



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISC. CIVIL APPL. NO. 538 OF 2015

GRAIN BULK HANDLERS LIMITEDAPPLICANT

VERSUS

MISTRY JADVA PARBAT & COMPANY LIMITEDRESPONDENT

IN THE MATTER OF AN APPLICATION UNDER SECTION 14 OF THE ARBITRATION ACT TO
DETERMINE THE MATTER OF A CHALLENGE TO THE ARBITRATOR

AND

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION ACT 1995(AS AMENDED
BY THE ARBITRATION (AMENDMENT) ACT NO. 11 OF 2009)

AND

IN THE MATTER OF AN ARBITRATION UNDER THE 2012 RULES OF THE CHARTERED
INSTITUTE OF ARBITRATORS (KENYA BRANCH)

("THE RULES")

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITEDCLAIMANT

AND

GRAIN BULK HANDLERS LIMITEDRESPONDENT

RULING OF THE COURT

The Application

1. By a Notice of Motion dated **22nd November, 2016** the respondent/applicant (*hereinafter called "applicant"*), seeks as the main prayer, an order staying further proceedings herein pending the hearing

and determination of the applicant's application for a stay of further proceedings pending appeal dated **17th November, 2016** and filed in the Court of Appeal. The application is founded on the grounds set forth therein and is supported by affidavit sworn by **Paresh Varsani**, a director of the applicant's company, on **22nd November, 2016**.

2. The applicant's case is that on 12th October, 2016, this court delivered its ruling dismissing the applicant's application seeking the recusal of the judge from further hearing this matter. The judge thereafter scheduled the delivery of judgment on the Originating Summons herein for the 24th November, 2016. Being aggrieved by the said decision, the applicant intends to appeal against the said decision of this court, and has filed an application for stay of further proceedings pending appeal before the Court of Appeal. The applicant's case is that unless the application is allowed, the opportunity to challenge this court's decision of the 12th October, 2016 on appeal prior to the decision on the Originating Summons will be lost, hence the applicant's right to a fair hearing will be infringed upon and this would result in an outcome that is repugnant to justice and morality. The applicant believes that its Intended Appeal and the application for stay of further proceedings pending appeal has good prospects of success and prays that this court do allow this application in the interests of justice.

3. The application is opposed by the respondent vide Grounds of Opposition dated **28th November, 2016** and a replying affidavit sworn by **M/S Shazeen Chatur**, the legal Director of the respondent, on **25th November, 2016**. The respondent has opposed the application on the grounds that:

- a. The respondent has not satisfied the test for a grant of stay of proceedings.
- b. The application has been brought after inordinate delay and the alleged urgency claimed by the respondent is neither justified nor can it be claimed in the circumstances.
- c. The bad faith with which this application has been made is further demonstrated by the fact that it was only filed on 23rd November, 2016, the eve of the date given for the delivery of the court's final decision in this matter (24th November, 2016).
- d. The mere fact that the respondent has filed an application for stay of proceedings in the Court of Appeal is not a ground for having these proceedings stayed more so in view of the fact that no orders have been given by the Court of Appeal.
- e. The application has no merit.
- f. The applicant's right to have this matter expeditiously determined as provided for **Section 1A of the Civil Procedure Act** has been consistently curtailed by the respondent's persistent tactics to have the final determination of this matter derailed. The respondent should not be allowed to continue to act in this manner to the prejudice of the applicant's own rights.

4. The respondent's case is that the mere fact that the respondent has filed an application in the Court of Appeal seeking a stay of these proceedings is not of itself a ground for having these proceedings stayed in view of the fact that the Court of Appeal has not given any orders in respect of that application. There can be no basis for the applicant claiming that the application is urgent in view of the fact that the ruling on the applicant's application dated 2nd September, 2016 which sought to have the judge herein recuse himself and which is the subject matter of the present application, was delivered by the judge on 12th October, 2016; and this application was filed 42 days after the recusal application had been dismissed. There was clearly inordinate delay in bringing the application. In any event Exhibit PV1 to the affidavit of **Paresh Varsani** confirms that the application to the Court of Appeal was filed on 21st November, 2016. This was a period of 40 days after the delivery of the ruling of 12th October, 2016. The applicant should not be allowed to benefit from its own indolence. The respondent's case is that the application has no merit and has been brought in bad faith with the sole view to scuttle the final determination of this matter. It is fair and just that the application is dismissed and the substantive matter in the Originating

Summons dated 11th December, 2015 determined forthwith.

