

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: TUIYOTT, NYAMWEYA & KORIR,

JJ.A.) CIVIL APPLICATION NO. NAI E198 OF

2025 BETWEEN

BAMBURI CEMENT LIMITED.....APPLICANT

AND

ROY HAULIERS LIMITED.....RESPONDENT

(Being an application for stay of execution pending hearing of an intended appeal against the decision of the High Court of Kenya at Nairobi (J. W. W. Mong'are, J.) delivered on 6th March 2025

in

H.C.C.C. No. E777 of 2024)

RULING OF THE COURT

- [1] There is a dispute between **Bamburi Cement Limited** (**Bamburi** or **the applicant**) and **Roy Hauliers Limited** (**Roy** or **the respondent**) that is before an arbitral tribunal for determination in which **Roy** is seeking compensation of Kshs.3,374,684,920.23 for an alleged breach of contract.
- [2] In applications dated 3rd February 2025 and 4th February 2025 filed before the High Court, **Roy** sought, as an alternative prayer, that **Bamburi** provides security in the sum of Kshs.3,374,000,000 to be held in a joint interest earning

account in the name of the advocates for the parties or that it furnishes security for the same amount in form of a bank guarantee pending the hearing and determination of the arbitral proceedings. On 6th March 2025 the High Court (**Mong'are J.**) allowed the application in the following terms:

“I direct that the sum of Kshs.3,374,000,000.00 from the sale proceeds of the shares of the defendant be retained in Kenya and be held in an interest earning account in the joint names of the advocates for the plaintiff and the defendant in a local Kenyan banking institution, pending the hearing and disposal of the Arbitral proceedings.”

- [3] Aggrieved by this ruling, **Bamburi** has filed a notice of appeal dated 12th March 2025 evincing an intention to challenge that ruling before this Court. Now we have a notice of motion dated 26th March 2025 by the same party seeking stay of the said orders pending the hearing and determination of the intended appeal.
- [4] Setting out to satisfy the grounds for grant of a stay under Rule 5(2)(b) of Court of Appeal Rules, 2022, **Bamburi** asserts that the intended appeal has good prospects of success and the intended appeal will be rendered nugatory if stay is not granted.
- [5] On the first limb we are told that; the judge failed to consider evidence which showed that shares in **Bamburi** were sold to **Amsons Industries (K) Limited (Amsons)**, a

company

incorporated in Kenya; the judge failed to consider that **Bamburi** does not own any of its shares; the judge failed to consider that **Amsons** indicated that they would continue to operate **Bamburi's** business in a similar manner to which it currently operates; the sale of shares was not a sufficient basis for making the order; and ordering **Bamburi** to deposit security for **Roy's** claim which is contingent and strenuously opposed by **Bamburi**.

- [6] **Bamburi** contends that an order for the deposit from proceeds of sale of its shares was issued in vain as it does not have access to or control over the proceeds of the transaction relating to the sale of its shares. Further, the order is extremely harsh and onerous as it will cause undue hardship on it by impacting its cash flow requirements for its cash intensive business. It argues that as its audited financial statement for the financial year ending 31st December 2023 showed that its cash and cash equivalent amounted to Kshs.3,693,000,000.00, forcing it to part with an amount nearly equal to its entire annual liquidity would gravely undermine its ability to operate as a going concern. It is emphasized that **Bamburi** is a publicly traded company with 871 suppliers and 357 direct staff which supports over 5,000 families and its continuing operation as a

going concern ought not to be impeded by an order requiring security for a speculative claim.

- [7] Responding to the motion, Shemir Omar Yakub, the Credit Manager at **Roy**, swore an affidavit on 14th April 2025. He explains that the purpose of the deposit order was to preserve and conserve the interest of **Roy** from potential sabotage flowing from the suspicious conduct of **Bamburi** to dispose its shares to a third party; and **Bamburi's** 'controllorship' hangs on the precipice of a takeover of another company whose charge and 'controllorship' will inevitably disrupt the status quo to the potential detriment of **Roy**; the impugned ruling was balanced and proper in law and fact; **Bamburi's** averment that its shares are not being sold to a foreign entity is a falsity as there is a newspaper article in The Star Newspaper that a Tanzanian firm had acquired it for 23 billion; the shareholders of **Bamburi** are based abroad and the transaction executed locally makes it difficult for **Roy** to enforce an arbitral award in the likely event of success; the order simply puts the parties at equal footing where none would be prejudiced upon conclusion of the dispute; the High Court exercised its jurisdiction to issue protective orders correctly, a remit that does not require the court to investigate and evaluate evidence at stake in the

arbitral proceedings; the claim before the arbitral tribunal has high chances of success; no hardship will be occasioned upon **Bamburi** as the order is simply for deposit of the money as security; and the assertion that the sale of shares to a third party was a scheme to frustrate the ongoing arbitration proceedings was not rebutted.

[8] At plenary hearing of the motion learned senior counsel Mr.

Kiragu Kimani appeared together with learned counsel Mr. Mwihuri for **Bamburi** while learned counsel Ms. Musando represented **Roy**. Both highlighted the written submissions filed on behalf of their respective clients which substantially followed the averments and arguments raised in the motion and response.

[9] In an application brought under Rule 5(2)(b), an applicant is required to demonstrate that its intended appeal raises at least one *bona fide* ground worthy of consideration by the Court that will hear the appeal. Conjunctive with this first requirement is that the intended appeal will be rendered nugatory if stay is not granted. The term nugatory will be considered within the circumstances of each case and will be construed in a wide sense to include, in appropriate cases, where not to grant stay would cause such hardship as would be out of proportion to

any prejudice the respondent might suffer if stay were to be granted. See for example **Reliance Bank Limited v Norlake**

Investments Ltd [2002] 1 EA 227 (CAK).

[10] For purposes of a rule 5(2)(b) application, the threshold as to what amounts to an arguable appeal is a low one and we have little doubt that the intended appeal here reveals more than one argument that is credible enough to deserve consideration by the appellate court. As it is common ground, the shares sold in **Bamburi** did not belong to the company itself, thus the contention that the order made by court directing **Bamburi** to deposit money from the proceeds of the sale of shares was in vain as it does not have control of the proceeds may not be frivolous. Similarly, is the debate as to whether or not a company incorporated in Kenya should be treated as a foreign entity simply because its shareholders are foreigners.

[11] On the nugatory aspect, there is contention that the amount to be deposited is nearly equal to **Bamburi's** annual cashflow. Since the company would have to raise the deposit from its own funds as it has no control of the proceeds of the sale of the shares, then its cashflow could be severely and adversely compromised. The effect on the cashflow of

Bamburi would not be any less onerous simply because the amount to be

deposited is to act as security as opposed to a pay out to **Roy** given that actual deposit of the money ordered would still have to be made. It is clear to us that not to grant stay could cause extreme hardship to **Bamburi**.

[12] In reaching that decision we are alive to the argument by **Roy** that it could be left with a paper award if no deposit as security is made. We think, however, that in the written submission by its advocates, **Roy** gives an answer as to whether the apprehension is well founded. In paragraph 14 of those submissions, counsel argues that:

“The projected hardship is baseless as the applicant company is valued over Kshs.60,000,000,000.00 which far exceeds the potential arbitral claim by the applicant’s own admission.”

[13] Unwitting, this is a concession by **Roy** that **Bamburi** has sufficient assets to meet the claim of Kshs.3,374,684,920.23 should it prevail at arbitration as there is no evidence, nay an allegation, of asset stripping or that the assets of the company are being moved out of Kenya. Making an order for a cash deposit is therefore unnecessary and indeed oppressive to **Bamburi** as we have held.

[14] As would be evident now, we are for allowing the motion dated 26th March 2025 as we now do. The order of the High Court (Mong’are, J.) of 6th March 2025 in High Court

Commercial Case

Number E777 of 2024 is hereby stayed pending the hearing and determination of the intended appeal therefrom. Costs of the motion shall be in the intended appeal.

Dated and delivered at Nairobi this 7th day of November 2025.

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.