IN THE COURT OF APPEAL

AT NAIROBI

CORAM: AKIWUMI, TUNOI & SHAH, JJ.A.)

CIVIL APPLICATION NO. NAI. 206 OF 1996 (UR.76/96)

BETWEEN

ABOK JAMES ODERA

T/A A. J. ODERA & ASSOCIATES ……APPLICANT

AND

KENYA POSTS & TELECOMMUNICATIONS

CORPORATION…….....….RESPONDENT

(Application for stay of Execution in an. intended appeal from the Ruling of the High Court of Kenya at Nairobi (Justice Ole Keiwua) dated 10th June, 1996

in

H.C.C.C. NO. 518 OF 1996)

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RULING OF THE COURT

The present application has been brought under Rule 5(2)(b) of our Rules for the stay of execution of the order made by Mr. Justice Ole Keiwua on 10th June, 1996, in Civil Case No. 518 of 1996. By this order, the learned Judge stayed proceedings in the suit then before him in which the applicant, a firm of architects, sought from the respondent, the Kenya Posts and Telecommunications Corporation, the very large amount of KShs.296,019,767.80 being the sum claimed to be due to it for services rendered to the respondent under a contract of service to which the Conditions of Engagements and Scales of Fees for Professional Services for Building Works which we shall hereinafter, refer to as "the Conditions", applied.

After the applicant's plaint had been filed, the respondent entered appearance and filed its defence.

The main averments contained in the defence were that the contract of service purported to have been entered into by the parties to the suit, was null and void and illegal and of no effect as it contravened s.12(d) of the Posts and Telecommunications Corporation Act which governs all the operations and activities of the respondent and also consequently, that the Conditions would not apply. Furthermore, the suit could not be brought because it offended s.109 (b) of the same Act which limited the period within

which actions could be instituted against the respondent. It was also pleaded in the defence in the alternative, that the Conditions provided for arbitration in case of disputes and since this had not been resorted to, the respondent would, but did not, crave leave of the court to have the dispute referred to arbitration. In the applicant's reply to the defence, the alleged illegality of the contract of service and legal defects with respect to the institution of the suit were denied. It was further averred that even if arbitration could be resorted to, which was denied, the respondent was estopped from pleading it at that stage.

The applicant filed an application for summary judgment on 25th April, 1996, which was set down for hearing on 27th May, 1996. However, prior to this latter date and after the filing of its defence, the respondent on 9th May, 1996, applied for a stay of the proceedings before the superior court and for an order referring

the matter in dispute to arbitration. Subsequent to this, the respondent on 23rd May, 1996, filed grounds of objection to the applicant's application for summary judgment, The respondent's application for stay was opposed by the applicant on the grounds that it had been brought in. bad faith, after inordinate delay on the part of the respondent, and was an abuse of the process of the court, The learned Judge after hearing the submissions made on behalf of both parties, held that s.6 of the new Arbitration Act. of 1995 which governed the matter in issue in the respondent's application, was a:

> **“... radical departure from the provisions of the old section 6. The new section provides that an application for stay to refer matter (sic) to arbitration can be made not later than the time when the applicant enters appearance of files other pleadings or takes any other step in the proceedings. The complete prohibition of not making the application after the filing of defence is done away with."**

The learned Judge then went on to stay further proceedings in the suit and to make an order for the suit to be referred to arbitration. The applicant having filed a notice of appeal against this decision, now seeks stay of it pending the determination of its intended appeal, As is well established, the two conditions which the applicant should satisfy in order to obtain the order that it seeks, are that its intended appeal is not a frivolous one; in other words, that it had an arguable ground to canvass during the intended appeal; and secondly, that the intended appeal, if it succeeds, would be rendered nugatory if stay of the order of the superior court, is not granted.

The main issue to be considered as to whether the intended appeal is arguable or not, relates to the learned Judge's decision on the effect of s.6 of the new Arbitration Act. But before doing so, we would like to consider first, the following excerpt from s.6(1) of the old Arbitration Act from which the former section "is a radical departure":

> **"If a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a person claiming through or under him, in respect of a matter agreed to be referred**
>
> **(a) any party to those proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings; ...".**

This statutory provision was considered in the case of **Maluki v. Oriental Fire & General Insce** (1973) E.A. 162. In that case, the appellant sued the respondent under an agreement which contained an arbitration clause. The respondent filed an application for the stay of the suit. Before the application was heard the respondent filed a defence joining issue with the plaint on the merits. The Judge made an order for stay which the appellant appealed against. In his leading judgment, Law J.A. had this to say:

> **"The most important words to be interpreted are the words 'apply to that court' What exactly do they mean? If the respondent, when it filed its defence on 7th February, had not yet applied to the court for a stay, then having filed a pleading, it was not entitled to the order for stay of proceedings the subject of this appeal.".**

Law J.A. also made the following observations concerning the defence which had been filed by the respondent in which issues were joined on merits:

> **"Secondly, it is at least arguable that in filing a defence which inter alia is joined issues on the merits, while an application for stay was pending, the respondent could be taken to have waived that application."**

Drawing inspiration for the latter foregoing observations made by Law J.A., we think that in considering the application before us, it can be said that it is at least arguable, even though the defence was filed before the application for stay, that the fact that it joined issue on matters of merit to the extent of denying the legal existence or validity of the contract of service, makes the application for stay that was subsequently filed, one that was not filed in good faith or one which was an abuse of the process of the court. We are not inclined to hold the view that simply because section 6(1) of the new Arbitration Act constitutes a carte blanche, its application cannot therefore, be subject to abuse. We think that this is an arguable point. But we do not wish to confine ourselves only to this point and in doing so, we would now look at the following wording of section 6 of the new Arbitration Act in pursuance of which, the learned Judge made his order of stay and the remittal of the dispute to arbitration:

> "6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a. party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless It finds-
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> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
>
> (2) Notwithstanding that an application has been brought under subsection(1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made,".

Here, the most important words are the words "shall if a party so applies not later than". But what exactly do they mean within the context of the present application? If the respondent had when it filed its notice of appearance and not later, actually applied for stay, the court should, subject to the provisions of subsections (1) (a) and (b), grant stay. Similarly, the same should apply if the respondent had filed its application for stay not later than when it filed its defence but which is not what happened, or if it had filed, which was the case, its application for stay not later than when it filed its grounds of objection which is "any pleadings", to the applicant's motion for summary iudgment.

The learned Judge in coming to the conclusion that he did and in determining his competency to do so, did not seem to have taken into consideration the provisions of s. 6 (1)(a) of the new Arbitration Act, as to whether the arbitration agreement which the respondent itself, had previously asserted was illegal and null and void, was so or not. He did not also consider whether the arbitration agreement was inoperable or not, that is to say, whether prior conditions that would give rise to arbitration had been fulfilled or otherwise. Mr. Machira, learned counsel for the applicant, argued that clause 218.01 of the Conditions which lays down the conditions precedent to the invoking of clause 219 of the Conditions which provides for arbitration, had not been fulfilled, We think that this gives rise to an arguable point in the intended appeal.

The learned Judge also seems to have based his decision to make the order that he made, on the basis that even though the respondent had filed its application for stay after it had filed its defence, the delay involved had been accounted for and was not inordinate and that in any case, it, had been hinted in the defence that the respondent would in the future seek a stay of the proceedings and the remittal of the dispute to arbitration, which really is not the same thing as actually making the application as envisaged under section 6(1) of the new Arbitration Act, if the defence constitutes the "any pleadings" of, or "any

other step in the proceedings" taken by, the respondent as the learned Judge seemed to think, and the application for stay was made later than any of them, it would be arguable, having regard to the first of the observations of Law, J.A. in the Maluki case (supra) already referred to, to say that, the learned Judge had no jurisdiction to hear the application. Indeed, the learned Judge did not consider the effect of the respondent's grounds of objection to the applicant's motion for summary judgment, as "any pleadings" or "any other step in the proceedings", which occurred after the filing of the respondent's application for stay.

It only now remains for us to determine whether if the intended appeal is successful, it would be nugatory if the present application for stay is not granted. We would say that this would be the case. We are strengthened in this view by the very wording of section 6(2) of the new Arbitration Act which we have already set out and which is to the effect that notwithstanding that a matter may be pending before the superior court as it is in this case, so long as an application has been brought under section 6(1) of the new Arbitration Act, arbitration proceedings may be commenced and continued and an award given. In the absence of any evidence to the contrary, this is what may well happen and the applicant would have been deprived of having his suit determined by a court of law if his intended appeal succeeds.

In the result, and for the reasons we have given herein before, the applicant's application for stay succeeds. Costs will be in the appeal. It is so ordered.

Dated and delivered at Nairobi this 12th day of July, 1996.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.