Submissions

5. Parties made oral submissions on the application. **M/S Omuko** for the applicant submitted that the applicant intends to appeal against the decision of this court dated 12th October, 2016 and if this court proceeds with this matter and makes a decision on the Originating Summons, then the applicant will not have a chance to challenge the decision made on 12th October, 2016. Counsel noted that staying of proceedings is a matter of judicial discretion, but that discretion should be exercised in the interest of justice and judiciously. Counsel cited the case of **Chesilyot Enterprises Ltd vs Co-operative Bank Ltd(2008) eKLR** in which the court stated that staying of proceedings can be made in the interest of justice, but even then the court must concern itself with the need for the expeditious disposal of the case, and proportionate use of judicial time. Counsel submitted that if the proceedings are not stayed, the applicant will not challenge the decision of 12th October, 2016. Further, there will be no prejudice to be caused to the respondent. Counsel submitted that the award herein was made in favour of the applicant so the respondent will not be losing anything if there is a delay. Counsel also relied on the cases of **Bhat vs Rent Restriction Tribunal (1982) KLR 417**, where the court observed that if there is no overwhelming hindrance, then a stay must be granted.

6. On the issue of delay, counsel submitted that there was no delay, leave done inordinate delay.

7. **M/S Mwangi** counsel for the respondent opposed the application. Counsel submitted that the suggestion that failure to allow stay will render the proceedings nugatory is not correct. Firstly, Counsel observed that there is no appeal filed in the Court of Appeal. What is in the Court of Appeal is only an application which has not been certified urgent and so there is not appeal. Secondly, the submission that the respondent will suffer no prejudice is not correct. Counsel submitted that the respondent is not in this court to challenge the arbitral award. The respondent is challenging a decision of an arbitrator. It is not an application under **Section 35** of the **Arbitration Act**. It is an application under **Section 14** of the **Act**. Counsel submitted that there will be prejudice in delaying this matter. The applicant has failed to satisfy the grounds for grant of stay of proceedings. Citing the case of **Machira t/a Machira & Co. Advocates vs E.A. Standard (2002) 2 KLR 63**, Counsel submitted that a party applying for stay of proceedings must show and particularize prejudice or loss to be suffered if stay is denied. It was submitted by the respondent that **Article 159** of **Constitution and Section 1A of Civil Procedure Act** encapsulate the overriding objective of the court – to facilitate a just and expeditious determination of disputes. Counsel also relied on the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wakabi Civil Appeal No. 326 of 2013 (2014) eKLR**, where court stated that interest of justice must be considered in regard to both parties. In this regard, **M/S Mwangi** submitted that the application – Originating Summons- was filed in December, 2015 One year ago, and should be allowed to proceed unhindered. Further, Counsel submitted that this application was filed after an inordinate delay. It took over 40 days for the applicant to file this application. An application for stay of proceedings must be done without delay. The application was filed on the eve of the judgment on the Originating Summons. This shows that the applicant was not sure whether to file it or not. Counsel submitted that equity does not aid the indolent. Citing the case of **Pius Kawinzi Kithoka vs Jacinter Kavindu Makau, (2012) eKLR**, Counsel submitted that a party will only be allowed to interfere with flow of proceedings in exceptional circumstances, and these are not exceptional circumstances. Counsel prayed that the application be dismissed and the court issue judgment on the Originating Summons dated 11th December, 2015.

Determination

8. I have carefully considered the application, the submissions of parties and the authorities. I am aware that a grant of an application to stay proceedings is within the discretion of this court. I am also aware that any exercise of such discretion has to be done in the interest of justice and must be judicious. So the only issue I raise for determination is whether or not I should exercise my discretion to stay these proceedings.

9. The fact that the proceedings sought to be stayed are my own proceedings makes it easier to make a

determination because I have in mind the history of the matter before the court.

The Law

10. The application is filed pursuant to **Sections 1A, 1B and 3A, 63(e) of the Civil Procedure Act** and Inherent powers of the court, **Article 50(1) and (2) and 159(3) of the Constitution**. These Sections of the law deal with the overriding objective of the court and judicial system, the right to a fair hearing. Under the Inherent Powers of this court is the court's discretion which I have referred to earlier.

Case Law

11. In terms of case law, authorities abound which persuade or guide this court on how to reach a decision. The applicant cited the case of ***Chesilyot Enterprises Ltd v Co-operative Bank (K) Ltd (2008) eKLR*** for propositions that the stay should be allowed. They also cited the case of ***Butt v Rent Restriction Tribunal (1982) KLR 417***. In both cases, the courts emphasize the discretionary powers of the court, which should be dictated by the nature of the case before the court, and whether appeal would be rendered nugatory. In the instant case, it is worth to note that there is no appeal. What is there is a Notice of Appeal, and an application before the Court of Appeal filed at the Registry in Nairobi on 21st November, 2016. That application was not certified urgent by the Court of Appeal, hence the applicant came back to this court for similar orders.

12. The respondent cited the case of ***Machira t/a Machira & Co. Advocates vs East African Standard (2002) 2 KLR 63*** where court made *inter alia* the following findings on stay of proceeding applications:

- i. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interests of one party.**
- ii. in handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage.**
- iii. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.**
- iv. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.**
- v. In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.**
- vi. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.**
- vii. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.**
- viii. The application in this case came late and without good reason. The plaintiff should be allowed to move on.**

13. In the case of ***Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokebii Civil Appeal No. 326 of 2013 (2014) eKLR***, the court established the criteria for consideration for an order of stay of proceedings

as follows:

“Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations”

The court then quoted **Ringera J** (*as he then was*) when he stated the following when confronted by a similar application in the case of ***Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000***

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

The court then distilled the following three main principles to guide a court in such applications:

- a. Whether the applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

14. In ***Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR***, the court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

And in ***Pius Kawinzi Kithoka vs Jacinter Kavindu Makau***, (aforesaid) the court made the following observation:

“The applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the court’s discretion. Equity does not aid the indolent”

15. The foregoing shows clearly that at the end of the day, the discretion in granting an order of stay of proceedings lies with the court, and it is one to be exercised in the interest of justice taking into account the totality of the matter before the court.

16. In the instant case, the court, on 12th October, 2016 dismissed an application by the applicant which had sought the recusal of the judge, being myself, from further hearing of this matter. The history of this matter is well documented through the said ruling and the pleadings herein. I will not narrate the same here, except to say that for some unexplained reason the applicant does not want this court to render a ruling on the Originating Summons filed herein on 11th December, 2015. The judgment on the said Originating Summons was initially scheduled for **26th August, 2016**. However, when the same was about to be delivered the applicant orchestrated factors leading to the filing of the aforesaid application for recusal, and which factors are documented in the ruling of this court on 12th October, 2016. This court

dismissed with costs that application. It is that ruling which the applicant seeks to appeal against, and so the stay of proceedings here actually only means the stay of judgment on the said Originating Summons. That is the only outstanding proceeding in the entire matter before the court.

17. It is not within the scope of this ruling to go into the merits of the intended appeal, given that no appeal has been filed. However, the discretion of this court must take into account the conduct of the applicant since the said ruling was delivered.

18. The application for recusal of the judge was heard *inter partes* on 27th September, 2016. All the three parties were represented in court. The applicant was represented by a **Mr. Ondego** who held brief for **Mr. Khagram**. The court, in the presence of all the parties, reserved the ruling for 12th October, 2016. On the day of the ruling, all other parties were represented except the applicant, and after the dismissal of the application, they requested that the ruling on the Originating Summons be delivered. The court then reserved the ruling for 24th November, 2016, 43 days from the date of the ruling. During these 43 days, the appellant never made any efforts either to file an appeal or to make the current application for stay of proceedings. The current application was filed in this court on 23rd November, 2016, a day before the judgment on the Originating Summons was due. When I received the said application, I was already on the heat of the moment with the judgment which was due the following day.

19. The applicant has not made even the feeblest attempt to explain the delay in filing the current application. There is on court file a letter from the applicant's advocates dated 18th October, 2016 asking for a copy of the ruling. In the said letter the applicant alleges that they were unable to trace the court file. This is a baseless allegation because this court gave directions in the open court in the presence of the appellant's counsel on 27th September, 2016 after the hearing of the application. This court gave notice that the judgment on the Originating Summons would be delivered on 24th November, 2016. That direction meant, without any doubt, that the file would be with the judge for the purpose of preparing that judgment. The appellant's assertion that they could not trace the file in the registry is false and is meant to mislead this court. In any event, if for any good reason they could not trace the file, why did they not ask the Court Clerk? The Machakos registry is so small, that if it takes one twenty minutes without locating a file, an inquiry from the judge's clerk would be in order. But, even if, for argument sake, this court were to accept that the applicant had some challenges locating the file, by 18th October, 2016, they had known where the file was. What did they do with that time which was well over 35 days before the date of the judgment on the Originating Summons?

20. This court is however, not surprised, because the conduct of the applicant in this matter since the inception of the matter has been wanting. Mr. Khagram has never attended to this matter personally, but at every stage he has been represented, with the result that orders are made and directions given, some of them by consent of the parties, only for the applicant through Mr. Khagram to renege on the same. The conduct of the applicant in this matter is not one which can please a court exercising its discretion, to do so in its favour.

21. The maxim that delay defeats equity is clearly applicable in this matter. Immediately after the ruling of this court on 12th October, 2016, the other two parties in this matter asked for the judgment on the Originating Summons. However, the court in its own wisdom gave them a date 43 days after the ruling. This court thereby made a provision for stay without any application by the applicant's counsel, who, without giving reasons failed to turn up for the ruling.

22. As to whether the applicant shall suffer loss if the application for stay of proceedings is not allowed, the respondent is not convinced that there is such a loss to be suffered. This is so because the Originating Summons herein in which judgment is due is filed in this court pursuant to **Sections 14(3),(5) (7) and (8) of the Arbitration Act Cap 49**. The Originating Summons challenges the appointment of an arbitrator. The respondent submitted that if the Originating Summons succeeds, it would mean that the arbitrator would be removed as such arbitrator. If the Originating summons fails, the arbitrator will continue in his office. Under **Section 14(8)** of the said **Act**, during the pendency of these proceedings,

“ ... The parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful”

This submission is persuasive, although the applicant disputes it on the grounds that according to the applicant there is already an award. However, I have noted that the section of the law under which the Originating Summons is filed only challenges the appointment of arbitrator, and on this ground, I am persuaded that the applicant is not likely to suffer loss if this application is not allowed.

23. I agree that the application before the court for stay of proceedings cannot be given by this court, considering the nature of the matter, and the unexplained delay by the applicant to make the application. The judgment on the Originating Summons was due on 26th August, 2016. It was then delayed by proceedings filed by the applicant. Upon these proceedings being determined, judgment on the Originating Summons was scheduled for 24th November, 2016. On 23rd November, 2016, a day before the delivery of the judgment, the applicant filed this application. This was an action couched in bad faith with the sole purpose of delaying the judgment on the Originating Summons. This court can no longer condone further delay in this matter.

24. The application before the court lacks merit, and is herewith dismissed with costs to the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 6TH DAY OF DECEMBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of:

M/s Mwangi for Applicant/Respondent

No appearance for Respondent

No appearance for Arbitrator

Court Assistant – Mr. Muniyao