



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 200 OF 2007

MOHAMED SALIM SHAMSUDIN ::
PLAINTIFF

VERSUS

TRISHCON CONSTRUCTION LIMITED ::
DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** dated **26th May 2015** filed in court on 27th May 2015 by the Defendant. The application seeks the following orders:-
 1. ***This application be certified as urgent;***
 2. ***Service of this application be dispensed with in the first instance;***
 3. ***The execution of the Ruling of this honorable court dated 15th May 2015 allowing enforcement of the arbitration award dated the 26th May 2015 be stayed pending the hearing and determination of this application.***
 4. ***The execution of the Ruling of this honorable court dated 15th May 2015 allowing enforcement of the arbitration award dated 26th May 2015 be stayed pending the hearing and determination of civil appeal no. 28 of 2013 between Trishcon Construction Company and Mohamed Salim Shamsudin, currently pending in the court of Appeal at Nairobi.***
 5. ***The costs of this application be provided for.***
2. The application is premised on the grounds set out therein, and is supported by affidavit of **Dhanji Velji** who is a director in the Defendant/Applicant Company.
3. The Applicant's case is that in the course of the hearing of the Plaintiff's application for enforcement of the Award, it was brought to the attention of this court that there is pending in the Court of Appeal at Nairobi, Civil Appeal No. 28 of 2013 filed by the Applicant against a decision of Justice Muga Apondi. The Appeal is against the decision of Justice Muga Apondi in an Application filed by the Applicant seeking to set aside the Award dated 26th May 2009. It is the same Award the subject of the Court's ruling of 15th May 2015. The Applicant's case is that one of the key legal issues raised in the aforesaid Appeal is whether the Arbitration between the parties was pursuant to the provisions of the Civil Procedure Act and Rules or pursuant to the Arbitration

Act 1995.

4. Soon after filing Civil Appeal No. 28 of 2013, the Applicant also filed an Application for stay of proceedings in the Appeal. The application was heard and the Court of Appeal granted a stay of proceedings on condition that the Award of Kshs 16,383,035/- is deposited in an interest earning account in the joint names of the Advocates of the parties pending the hearing and determination of the Appeal which had already been filed.
5. However, the Applicant found it challenging to raise the sum of Kshs.16, 381, 035/- as ordered by the Court of Appeal. Instead, and in a bid to meet the condition set by the Court, the Applicant filed a Notice of Motion application dated 30th October 2013 in Civil Application No. NAI 86 of 2013 seeking to vary the terms set by the Court of Appeal, praying that instead of making a cash deposit, the Court do accept as security a lien for the title documents in respect of Land Reference Number 12833/5 Kikuyu. That application is yet to be heard.
6. The Applicant's case is that the Respondent will not be prejudiced in any way in the event that this application is allowed given that the Applicant is prepared to offer security for the arbitral award sum as ordered by the Court of Appeal, albeit in a varied form. On the other hand, the Applicant believes it stands to suffer substantial and irreparable loss and damage unless a stay is granted, especially if the Applicant is successful in the pending Appeal. The Applicant's case is that the issues raised in appeal, and which were partly canvassed before this Court, are not frivolous, and that the appeal filed has merit. The Applicant is prepared to put in place security as may be allowed by the Court of Appeal to secure the interests of the Respondent. The Applicant is advised by its counsel that rather than seeking to appeal against the ruling of this court, it is better to pursue the pending Appeal given the similar issues arise in both, and that the best course is for this court to stay enforcement of the Award pending the hearing and determination of Civil Appeal No. 28 of 2013.
7. The application is opposed through the replying affidavit sworn by Mohamed Salim Shamsudin on 3rd June 2015. Mr. Shamsudin deponed that the current application should be dismissed since the Applicant has failed to provide security for stay of proceedings as ordered by the court of Appeal in civil Appeal No. Nairobi 86 of 2012.
8. Parties relied fully on the supporting affidavits, which I have carefully considered. The only issue I raise for determination is whether this court should grant stay in the circumstances of this application.
9. Since all the parties agree that there is a conditional stay of proceedings in the civil appeal no. 28 of 2013, and the appellant is yet to provide security of Kshs.16,831,035/=, a stay of proceedings in this application can be granted for a limited period to enable the Applicant provide security in the terms of the Ruling of the Court of Appeal dated 27th September 2013. If that security is provided as per that Ruling, the Respondent herein will not suffer any prejudice since the suit property will be protected by the security.
10. However, I have noted that the Respondent is skeptical about the Applicant providing the said security since the Respondent has failed to do the same. I will in my Ruling therefore give a limited stay of execution for 90 days to enable the Applicant provide the security above said, failure whereof the stay granted herein will automatically lapse.
11. In the upshot, I make the following orders:-
 1. ***The application for stay is granted for a period of 90 days from the date of this Ruling.***
 2. ***Costs of this application shall be for the Respondent.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Muhindi holding brief for Wandabwa for the Plaintiff

Mr. Thuku holding brief for Namachanja for the Defendants

Teresia – Court Clerk