REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: PALL J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NA. 10 OF 1997

BETWEEN

KENYA NATIONAL TRADING CORPORATION LIMITED..............PLAINTIFF

AND

COMPANIA MERCANTIL DEL CAFE S.A. ....DEFENDANT

(Application for extension of time to file a record of appeal in an intended appeal from a ruling of the High Court at Nairobi (Mr. Justice A.I. Hayanga) dated 25th April, 1996
in
WINDING UP CASE NO.3 OF 1996)
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R U L I N G

By this notice of motion brought under rule 4 of the Court of Appeal Rules (Rules) by National Trading Corporation Limited (hereinafter called the applicant). The applicant has sought an order that the time for filing an appeal from the order of the superior court (Hayanga J) dated 25th April, 1996 may be extended.

A brief resume of the facts which led to the said order is as follows:

On or about 9 June, 1994 the applicant entered into a contract with Compania Mercantil Del Cafe Sa the respondent a Spanish Company to supply 18000 bags of Kenya Coffee MHL to the Respondent. The contract was subject to the terms and conditions of the European Contract for Coffee (the contract). The applicant breached the contract as it failed to supply coffee in terms of the contract. According to the applicant, as a dispute has arisen between it and the respondent in accordance with the conditions of the contract, the same has to be referred to arbitration. On behalf of the respondent it is denied that there is any dispute between the parties which under the terms of the contract is referrable to arbitration.

It is part of the record of the superior court that by an undated letter the applicant wrote to the respondent as follows:-

"Owing to various problems we Kenya National Trading Corporation Ltd have been unable to fulfil the above contract with yourselves. Taking into consideration the current market conditions we hereby propose to wash out the mentioned contract as detailed here below:-

U.S.D/50 Kg FOB MSA

current Market Price 170

contract price 90

Wash out Difference 80

Quantity of 18000 x 60 kg bags

Wash out Amount USD 18000x1.2x80

= USD 1,728,000

> This amount .... will be paid to you in 15 Quarterly amounts of a minimum of USD 115,200 to be deducted from our coffee shipment invoices relating to sales to you. Failing which a transfer of the unpaid quarterly balance will be transferred to you in U.S. Dollars to a bank account to be nominated by you".

And it is also on record that by its letter dated 25.10.1994 the respondent accepted the said wash out terms.

However, the applicant failed to pay in accordance with the said offer which had been accepted by the respondent. The applicant made a solitary payment of U.S.D. 50000 only.

The respondent then filed Winding up Cause No.3 of 1996 to wind up the applicant. By a chamber summons dated 14 March, 1996 the applicant applied under s.6(1) of the Arbitration Act (Cap.49) and s.223 of the Companies Act (Cap.486) for an order that all further proceedings in the winding up cause be stayed. The Applicant in the affidavit supporting the said chamber summons said that under the provisions of clause 42 A, B C and D of the contract all matters in dispute should be referred to arbitration and therefore in view of the provisions of s.6(1) of the Arbitration Act the proceedings in the winding up cause should be stayed. The matters in dispute according to the applicant, are: "whether the petitioner can wind up the company for the alleged breach of the contract to supply unspecified quantity of coffee which the company now states that the terms of the contract were conditional and were not fulfilled". (See paragraph 5 of the said affidavit).

I think the applicant invoked the provisions of s.223 of the Companies Act in general aid of s.6(1) of the Arbitration Act.

The respondent by its grounds of opposition opposed the applicant's application on the grounds (interalia) that there was no arbitrable dispute as the parties had already determined the dispute by agreeing upon the said sum of USD 1,72800/= as damages for recision of the said contract and the applicant had agreed in writing to pay the said sum in a manner agreed to between the parties. Thus a new agreement replacing the Contract came into being which has no arbitration clause in it. It was also a ground of opposition that the debt had not been disputed by the applicant.

