was averred that it was the respondent who continue to suffer severely on account of the fact that the 50% deposit was borrowed from a bank and the failure to complete the house in time had been prejudicial to her in that she had to repay the loan from salary without the house. She contended that the only way to get indemnified was by permitting the decree to be executed.

6. During the hearing, the Applicant provided the court with two decisions being Court of Appeal civil Application No. sup.3 of 2015; ***Nyutu Agrovet Ltd vs Airtel Networks Ltd [2015] eKLR*** in which the Court of Appeal granted leave to appeal to the Supreme Court against its orders upon on decision by the High Court in enforcement of an arbitral award and ***Dhanjal Investments Ltd vs Kenindia Assurance Co. Ltd [2018] eKLR*** where the Supreme Court considered an appeal from the decision of the Court of Appeal by which the Court of Appeal had overturned the decision by the High Court that dismissed on application seeking to set aside an arbitral award.

7. The court directed that the preliminary objection be argued as an opposition to the application together with the Replying Affidavit and the same argued orally.

8. In the oral arguments, the counsel confined themselves to the parameters set by Order 42 Rule 6 beyond arguing the point whether or not there was a right of appeal. Even though Mr. Abed directed substantial energy in arguing the strength of the intended appeal, the court did inform him that such is a question and consideration and determination by the Court of Appeal and the line was dropped. However, by the time the court intervened, counsel had argued that there having been no written and signed agreement there was no valid agreement to found an award and that in law general damages are not awardable for breach of contract.

9. He then submitted that filing of its application within 19 days was timeous and not bad for inordinate delay and that his client was prepared to provide security for the sum disclosed in the warrants. On the preliminary objection counsel submitted that as crafted and filed the same was so wide and ambiguous and needed no consideration by the court but befitted being struck out.

10. For the respondent Ms. Gitari advocate opened her submissions by pointing out that the question of arguability of the appeal was not due for consideration before this court. She then submitted that substantial loss must also be viewed and argued from the view point that the decree-holder has been kept away from her money for years without the applicant saying a thing. However while appreciating the discretion vested upon the court, counsel submitted that if the court be mind to grant stay then instead of entire deposit, a portion of sum, not disputed, be paid out to the decree-holder and balance deposited in an escrow account.

11. The last point taken was that on jurisdiction raised in the Notice of Preliminary Objection to the effect that section 10 & 32(a) of the Arbitration Act bars the court for interfering in arbitral proceedings with a view to achieving finality and respecting parties' choice of forum. She took the very firm positions that by law the decision of this court adopting and recognizing the award is final without the right of appeal and therefore without an appeal there is no basis or rationale to consider ordering stay of execution because the court has become *functus officio*.

12. It was then added that the invocation of Order 42 Rule 6 as founding the application is not applicable and the application does not lie because the Arbitration Act and its rules are a complete code without room for invitation of the Civil Procedure Act and the Rules. She urged that the application be dismissed with stressing the point that the Court of Appeal in ***Nyutu Agrovet's case*** had said no appeal lies to the Court of Appeal from a decision of the High Court enforcing an award.

13. On the basis that Ms. Gitari had cited to court a decision whose copy she did not serve upon Mr. Abed, the court granted an adjournment to enable Mr. Abed to lay hands on the decision and to respond.

14. By the next date set for Mr. Abed's response, he had filed copies of the two decisions I have adverted to hereinabove. Based on the said decisions he said that in the case relied on by the decree holder to assert no right of appeal, the loser in the appeal opted to go to the Supreme Court and the Court of Appeal certified the question as an important matter of public interest fit for consideration by the Supreme Court. In his submissions, the decision in Nyutu Agrovet and the provision of Section 39 (3) are clear that appeal lies to the Court of Appeal. He then relied in ***Dhanjal Investment's case*** to show that a decision on enforcement of an award had found its way to the Supreme Court as a pointer that indeed appeal lies. He however reminded the court that what was before the court was an application for stay pending appeal with a rider that he had instructions to file an application for leave to appeal.

15. Because Mr. Balala had been granted leave to introduce the two decisions, the court granted to Ms Gitari an opportunity to make a comment on the law therein revealed. On the decision in Nyutu Agrovet being challenged at the Supreme Court, counsel pointed out that the appeal was still pending determination and therefore the decision by the Court of Appeal still stood.

16. On Section 39(3) counsel submitted that the same only applies to the two circumstances under section 39(1) and (2) which did not exist in this matter. On the decision in Dhanjal Investments, counsel submitted that it did not apply here because the dispute here was a pure commercial transaction without an element of public interest considerations.

Issues, analysis and determination

17. Even though the application is purely one for stay pending appeal which should not demand too much agitation and detailed study and arguments outside Order 42 Rule 6, the counsel in this matter have raised auxiliary points which are to this court are germane and ought to be considered and comments made. The issues I need to consider in this determination before I consider whether or not to grant stay are:-

1. Is there jurisdiction to grant stay it being said that there is no right of appeal?

2. Does Civil Procedure Rules apply to applications over the recognition and enforcement of arbitral awards?

18. I consider the two issues to deserve determination preliminarily because, if I hold for the respondent on them, then I would down tools at that juncture.

Does the court have jurisdiction to entertain and grant stay in this matter?

19. The jurisdiction of this court to grant stay is invoked once a Notice of Appeal is filed for an appeal is deemed filed then^[1]. It is however not for this court to consider the merits or arguability of the appeal filed from its own decision. I have also hold the view that I am possessed of no powers to consider the validity of the Notice once filed. That must be left to the Court of Appeal to determine. I therefore find that the argument that there could be no right of appeal does not oust my jurisdiction to entertain and consider an application.

20. More importantly, by the time the application was argued to conclusion, the appeal to the Supreme Court was pending. that situation however changed substantially when on the 6/12/2019 the supreme court delivered its judgment on the appeal and set the law that there are circumscribed jurisdiction of the Court of Appeal in that regard. Whether that circumscribed jurisdiction of the Court of Appeal exists here or not must be argued at an appropriate forum and resolved before it can be said that I lack jurisdiction to consider an application for stay. In fact in the matter before the Supreme Court it was ordered that the Court of Appeal shall determine in *limine* whether the threshold for admitting the appeal shall have been met. I hold and find that there is jurisdiction in the court to hear and determine an application for stay on the facts revealed of a Notice of Appeal being filed the material presented to court.

Is Civil Procedure Act and its rules Applicable in this matter?

21. The Application under consideration was clearly premised not only on the rules but also the oxygen provisions as well as the inherent powers of the court. My learning is that Civil Procedure Act is a statute of general application whenever a court sits to exercise its civil jurisdiction. I entertain no doubt that when an application is filed in court to enforce or challenge an arbitral award; the court entertains it under its civil jurisdiction.

22. There is yet no jurisdiction identifiable and distinguished as arbitration jurisdiction. Accordingly the court, beyond the obvious nature of overriding objectives and its inherent powers, is never capable of divorcing itself from Section 1A, 1B, 3 & 3A of the Act. May be it is time to rethink this regular phraseology declaring '*this and that statute*' as a complete code, autonomous and self-serving never to need support from each and every other law.

23. The arbitration rules, very brief rules indeed when compared to the way rules are generally promulgated under many statutes, are promulgated pursuant to the power donated to the Chief Justice pursuant to Section 40 of the Act. The extent of the space provided by that provision is to govern all proceedings where the courts intervention is permitted or intended by the statute. To me the legislature intended that the Rules be made for purposes of regulating all proceedings to be undertaken by the court under the statute. But being so brief, the rules themselves say under Rule 11, that Civil Procedure Rules shall apply to the proceedings under the Rules, '*wherever it is appropriate*'. I go back and reiterate that Civil Procedure Act and its Rules is a statute of general application on matters procedure whenever civil litigation is involved and are at all times applicable unless expressly excluded by a statute. But even then only the Rules may be excluded. The Act cannot be ignored by any court to which it applies.

24. For me I do find that the application of Civil Procedure Rules on matters where court intervention is permissible under the Act has not been prohibited by any provisions of the Act and therefore unable to uphold Ms. Gitari's position in this matter.

25. Having determined the two preliminary questions, I must now pose and ask the question if the applicant has met the thresholds to be granted stay pending appeal.

26. On timelines, I note that my decision to enforce the award was made on the 25/10/2019 and the current application filed on the 14/11/2019, some 19 days later. To me that presents promptitude and not inordinate delay. I do find that the application cannot be faulted nor deemed to have been made after delay.

27. For substantial loss, I do consider that the right of an aggrieved litigant to pursue an appeal should be appreciated the same way the right of the successful party holding a decree needs to be appreciated. While a party must have his right to access the court system to resolve its dispute, there is always a corresponding right upon the successful party, as that of an owner of a property in a decree, not to be arbitrarily deprived. In this matter that balancing act ought to be practical and objective. It must be noted that there has not been any allegation that the decree-holder is a person of the straw who would be incapable of effecting a refund should the appeal succeed. That the applicant/judgment debtor gave that consideration a wide berth is to me an indication and appreciation that having been able to contract for the purchase of an apartment, situate at an undeniably an upmarket area, and at a price that is not so modest, the decree-holder is not capable of being viewed as being impecunious. However, the dispute now is not limited to the sum of Kshs.11, 000,000/= paid and acknowledge by the Applicant/judgment debtor. It now stands at slightly over 26,000,000/=. Part of that is what the Applicant says was wrongly awarded by the arbitral tribunal and recognized by this court.

28. I also take note that before the matter went to arbitration, the Applicant/judgment debtor had in fact offered to effect a refund by his email of 11/4/2016, about four (4) years after the agreement was executed and since then some 3 years have since lapsed. My calculation is that we are headed to the ninth year since the Respondent/decree holder paid money to the judgment debtor applicant and she is today without both money and the desired house. I take the view that in the circumstances revealed, it would be unconscionable, if not out-rightly unfair, if the court was to order that the money whose refund was promised in April 2016, be kept away from the person entitled.

29. For those reasons, I do grant stay pending appeal but on conditions that the Applicant shall:-

a) Pay to the Respondent decree-holder a sum of Kshs.11,740,000 being the sum due as refund together with the costs of arbitration assessed in the sum Kshs.651,000/=-, within 30 days from today.

b) The balance of the decretal sum being Kshs.14, 048,595 be secured by a bank guarantee or an insurer's bound to be lodged in court within 30 days from today.

c) Time shall be of essence and the decree-holder shall be entitled to execute in the event of default

d) On costs, I do award the same to the Applicant/judgment-debtor being the successful party.

Dated and delivered at **Mombasa** this **16th** day of **December 2019**.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Order 4(2) Rule 6(2) 4