REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 443 OF 2011

AFTRACO LIMITED.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

AND

EXCLUSIVE ESTATES LIMITED.....1ST INTERESTED PARTY

POSTAL HOUSING COOPERATIVE SOCIETY LIMITED....2ND INTERESTED PARTY

RULING

[1] The Defendant/Applicant, **Telkom Kenya Limited**, filed the application dated **12 October 2016** for orders that pending the hearing and determination of this application and the intended appeal there be a stay of the arbitral proceedings before **Ms. Z Jan Mohamed,** and **Mr. A.F. Gross**; and that the costs of the application be provided for. The application was made on the grounds that the Defendant intends to appeal the decision of the court made on **28 September 2016** to the Court of Appeal, which intended appeal raises a fundamental issue of constitutional interpretation and has reasonable chances of success; namely that doubts have been expressed in later decisions of the Court of Appeal with respect to the correctness of the decision of the Court of Appeal in **Nyutu Agrovet Limited vs Airtel Networks Limited [2015] eKLR,** and that it is therefore necessary for the for the Court of Appeal to consider the Defendant's appeal in order to settle the law in this regard.

[2] It was further the Defendants contention that the Plaintiff and the Interested Parties were likely to take steps to fix the two concurrent arbitral proceedings for hearing before the appeal is heard and determined, and that there was a risk of the two awards being published awarding the same property to two different persons if the two arbitrations are not consolidated; in which event the Defendant would be incapable of complying with both the awards. The Defendant further posited that no prejudice will be suffered by the Plaintiff and the Interested Parties if the proceedings before the two arbitrators are stayed as proposed.

[3] The application was filed pursuant to **Article 165(6) of the Constitution** and **Order 42 Rule 6 of the Civil Procedure Rules, 2010**; and was supported by the Supporting Affidavit of **Wangechi Gichuki** annexed thereto, sworn on **11 October 2016;** in which the aforementioned grounds were amplified. Annexed to that affidavit are copies of the Notice of Appeal filed on **12 October 2016** and a letter dated

11 October 2016 by the Defendant requesting for copies of the proceedings in this case for the purpose of an appeal. The Plaintiff also relied on the Supplementary Affidavit sworn by **Wangechi Gichuki** and filed on **14 October 2016** to buttress the Defendant's case and express the attendant sense of urgency.

[4] In opposition to the application, the Plaintiff, **Aftraco Limited**, filed Grounds of Opposition on **17 October 2016**, contending that the application is an abuse of the process of the Court for the reason that the intended appeal does not in any way raise fundamental issues for determination by the Court of Appeal; and that in any case, the Court is *functus officio*, having granted the Defendant an order of stay that lapsed on **12 October 2016**. It was further contended that no sufficient cause was shown by the Defendant to warrant the granting of the orders sought and that the Defendant had failed to demonstrate that it stands to suffer prejudice. The Plaintiff therefore urged for the dismissal of the application as it is only intended to further delay the arbitral process to the detriment of the Plaintiff.

[5] The two proposed Interested Parties, **Exclusive Estates Limited** and **Postal Housing Cooperative Society Limited**, were equally opposed to the application. The 1st Interested Party filed its Grounds of Opposition on **14 October 2016**, contending that the application is *res judicata* as the Court had on **28 September 2016** granted a stay for 14 days, and hence the Court is *functus officio*. It was further contended by the 1st Proposed Interested Party that the application is an abuse of the court process as it seeks to stay a negative order in respect of an arbitration that was commissioned by a court order; and that substantial injustice is being caused to the 1st Proposed Interested Party by the delaying tactics employed by the Defendant, given that the arbitral hearing dates had been constantly vacated since **2013**. The 1st Proposed Interested Party further asserted, as did the Plaintiff that no evidence of substantial loss that will be suffered by the Defendant had been demonstrated. It was thus urged that the application be dismissed forthwith with costs.

[6] In addition to the Grounds of Opposition aforementioned, the 1st Proposed Interested Party filed a Replying Affidavit sworn by **Francis Mburu Mungai** on **17 October 2016** responding to the averments in the Defendant's Supporting and Supplementary Affidavits aforementioned. It was therein averred that the Defendant's affidavits are misleading to the extent that no doubts have been in fact cast over the decision in the **Nyutu Agrovet case**. It was averred further that the averments in paragraph 8 of the Defendant's Supporting Affidavit are *res judicata*, and therefore that the application is an attempt to have a second bite at the cherry. The rest of the averments in the Replying Affidavit were a reiteration of the 1st Proposed Interested Party's posturing that no sufficient cause has been shown to warrant the granting of the orders sought.

[7] On its part, the 2nd Proposed Interested Party relied on the Grounds of Opposition filed herein on **17 October 2016**, contending that the Court does not have the jurisdiction to entertain the Notice of Motion dated **12 October 2016** as the prayers as framed therein have already been ruled upon and are *res judicata*. It was further posited that the application has been filed with mala fides, with an ulterior motive of scuttling the hearing and determination of the arbitration, as the Defendant had not shown or demonstrated what prejudice it would suffer. Thus, the 2nd Interested Party also rooted for the dismissal of the application with costs.

[8] The application was argued on **17 October 2016** on the basis of written and oral submissions by Learned Counsel for the parties and the Lists of Authorities filed by them. **Mr. Kiragu Kimani** for the Defendant urged the Defendant's case, invoking the jurisdiction of the Court pursuant to **Articles 159 and 165(6) of the Constitution** as well as **Sections 1A** and **1B** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules, 2010**. It was the submission of Mr. Kiragu Kimani that, as required by **Order 42 Rule 6(2)** of **the Civil Procedure Rules,** the Defendant had demonstrated sufficient cause for stay and also shown that it would suffer substantial loss. Positing that substantial loss need not be in monetary terms, he highlighted the relevant averments in the two affidavits sworn by **Wangechi Gichuki** to show that the two arbitral proceedings had already been set down for hearing.

[9] Relying on the cases of **Ujagar Singh vs. Runda Coffee Estate Ltd, City Chemist (NBI) & Another vs. Oriental Commercial Bank**, in addition to **David Nkanata Magiri vs Benard Benedict Mungania and 4 Others [2012] eKLR, Halai & Another vs. Thorntorn and Turpin (1963) Ltd**

[1990] KLR 365 and Butt vs. Rent Restriction [1982] KLR 417, **Mr. Kimani** submitted that the Defendant had made out a good case to warrant the granting of the order of stay as sought, pointing out that the Defendant is ready to abide by any order that the Court may make as to security.

[10] On behalf of the Plaintiff, **Mr. Ahmednassir, SC**, opposed the application calling it a classic example of abuse of the Court process. He submitted that the two arbitrations were knowingly and expressly initiated by consent before different arbitrators; and that therefore the Defendant would be insincere to seek consolidation five years down the line. He further submitted that for the Court to be moved under **Article 165(6)** of **the Constitution**, the party petitioning for relief must be aggrieved by the jurisdiction of the tribunal and the person aggrieved must bring an original cause of action; which, it was submitted, was not the case herein.

[11] It was further submitted by Counsel for the Plaintiff that, the Defendant having consented to the two arbitrations in the first place, it should not be heard to complain that it would suffer substantial loss by the mere fact of the arbitrations being proceeded with; and that possibility of the two arbitral awards being made was merely speculative, and therefore it would not serve the ends of justice for the Court to grant stay orders on the basis of what Senior Counsel referred to as "improbable probability". The Plaintiff relied on the cases of **Western College of Arts & Applied Sciences vs. Oranga & Others [1976-80] 1 KLR 78, Wananchi Group Kenya Limited vs Commissioner for Investigations & Enforcement [2014] eKLR, Feisal Amin Janmohammed T/a Dunyia Forwarders vs Shami Trading Co. Ltd [2014] eKLR and Judicial Service Commission vs. Kalpana H. Rawal [2015 eKLR** in opposing the application.

[12] Mr. Kigata, Learned Counsel for the 1st Proposed Interested Party relied on the Grounds of Opposition filed and the Replying Affidavit of **Francis Mburu** in opposing the application. He associated himself with the submissions of Counsel for the Plaintiff and reiterated that the parties had consented to their dispute being referred to arbitration and should therefore submit or be made to submit to that process to its conclusion. He added that if the Defendant is aggrieved by the result of the arbitration it will be free to seek relief as appropriate. Counsel relied on the cases of **Bai Lin (K) Ltd & 2 Others vs Zingo Investments Limited & Another [2014] eKLR** and **Kihara vs. Barclays Bank (K) Ltd [2001] 2 EA 420** for the proposition that specific details and particulars of substantial loss have to be shown before an order of stay can be granted. **Mr. Kigata** concluded his submissions by positing that to grant the application would be to go contrary to **Article 159 of the Constitution** which recognizes arbitration as an expeditious dispute resolution mechanism. He therefore urged for its dismissal with costs.

[13] On behalf of the 2nd Proposed Interested Party, **Mr. Anzala** relied on the Grounds of Opposition filed and adopted the submissions of **Mr**. **Ahmednassir, SC**, and urged for the dismissal of the application. He relied on the cases of **Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR** and **Dream Camp Kenya Limited vs Mohammed Eltaff & 3 Others [2013] eKLR,** in support of his submissions and pointed out that though the application was filed under the Civil Procedure Rules, the proceedings sought to be stayed are under the Arbitration Act, which is, in itself, a self sufficient legislation.

[14] In his reply to the submissions by Learned Counsel for the Plaintiff and the proposed Interested Parties, **Mr. Kiragu Kimani** was of the view that no authority was cited to support the argument that an application under **Article 165(6) of the Constitution** must be based on a grievance. He stressed the pointed that the Defendant is not out to challenge the consent orders made for referral to arbitration, but a stay of arbitral proceedings pending an appeal against the Ruling of the Court delivered on **28 September 2016;** adding that the delay of the arbitral proceedings could not be wholly blamed on the Defendant. He thus urged that the application be allowed.

[15] Having carefully considered the grounds upon which the application dated **12 October 2016** has been brought, the affidavits filed in support thereof and the responses filed by the Plaintiff and the proposed Interested parties, as well as the submissions made herein, it is plain that the issues falling for my determination are three-fold; firstly is the question as to whether the court has **jurisdiction** to entertain the application. granted the contention by the Respondents that the court is *functus officio* and

that the application is *res judicata;* and that for the court's supervisory jurisdiction under **Art. 165(6) of the Constitution** to be invoked, there has to be a grievance against the inferior tribunal whose proceedings are sought to be stayed. The second broad issue to consider is whether the conditions for grant of stay, as stipulated under **Order 42 Rule 6 of the Civil Procedure Code**, have been satisfied in this instance.

[16] On the **applicability of Art. 165(6) of the Constitution** to the instant application, it was the contention of the Plaintiff that the Defendant needed to demonstrate a valid grievance against the arbitrators and by bringing an original appeal or cause of action, it needs to be recalled that the same situation now obtaining, presented itself in respect of the first application dated **15 August 2016**. The stay sought herein, is not in direct correlation with the Ruling of the Court dated **28 September 2016**, which was in any event a negative order, but in respect of the two arbitral proceedings pending before **Ms. Z. Jan Mohamed** and **Mr. A.F. Gross**, to enable the Defendant appeal the aforementioned Ruling. The two arbitrations were initiated vide a court order, albeit by the consent of the parties.

[17] Accordingly, when the same question of whether the court had the jurisdiction under **Art. 165(6) of the Constitution** to grant stay was posed in the course of the hearing of the initial application, the Court gave this matter due consideration and came to the following conclusion:

"...The Court was ... urged, pursuant to Articles 159 and 165(6) of the Constitution, as read with Sections 1A, 1B, 3A, 59C and 63(e) of the Civil Procedure Act, to venture outside the Arbitration Act and exercise its supervisory jurisdiction with a view of furthering the Overriding Objective of the Civil Procedure Act and the Rules thereunder. It is common ground herein that the issue of consolidation of arbitral proceedings is not specifically covered either by the UNCITRAL Model Law or the national law, namely the Arbitration Act. Consequently, I would agree with the Defence Counsel that consolidation is a matter that falls outside the ambit of Section 10 of the Act. That being the case, the Court has the jurisdiction pursuant to Articles 159(2)(d) and 165(6) of the Constitution ...to entertain the application and, if merited, grant orders that would meet the ends of justice in this matter. I have no doubt that the Court has the residual power under the aforementioned provisions to ensure, not only that the ends of justice are attained, but to also facilitate the expeditious, proportionate and affordable resolution of civil disputes, in furtherance of the Overriding Objective of the Civil Procedure Act. This is the same viewpoint that was taken by the Court in the case of Songa Ogoda & Associates vs. University of Nairobi [2014] eKLR, concerning an application for stay of arbitral proceedings, a matter not specifically provided for in the Arbitration Act. I therefore find no merit in the argument that the Court's jurisdiction to entertain the application is ousted by Section 10 of the Arbitration Act..."

[18] I would come to the same conclusion in respect of the argument that for **Article 165(6) of the Constitution** to come to the aid of the Defendant in the instant application, there has to be a grievance. This is because there is no gainsaying that the application for stay is intertwined with and inseparable from the two arbitral proceedings. It is for this reason that the Defendant found it instructive to exhibit, as an annexure to the Supplementary Affidavit, the two letters dated **12 October 2016** from Counsel to the Arbitrators asking for hearing dates to be set in respect of the arbitral proceedings. I therefore find untenable, given the circumstances of this case, the argument that for **Article 165(6) of the Constitution** to come into play there must be a grievance.

[20] As to whether the application is *res judicata*, the argument was hinged on the fact that the instant application is the same as the application that was the subject of the Court's Ruling dated **28 September 2016** in the sense that both these applications seek the stay of the two arbitral proceedings pending before **Ms. Janmohamed** and **Mr. Gross**. In this regard, **Section 7 of the Civil Procedure Act** provides that:

> **"No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title…and has been heard and finally decided by such Court."**

[21] The applicable principles giving effect to the aforestated provisions are now well settled, and were restated, for instance, in the case of **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others [2010] eKLR** thus**:**

a) The matter in issue is identical in both suits.

b) That the parties in the suit are substantially the same.

c) There is concurrence of jurisdiction of the Court.

d) That the subject matter is the same and finally,

e) That there is a final determination as far as the previous decision is concerned.

[22] Applying the principles to the facts of this case, it is noted that whereas the same parties have come before this Court seeking the same order of stay of the two arbitral proceedings, it is instructive to consider for what reason stay is sought. In the first application, the stay sought was pending the hearing and determination of that application itself. The application was for consolidation of the two arbitral proceedings. In the instant application, the stay is sought pending an intended appeal against the Ruling of the Court delivered on **28 September 2016**. The distinction is significant, and it is for that reason that I find that the instant application cannot be said to be *res judicata*.

[23] The third and final limb of the preliminary jurisdictional points is the Respondents argument that the Court is *functus officio,* having already granted stay following the Ruling of **28 September 2016**. In the case of **Dickson Muricho Muriuki vs Timothy Kagondu Muriuki and 6 Others [2013] eKLR,** the Court of Appeal had occasion to consider the circumstances when the court would be deemed to be functus officio. It rendered itself thus:

> **"...it is profitable to note that the concept of functus officio should not be confused with the doctrine of *res judicata* although both have an element of prohibition of exercise of authority over the subject of the suit. The former prohibits exercise of authority by any court in the same suit the court has determined completely, while the latter relates to a situation where there are two suits; a current suit and another previous; ...whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently overstretch the application of the concept of *functus officio*...Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case..."**

[24] As was rightly pointed out by the Respondents, an application was promptly made on **28 September 2016** by the Defendant's Counsel for a temporary stay of the arbitral proceedings for 21 days to enable Counsel seek instructions. The application was opposed on the basis that the matter was long-standing as the arbitral proceedings had been pending since 2011 and the parties were anxious to proceed with the same. The Respondents were at pains to emphasize that two arbitrations had been consented to by the parties concerned, and having given the matter anxious care, the Court granted a temporary stay in the following terms:

> **"I have considered the oral application by Mr. Ondieki and would grant stay as sought but only for 14 days, whereafter the parties should be at liberty to proceed with the arbitral proceedings..."**

[25] It was clear to all concerned that the order was not in anticipation of a formal stay application pending appeal, but to enable the Defendant move to the Court of Appeal for stay or any further interim orders as it deemed fit, pending its intended appeal. It was for this reason that the Court made it manifest that the arbitral proceedings would be proceeded with after the 14 days, and was the same reason that an application for extension of the 14 days aforementioned was declined by the Court on **17 October 2016**.

In the premises, the Court is indeed *functus officio* in respect of the application for stay pending appeal, having already granted stay on clear terms as has been shown hereinabove.

[26] In the light of the foregoing, it is my considered view that the Court lacks the jurisdiction to entertain the Notice of Motion dated **12 October 2016,** and I so find. The same is hereby dismissed with costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY 2017

OLGA SEWE

JUDGE