The gist of the ruling of the superior court sought to be appealed from is that the parties were not ad idem that there was a dispute which could be referred to arbitration and also there was no evidence to show that certain other preconditions for a reference to arbitration had been complied with under the contract.

Now coming back to the application before me, Mr. Kiragu has argued that there was no right of appeal to appeal against an order of this kind and that the applicant could appeal only with the leave of the court which it had not obtained.

Mr. Opini said that under section 75(1)(d) of the Civil Procedure Rules an appeal lies as of right

against an order staying or refusing to stay a suit where there is an agreement to refer to arbitration. Mr Opini for the applicant has drawn my attention to rule 3 of the Companies (High Court) Rules which reads:

> "3- Any proceedings brought under these rules shal be deemed to be a suit within the meaning of the Civil Procedure Act and any rules made thereunder and the general practice of the court including the course of procedure and practice in chambers shall apply so far as may be practicable except if and so far as the Act or the Rules otherwise provide."

If therefore the said application for stay of proceedings or the petition for winding up of the applicant company in which that application was made could be said to have been brought under the said rules, it is to be deemed to be a "suit" within the meaning of the Civil Procedure Act and the rules thereunder. Under s.75(1)(d) of the Civil Procedure Act an appeal lies as of right from an order staying or refusing to stay a suit. It is obvious that neither the application nor the petition for winding up could have been brought under any of the said rules. Therefore neither the application for stay nor the petition could be deemed as a suit within the meaning of the said rules.

Moreover a petition for winding up cannot be a "suit" within the definition of a suit under s.2 of the Civil Procedure Act which says: a "suit" means all proceedings commenced in any manner prescribed" and "prescribed" means "prescribed by the rules" made under the Civil Procedure Act.

I am therefore of the view that the order of the superior court refusing stay of the winding up proceedings is not appealable as of right. The applicant could appeal only either with the leave of the superior court or with the leave of this court under rule 39(b) of our Rules. The applicant does not deny that no leave to appeal has been obtained.

The applicant says that under clause 42 of the contract, there was an agreement to refer a dispute arising under the contract to arbitration. Mr Kiragu for the respondent has submitted that the contract has already been superseded by the said new agreement whereby the applicant agreed to pay a certain sum by way of liquidated damages. I agree with him. Thus firstly there is no provision under the new agreement to refer any dispute between the parties to arbitration. Secondly there is in fact no dispute which even under the provisions of the contract could have been referred to arbitration and thirdly the so called dispute which the applicant has alluded to does not fall within the provisions of the contract.

The applicant lodged the notice of appeal on 30th April, 1996. The applicant applied for copies of the proceedings but did not send a copy of the letter requesting for the said copies to the respondent's advocates. In accordance with rule 81(2) the applicant is therefore not entitled to avail of the proviso to rule 81(1) of our Rules. So, the appeal should have been filed within 60 days of 30th April, 1996 which period is long past now.

According to the affidavit supporting this notice of motion, the delay in filing the appeal was occasioned because of the delay on the part of the High Court Registry to issue a certified copy of the order sought to be appealed from. However the said certified copy was received according to the said affidavit on 23.9.1996. The applicant brought this notice of motion on 23.1.1997 exactly after 4 months of the certified copy of the ruling, which it needed, having been received by it. There is no explanation for this inordinate delay. Nor is there any explanation for non compliance with r.81 of the Rules of this court. I am not satisfied therefore that the applicant has been diligent enough in pursuing the intended appeal. A winding up petition transcends the bounds of an ordinary litigation between a creditor and a debtor. In it other creditors also have an interest.

I think it would not be just in a matter of this nature to grant indulgence to the applicant by extending the time for filing the intended appeal. Taking all matters into account I decline to exercise my discretion in favour of the applicant.

I therefore dismiss the application with costs assessed at Shs.5,000/= which will be payable within 14 days of this order.

Dated and delivered at Nairobi this 28th day of April 1997.

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR