Devkan Enterprises Ltd v Edermann Company (K) Ltd (Civil Application E239 of 2025) [2025] KECA 1538 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KECA 1538 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E239 OF 2025

WK KORIR, JM NGUGI & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

DEVKAN ENTERPRISES LTD ..... APPLICANT

AND

EDERMANN COMPANY (K) LTD ..... RESPONDENT

(Being an Application for stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi, (Mong'are, J.) dated 31{{^st}} day of October, 2024 in H.C. Misc. No. 41 of 2013)

RULING

1. The parties entered into a lease on 25th May, 2005 – the applicant was the tenant; the respondent the landlord. A dispute was referred to arbitration pursuant to an arbitration clause in the lease agreement. The applicant prevailed: a final arbitral award was published on 17th October, 2012 in favour of the applicant.

2. Before the High Court, two applications were heard by Kamau, J.: the applicant's application to recognize and enforce the arbitral award and the respondent's application to set it aside. Both were dismissed in a consolidated ruling dated12th July, 2013 — the enforcement bid on the footing that a certified copy of the award had not been exhibited to the application; the setting-aside bid for not meeting Section 35 of the *Arbitration Act* thresholds.

3. The applicant then sought review. In a ruling dated 15th April, 2019, Amin, J. reviewed the earlier ruling and adopted the arbitral award as a judgment of the court and a decree issued.

4. Years later, the respondent approached the High Court citing discovery of new material and sought, inter alia, that the matter be sent back to arbitration. By a ruling dated 31st October, 2024, Mong'are, J. allowed the respondent's application, reviewed the earlier position, set aside the arbitral award, and directed that the dispute be arbitrated de novo before a different arbitrator.

5. Aggrieved, the applicant lodged a notice of appeal and now seeks a stay of execution of the said ruling and orders directing a fresh arbitration, pending the hearing and determination of the intended appeal. The application is dated 20th March, 2025 and is primarily predicated on Rule 5(2)(b) of the Court of Appeal Rules. We already issued interim orders of stay pending this ruling. This ruling will determine if those orders will remain in place pending the hearing and determination of the appeal.

6. The application came up for hearing on 20th August, 2025. Mr. James Singh, learned counsel, appeared for the applicant while Ms. Magdalene Ng'etich, learned counsel, appeared for the respondent. Both parties relied on their written submissions and briefly highlighted them.

7. The applicant contends that the intended appeal is eminently arguable because it raises substantial and weighty questions of law that deserve full ventilation before this Court. At the heart of the appeal is the question whether a High Court judge could set aside an arbitral award that had already been adopted as a judgment and decree by a court of concurrent jurisdiction. The applicant argues that this goes against the doctrine of finality, which has been consistently emphasized by the courts. In Christ for all Nations v Apollo Insurance Co. Ltd [2002] EA 366 and Transworld Safaris Ltd v Eagles Aviation Ltd & 3 others (HC Misc. Appl. No. 238 of 2003), the principle was underscored that arbitral awards are to be treated with finality, subject only to challenge within the narrow confines of section 35 of the *Arbitration Act*.

8. The applicant also questions whether the learned Judge was right to rely on the discovery of new evidence under Order 45 of the Civil Procedure Rules to set aside an arbitral award — a ground not envisaged under section 35 of the *Arbitration Act*. Further, the applicant challenges the competence of a "review of a review," pointing to Order 45 Rule 6 of the Civil Procedure Rules and the doctrine of functus officio, and citing Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR for the principle that even a single bona fide ground is sufficient to demonstrate arguability, though the appeal need not ultimately succeed.

9. On nugatoriness, the applicant stresses that unless stay is granted, a new arbitration will commence, imposing sunk costs and irrecoverable time and resources, and rendering the appeal an exercise in futility. It points out that the impugned ruling has already triggered steps towards fresh arbitral proceedings, with the respondent moving to propose and appoint a new arbitrator. In support, reliance is placed on Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited [2014] eKLR, which defined "nugatory" to mean worthless, futile, invalid or trifling, and required courts to consider whether prejudice could be reversed or compensated by damages. The applicant argues that in this case, the prejudice would be irreversible: once a fresh arbitration proceeds to conclusion, the appeal would be robbed of practical utility. Similar guidance is drawn from Kiliagi & another v Jamii Bora Bank & 2 others [2021] KECA 265, where the Court noted that stay should issue where refusal would lead to irreversible consequences or reversal only at considerable hardship or expense. The applicant also cites Scope Telematics International Sales Ltd v Stoic Company Ltd & Another [2017] KECA 545, which held that irreparable harm or injustice can justify the Court's discretion in favour of stay. To further highlight prejudice, the applicant invokes National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] KECA 333, where the Court held that once an applicant reasonably raises the respondent's inability to repay decretal sums, the evidential burden shifts to the respondent. Finally, by reference to AIC Ltd v Federal Airports Authority of Nigeria [2022] UKSC 16, a decision of UK's Supreme Court, the applicant emphasizes the fundamental importance of finality: a successful party is entitled to enjoy the fruits of its judgment without the anxiety that it may be deprived of them later.

7. The respondent, for its part, opposes the application and maintains that the applicant has failed to demonstrate the existence of any arguable appeal. It submits that there is no contradiction between the two High Court rulings: the ruling by Amin, J. concerned enforcement of the arbitral award, while the later ruling by Mong'are, J. dealt with an application for review premised on newly discovered material evidence. According to the respondent, these were distinct prayers raising different questions, and the learned Judge was well within the review jurisdiction provided by section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules in entertaining the latter application. On this footing, the respondent contends that no bona fide question of law or fact arises to warrant appellate scrutiny.

7. The respondent, consequently, contends that on the first limb of arguability, the Applicant has failed to identify any bona fide legal issue warranting ventilation on appeal. Relying on Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR and Jivraj Shah v Standard Bank [1982] WLR 417, counsel emphasized that while an arguable appeal is one that raises at least one serious point deserving consideration, and not one that must necessarily succeed, in their view, the Applicant's complaints — that the High Court misapplied the principles of review or failed to apply res judicata — are unfounded because the two applications before the court were not the same: one sought enforcement while the other was a review based on fresh evidence.

8. On the nugatory limb, the Respondent submits that the Applicant has also fallen short. Citing Reliance Bank Ltd v Nor Lake Investment Ltd [2002] 1 EA 227 and Peter Hinga v Dickson Muiruri Kibiru & another [1984], it is argued that the term "nugatory" must be given its full meaning, including whether the act sought to be stayed is reversible, or if not, whether damages would reasonably compensate the aggrieved party. In their view, the continuation of the arbitral proceedings would not irreversibly prejudice the Applicant since, should the intended appeal ultimately succeed, any prejudice suffered can be compensated by costs. The Respondent stresses that arbitration proceedings do not foreclose the appellate court's determination, and indeed,an arbitral award made de novo would not override the Court of Appeal's eventual judgment.

8. The Respondent therefore urges this Court to find that the Applicant has failed to satisfy either limb of the Rule 5(2)(b) test, and to dismiss the application with costs.

9. The application is governed by Rule 5(2)(b) of the Court of Appeal Rules. The principles applicable are well settled. An applicant must show (i) that the appeal is arguable (not frivolous), and (ii) that unless the order sought is granted, the appeal would be rendered nugatory.

10. This Court in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR restated these principles and emphasized that the burden lies on the applicant to demonstrate both limbs. On the arguability limb, the Court stated that even a single arguable ground would suffice. In Stanley Kangethe Kinyanjui (supra), this Court held that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. In other words, this is not to say that an arguable appeal is one which has a winning argument or even one that has a likelihood of success; it is merely to say that it presents serious legal issues warranting further judicial consideration on appeal.

11. On the nugatory aspect, we assess the likely impact on the appeal if the interim relief is denied. In Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited [2014] KECA 548 (KLR), the Court pointed out that:

> " As for the second requirement, we have to ensure that the word 'nugatory' has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (Reliance Bank Ltd v Nor Lake Investment Ltd [2002] IEA 227). Secondly we have

to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

8. Applying the above principles, we are satisfied that the intended appeal raises bona fide and weighty questions of law which merit full interrogation on appeal. Chief among them is whether, once Amin, J. had adopted the arbitral award as a judgment and decree of the court, the High Court, differently constituted, could later review and set aside that award and direct a fresh arbitration, in light of the doctrines of functus officio, the prohibition against "review of a review" under Order 45 Rule 6 of the Civil Procedure Rules, and the policy of finality that underpins arbitration save for the narrow exceptions under section 35 of the *Arbitration Act*. Closely related is the question whether "discovery of new evidence" as contemplated in the Civil Procedure Rules could be deployed to circumvent the exclusive and exhaustive grounds of challenge provided under section 35 of the *Arbitration Act*. A further arguable point arises from the applicant's contention that the impugned ruling created two parallel and conflicting judicial trajectories in respect of the same arbitral award, thereby undermining coherence and certainty in the judicial process. Each of these issues is far from frivolous and comfortably meets the threshold of arguability as explicated in Kangethe (supra). We therefore find the first limb satisfied.

9. We are equally persuaded that, absent a stay, the intended appeal risks being rendered nugatory. The impugned ruling positively commands the parties to appoint a new arbitrator and commence a de novo arbitration. If those proceedings move ahead, the parties will inevitably incur substantial, irrecoverable costs and time before this Court determines the appeal. Even if the applicant ultimately succeeds on appeal, those sunk costs and expended resources cannot meaningfully be reversed.

8. The respondent's suggestion that any prejudice is compensable by costs underestimates the structural prejudice of compelling parties into a second arbitration while a live and arguable appeal challenges the very lawfulness of ordering that second arbitration. The spectre is not merely pecuniary; it is also institutional — concerning finality of arbitral processes, legal certainty of a judgment adopting an award, and the coherence of High Court orders concerning that award. In the language of Hashmukhlal Virchand Shah (supra), allowing the new arbitration to proceed now risks rendering the appeal worthless or futile, and the prejudice is not readily remediable by damages.

9. We also reject the characterisation of the impugned ruling as a "negative order." It does not simply dismiss or decline relief; rather, it sets aside an already adopted award and compels the parties to commence a fresh arbitration — thereby altering the status quo and imposing immediate obligations with practical and financial consequences. Such an order is capable of execution and, if executed pending appeal, threatens nugatoriness.

10. In the circumstances, the applicant has satisfied both the arguability and nugatory limbs.

11. The Notice of Motion dated 20th March, 2025 is allowed on the following terms:

    i. There shall be a stay of execution of the ruling and all consequential orders of the High Court (Mong'are, J.) dated 31st October, 2024 in Nairobi Milimani Commercial HC Misc. No. 41 of 2013, pending the hearing and determination of the intended appeal.

    ii. The intended appeal shall be fast-tracked.

        a. The applicant shall file and serve the Record of Appeal together with its written submissions within 45 days of today.

        b. The respondent shall file and serve its written submissions within 21 days of service of the Record of Appeal.

c. The Deputy Registrar shall list the appeal for hearing on priority in the next available date upon completion of filing.

iii. Costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

W. KORIR

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

.....

G. V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR