



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO NAI 16 OF 1984

(In the matter of an intended appeal)

BETWEEN

**KENYA CASEMENTS**

**LIMITED.....APPLICANT**

**AND**

**IDEAL CASEMENTS**

**LIMITED.....RESPONDENT**

(Application for stay of execution pending an intended appeal from a judgment of the

High Court of Kenya at Nairobi (Porter, J) dated 23rd November, 1983

in

High Court Civil Case No 2719 of 1983 (O.S)

### **RULING**

During the course of this application by the Respondent to the Originating Summons, which came before the High Court in July and November last year, to stay the execution of the Ruling by Porter J of 23rd November, 1983, Mr. Nagpal, for the Respondent to this application, has taken preliminary objection which, he says, goes to the jurisdiction of this court. He says we cannot, in the circumstances of this case, make any order of a stay, which could, in any event, only be under Rule 5 of this Court's Rules, as recently amended.

Mr Nagpal has argued that there was no issue before Porter J as to whether the arbitration was competent under Clause 16 of the original Agreement between the parties, or as to whether it should proceed. The only issues before the judge were the application for the injunction, which Nyarangi J (as he then was) had granted ex parte on the 29th July, 1983, and which the Respondent sought to continue when the matter came before porter J, inter partes, and the replacement of the late Mr Humphrey Slade by Mr R E G Rusell, to whom, there is, personally, stated to be no objection. The Judge, said Mr Nagpal, had no need to say, and should not have said, as he did on the penultimate page of his Ruling:-

“In these circumstances it seems to me that the more one considers the facts of this case the more obvious it becomes that it is a matter which should be referred under the agreement to an arbitrator

and in these circumstances Mr Patel's argument that I cannot grant the application for appointment of a new arbitrator in view of the fact that there should be no arbitration in the first place is wrong, and the quickest step to settlement of the dispute is for the arbitrator to be appointed and the arbitration to be entered on without any further delay."

Since the arbitration was already in being and unless stopped, will be heard on the 18th, 19th and 24th April of this year, Mr Nagpal submitted that the arbitration did not depend in any way on the proceedings before the High Court.. The proper course for the applicant to have taken was to seek an injunction or to have brought a declaratory suit if it contended that the arbitration was incompetent, as indicated in the passage from the 19th Edition of RUSSELL ON ARBITRATION to which he referred us.

There have been two recent cases in which this court has said that issues not before the High Court on an Originating Summons should not be decided in proceedings before it, namely Kenya Commercial Bank v James Osebe, Civil Appeal 60 of 1982, where the issue of damages could not in any event, have been determined on an Originating Summons, and James Njoro Kibutiri v Eliud Njau Kibutiri, Civil Appeal 30 of 1982 where LAW JA said that the High court had no jurisdiction to partition nonpartnership land. That is undoubtedly correct, but until this court had decided that the High Court should not have determined the issue (if, indeed, in this case it should not) the High Court order remains in effect and is valid and enforceable as an order which has been duly issued and sealed.

Attractive, therefore, as Mr Nagpal's argument is, we agree with Mr Nowrojee, who represents the Applicant, that the point he has taken does not go to the jurisdiction of this court, but only to the rectitude or otherwise of part of the decision of the High Court. In those circumstances this court must have jurisdiction under rule 5, as it is framed, to decide the issue of the whether or not a stay of PORTER J's Ruling should be granted.

We accordingly dismiss the preliminary objection and proceed to determine the question raised by the Notice of Motion filed on 26th March, 1984.

Dated at Nairobi this 17th day of April, 1984.

A A KNELLER

JUDGE

A R W HANCOX

JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL