**China Railway Construction Engineering v Automated Entrance Systems Limited; Trademark Africa (Interested Party) (Civil Appeal (Application) E154 of 2025) [2025] KECA 1723 (KLR) (24 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1723 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL (APPLICATION) E154 OF 2025**

**DK MUSINGA, JM NGUGI & GV ODUNGA, JJA**

**OCTOBER 24, 2025**

**BETWEEN**

**CHINA RAILWAY CONSTRUCTION ENGINEERING .................... APPLICANT**

**AND**

**AUTOMATED ENTRANCE SYSTEMS LIMITED .......................... RESPONDENT**

**AND**

**TRADEMARK AFRICA .......................................................... INTERESTED PARTY**

***(Being an application for stay pending appeal of the Ruling of the High Court at Nairobi (F. Mugambi, J.) delivered on 20th December 2024 in HCOS NO. E615 OF 2024)***

**RULING**

1. Before this Court is a notice of motion dated 8th April 2025 by the applicant under rule 5(2)(b) and 43 of the Court of Appeal Rules as well as Article 50 of the *Constitution*. The applicant principally seeks stay of execution of the ruling delivered by the High Court (F. Mugambi, J.) on 20th December 2024 in Milimani HCOS No. E615 of 2024, Automated Entrance Systems Ltd v China Railway Construction Engineering, pending hearing and determination of an intended appeal.

2. The background to the application is that Automated Entrance Systems Limited (the respondent) and China Railway Construction Engineering (the applicant) executed a Finder's Fee Agreement on 6th February 2024. The respondent contended to have been appointed as the applicant's agent in respect of a tender issued by Trademark Africa (the interested party) for the construction of a One Stop Border Post at Nakonde, Zambia. The respondent alleged it discharged its obligations by coordinating the tender process and assisting with bid preparation which led to the applicant being awarded the contract valued at USD 5,255,542.85. On that basis, it sought payment of ten percent of the contract sum, amounting to USD 525,554.29, which it said the applicant had refused to pay. To protect its claim,

the respondent moved the High Court at Nairobi vide Commercial and Tax Division Civil Suit E615 of 2024 urging the court to compel the interested party to withhold that amount pending arbitration. It also sought a variation of the arbitration clause so that the dispute would be determined by a sole arbitrator rather than the three arbitrators specified in the agreement.

3. The applicant opposed the application, contending, first, that the court lacked jurisdiction since the tender was to be performed outside Kenya. It maintained that the respondent was not a party to the tender and therefore could not claim any rights arising from it. Further, it denied that any valid arbitration agreement existed and alleged that the Finder's Fee Agreement was fraudulent. The applicant's General Manager denied ever signing such an agreement or even being in Kenya at the material time and disputed the authenticity of the documents relied upon by the respondent. It also argued that no evidence had been adduced to show its inability to pay the claimed commission, and that granting the orders would interfere with the performance of the main tender contract.

4. The interested party also opposed the application. It argued that it was a stranger to the alleged commission agreement and thus no orders could issue against it. It emphasized that the applicant never disclosed the respondent as its agent during the tender process and that it was not bound by any arbitration agreement between the said parties. It also faulted the form of the application before court, contending that it improperly invoked provisions of both the *Arbitration Act* and the *Civil Procedure Act*.

5. The High Court (F. Mugambi, J.) vide a ruling delivered on 20th December 2024 addressed itself, first, to the issue of jurisdiction. Citing sections 14 and 15 of the *Civil Procedure Act* and the decision in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, the court held that jurisdiction in contractual matters may be grounded where the contract was made, performed, or where payments were due. It found that since the agreement was executed in Kenya and the respondent's performance in preparing tender documents occurred in Kenya, there was a sufficient nexus to clothe the court with jurisdiction.

6. Turning to the prayer for interim relief, the court applied the principles in Giella v Cassman Brown [1973] EA. 358 and found that the respondent had demonstrated a prima facie case. It reasoned that the respondent's rights under the agreement were collateral to the main tender contract and thus fell within exceptions to the doctrine of privity. Given the applicant's failure to honour payment demands and the risk of dissipation of funds, the court held that the balance of convenience favored preserving the funds.

7. On that basis, and in line with section 7 of the *Arbitration Act*, the learned judge ordered the interested party to preserve and withhold payment of USD 525,554.29, being ten percent of the contract value, pending determination of the arbitration. However, the court declined to vary the arbitration clause. Relying on section 10 of the *Arbitration Act*, it underscored that courts have a limited role in arbitration matters and cannot rewrite parties' agreements by imposing a single arbitrator where the contract provided for three. It also stressed that issues of validity of the agreement and authenticity of documents were factual disputes best left to the arbitral tribunal. In conclusion, the application succeeded only to the extent of the preservation order, with each party ordered to bear its own costs.

8. The applicant, being dissatisfied with the decision of the High Court, has filed an appeal before this Court, to wit, Civil Appeal No. E154 of 2025, seeking to challenge the said decision.

9. In this application, which is supported by the grounds on the face thereof and in the affidavit in support sworn by WU HAIBO, the applicant's General Manager, the applicant contends that its intended appeal raises arguable points of law with high chances of success. In the memorandum of appeal which is annexed to her affidavit, the applicant contends, inter alia, that the trial court erred by

granting an order not sought in the application, namely, compelling the interested party to preserve USD 525,554.29 pending arbitral proceedings, thereby acting without jurisdiction and assuming the role of a party to the dispute. The applicant further faults the court for finding that the subject matter was under threat without showing any nexus to the applicant's contract; for disregarding clear evidence that Wu Haibo was not in the country at the time of the alleged agreement; and for overlooking proof that the impugned agreement was forged and invalid. It is also contended that the court wrongly held that the respondent's potential loss outweighed that of the applicant despite evidence that the adverse order threatened to stall a public project in Zambia to the detriment of both the applicant and Zambian taxpayers.

10. On the foregoing grounds, the applicant submits that she has demonstrated that her intended appeal raises arguable issues worthy of consideration by this Court.

11. On the nugatory limb, the applicant contends that the agreement relied upon by the court to justify a referral to arbitration is non- existent and that no arbitral proceedings should, therefore, be taking place. It is contended that if such proceedings were to continue and culminate in an award, the appeal would be rendered futile as the outcome it seeks to forestall would already have materialized. The applicant further contends that the continued withholding of the sum of USD 525,554.20 which is itself the subject of the intended appeal would equally defeat the appeal by depriving it of practical effect.

12. The application is opposed through a replying affidavit sworn by Dr. Peter N. Mwaniki, the respondent's Managing Director. At the outset, the respondent asserts that there are no execution proceedings underway as alleged by the applicant, and that what it has done is merely to commence arbitration proceedings which it is legally entitled to pursue. The respondent further notes that the interested party has not challenged the order requiring preservation of 10% of the contract funds, which, in its view, signifies acquiescence to the impugned decision.

13. It is also deposed that the High Court was not asked to grant leave to refer the matter to arbitration but only to issue preservatory orders pending arbitration and to amend the arbitral process. The respondent contends that under section 17 of the *Arbitration Act*, an arbitral tribunal is competent to rule on its own jurisdiction, including the validity of the arbitration clause and, therefore, this Court cannot halt arbitration proceedings. In addition, it is averred that the High Court did not conduct a full hearing or make findings of fact based on evidence. Rather, the court confined itself to determining whether an exception to the doctrine of privity of contract applied so as to justify preservation of the subject matter. The court did not pronounce itself on the validity of the agreement between the parties and as such, there is no decision on validity that this Court can overturn.

14. The respondent further avers that arbitral proceedings have already commenced but the applicant has no genuine intention of resolving the dispute. Instead, it has embarked on a deliberate scheme to delay determination of the matter by raising jurisdictional issues. According to the respondent, if the applicant genuinely believed that the Finder's Fee Agreement was a forgery, it ought to present its case before an independent and impartial tribunal rather than obstruct the arbitration.

15. On the issue of prejudice to the project, the respondent maintains that there is no risk of stalling as alleged since the project is already at its final stage and is in the process of being handed over. The withholding of 10% by the interested party will therefore not occasion any disruption.

16. At the hearing hereof, learned counsel Mr. Muange appeared for the applicant, while the respondent was represented by Mr. Mutiso and the interested party by Mr. Abuga. Both the applicant and the respondent had filed submissions which they proceeded to highlight. Although the interested party had not filed any submissions, its counsel made brief oral submissions in support of the application.

17. Addressing a preliminary question from the Court on whether leave was necessary before approaching this Court, counsel for the applicant maintained that no such leave was required since the impugned ruling related to a referral to arbitration and not the setting aside of an arbitral award. On the substance of the application, it was argued that the High Court erred in granting injunctive relief and directing the parties to arbitration without properly applying the established principles in Giella v Cassman Brown, having relied solely on the balance of convenience while disregarding the other necessary considerations. Counsel stressed that the intended appeal was arguable and that absent a stay, it would be rendered nugatory because the ruling directed preservation of a significant sum amounting to 10% of the advance payment which was critical to the applicant's ability to perform its contractual obligations. It was further contended that permitting arbitration to proceed without a stay would effectively overtake the appeal and nullify its purpose.

18. Mr. Mutiso, on behalf of the respondent, raised a preliminary issue; that the applicant had failed to serve the record of appeal within the statutory timelines thereby rendering the appeal incompetent. He contended that without a competent appeal, there could be no arguable appeal to sustain a rule 5(2)(b) application. On the nugatory aspect, the respondent maintained that only 10% of the contract sum had been preserved by the interested party, which did not threaten the appellant's performance and that the project was near completion, with mechanisms for ongoing payments built into the contract. It was further submitted that the funds were preserved pending arbitration and not released to the respondent, and that it was the appellant who was frustrating the arbitral process.

19. On the issue of leave pending appeal, counsel contended that the ruling under challenge as reflected in paragraph 1 of the impugned decision was grounded on provisions of the *Arbitration Act*. Referring to sections 7 and 17 of the *Arbitration Act* alongside Order 43 of the Civil Procedure Rules and section 75 of the *Civil Procedure Act*, counsel submitted that appeals from such orders are not as of right. Accordingly, he contended that leave was required and, in its absence, the present application was incompetent and bound to fail.

20. For the interested party, counsel supported the applicant's position, submitting that since the High Court application had been brought under section 7 of the *Arbitration Act* for preservatory orders, leave to appeal was not required. Counsel relied on the decisions of this Court in Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR and Gitonga & Others v Mary & Others [2019] eKLR for the argument that appeals under section 7 are permissible. Counsel further contended that the appeal was arguable and that without stay the appeal would be rendered nugatory particularly because the subject matter involved funds held outside Kenya which could affect contract performance.

21. We have considered the application, the affidavits, the rival submissions and the law. It is trite law that applications of this nature, the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.

22. However, before engaging with those two limbs, we must first be satisfied that this application and indeed the appeal before this Court is competent as to confer this Court with jurisdiction.

23. At the hearing of this application, the Court invited counsel for the applicant to address the competence of the appeal in light of the requirement for leave. Learned counsel submitted that leave was unnecessary, asserting that the impugned ruling concerned a referral to arbitration rather than the setting aside of an arbitral award. Counsel for the interested party associated himself with that position. The respondent, however, maintained that leave was a mandatory prerequisite and, in its absence, both the application and the pending appeal were incurably incompetent and liable to be struck out.

24. The ruling under challenge was, by its express terms, rendered pursuant to section 7 of the *Arbitration Act*, Cap. 49, which empowers the High Court to grant interim measures of protection before or during arbitral proceedings. That provision, in our respectful view, does not confer an automatic right of appeal. As this Court stated in Anne Mumbi Hinga v Victoria Njoki Gathara [2009] KECA 466 (KLR), the *Arbitration Act* is a self-contained code and the avenues of appeal are confined to those expressly conferred. Section 39 of the *Arbitration Act* which permits an appeal on a question of law, is limited to arbitral awards and does not extend to interlocutory rulings made under section 7. Since section 7 is silent on appeals, no right of appeal can be implied. It follows, therefore, that a party aggrieved by an order made under section 7 must first bring themselves within the ambit of section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules which require leave before an appeal can lie from such interlocutory orders. The applicant herein neither sought nor obtained such leave.

25. In the premises, we hold that this application is incompetent for want of leave and is hereby struck out with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2025.**

**D. K. MUSINGA, (PRESIDENT)**

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**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.**