

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL & TAX DIVISION
HCCOMM MISC NO. E204 OF 2023

**NANCHING MUNICIPAL ENGINEERING
DEVELOPMENT GROUP CO. KENYA LIMITED.....
APPLICANT**

VERSUS

**GALANA OIL KENYA LIMITED.....1ST
RESPONDENT**

**ANYI JITUAN SENSEN INVESTMENT LIMITED..2ND
RESPONDENT**

RULING

1. Before the Court for determination is the Applicant’s Notice of Motion dated 7th April 2025 brought under sections 1A, 1B and 3A of the Civil Procedure Act, and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks an interim order for stay of execution of this Court’s ruling delivered on 13th March 2025, by which the arbitral award issued on 15th May 2023 was enforced. The Applicant further prays that the costs of the Motion abide the outcome of the intended appeal.
2. The application is supported by the affidavit of *Xu Xiaobing*, who deposes that the Applicant is dissatisfied with the said ruling and has filed a Notice of Appeal. He asserts apprehension that the Respondents have set in motion execution proceedings, and unless a stay is granted, the

decretal sum, which is said to be colossal, will be executed against the Applicant, occasioning substantial loss and rendering the intended appeal nugatory. It is contended that the Motion has been brought timeously.

3. The 1st Respondent opposes the Motion through a Replying Affidavit sworn by *Raphael Kimani Kamau* on 22nd April 2025. The Respondent contends that no automatic right of appeal lies from a decision under section 35 of the Arbitration Act, and the Applicant has neither sought leave under section 39 nor furnished a draft memorandum of appeal to demonstrate arguable grounds. It is averred that the Applicant has not demonstrated exceptional circumstances to warrant stay, nor proved any prejudice or substantial loss.
4. The Respondent maintains it continues to suffer commercial prejudice owing to the Applicant's prolonged non-payment of an arbitral award issued over two years ago, whose enforcement is being delayed contrary to the principles of finality and expeditious resolution in arbitration. The Respondent urges that the Motion be dismissed, or alternatively that security be ordered for the entire decretal sum plus interest and costs.
5. In a Supplementary Affidavit, Xu Xiaobing reiterates that the Respondent's opposition misapprehends both fact and law. He asserts that the instant Motion solely concerns stay pending appeal, whereas the issue of leave to appeal is properly before the Court of Appeal in separate proceedings. It is contended that exceptional circumstances exist, including alleged errors in computation of interest and costs

in the arbitral award, and that the Respondent, having declined to participate in the arbitration, should not benefit from immediate execution. The Applicant maintains that its intended appeal raises arguable jurisdictional issues and that refusal of stay will render that appeal nugatory.

6. Both parties filed written submissions. The Applicant argues that it has met the threshold under Order 42 Rule 6 and relies on authorities such as **Maitha v National Bank of Kenya Ltd and African Merchant Assurance Co. Ltd v Nyamai Kea** to emphasize that mistakes of counsel should not be visited upon the litigant. On substantial loss, the Applicant relies on **James Wangalwa v Agnes Cheseto, Equity Bank Ltd v Taiga Adams Co. Ltd, and Kenya Power & Lighting Co Ltd v Eunice Nikrote Ringera**, arguing that execution of over Kes. 13 million plus interest and arbitration costs would cause irreparable financial harm and may force it into insolvency. The Applicant also impugns the Respondent's warrants of attachment as based on erroneous interest computation.
7. The 1st Respondent, on its part, submits that this Court lacks jurisdiction because the Court of Appeal is already seized of the matter and because the Applicant has not obtained leave under section 39 of the Arbitration Act. Reliance is placed on **Harsha Shah v Diamond Trust Bank**. The Respondent submits that section 35 appeals are only permissible in exceptional cases, citing the Supreme Court's pronouncements in **Nyutu Agrovat Ltd v Airtel Networks Kenya Ltd and Synergy Industrial Credit Ltd v Cape**

Holdings Ltd. The Respondent argues that the Applicant has not shown substantial loss and refers to **Antoine Ndiaye v African Virtual University and Kenya Shell Ltd v Benjamin Karuga Kibiru**, stressing the requirement of particularized evidence. It is further contended that the Applicant's offer of security is contradictory and made in bad faith.

Analysis and determination

7. I have considered the Motion, the affidavits, the rival submissions, and authorities cited. The issues for determination are:

- i. whether the Motion is incompetent for want of leave to appeal; and*
- ii. whether the Applicant has met the threshold for stay under Order 42 Rule 6(2).*

Whether the Motion is Fatally defective for want of leave

8. It is not disputed that no automatic right of appeal lies from a ruling made under section 35 of the Arbitration Act. The Supreme Court in **Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Chartered Institute of Arbitrators [2019] eKLR** and **Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] eKLR** held that appeals may only be entertained in narrow and exceptional circumstances where the High Court's decision is so manifestly wrong as to require correction. Those decisions, however, do not negate the High Court's jurisdiction to consider a stay application pending the intended appeal.

9. The Court of Appeal in **Equity Bank Ltd v West Link MBO Ltd [2013] eKLR** held that the High Court may issue interim protective orders to preserve the subject matter of an intended appeal. The question of whether leave to appeal should ultimately be granted falls squarely within the appellate court's jurisdiction. At this stage, the inquiry is limited to whether the statutory criteria for stay are met.
10. I therefore find that the Motion is not incompetent and proceed to its merits.

Whether the Applicant meets the threshold for stay under Order 42 Rule 6

11. Order 42 Rule 6(2) requires the Applicant to demonstrate: (a) substantial loss, (b) that the application was made without unreasonable delay, and (c) that security will be provided for the due performance of the decree. (See **Vishram Ravji Halai v Thornton & Turpin (1963) Ltd [1990] KLR 365**).
12. Substantial loss is the cornerstone of stay applications. As held in **James Wangalwa v Agnes Cheseto [2012] eKLR**, the Applicant must show that execution will create a state of affairs that will irreparably affect the appeal.
13. The decretal sum is KES 13,078,917.85, plus interest and arbitration costs of KES 8,098,000. The Applicant asserts that execution would cripple its financial standing and render the appeal nugatory. The Respondent argues that no evidence of its inability to repay has been provided.
14. In money decrees, the burden initially lies on the Applicant to raise reasonable apprehension that the

Respondent may be unable to refund the decretal sum; thereafter, the evidential burden shifts to the Respondent to demonstrate its financial capability. (See **Kenya Shell Ltd v Benjamin Karuga Kibiru [1986] KLR 410; Equity Bank Ltd v Taiga Adams Co Ltd [2006] eKLR**).

15. The Respondent, a private entity, has not placed before the Court any material demonstrating capacity to refund the decretal amount if the appeal succeeds. Given the magnitude of the award and the Respondent's silence on its financial standing, I am satisfied that the Applicant has established substantial loss.
16. On the issue of delay, the ruling sought to be stayed was delivered on 13th March 2025. The Motion was filed on 7th April 2025. A delay of approximately 30 days is not unreasonable. I therefore find that the Application was lodged timeously.
17. Then there is security for due performance. The Applicant expresses willingness to furnish security. The Respondent insists on security for the entire award. The nature and quantum of security is a discretionary matter to be exercised judicially.
18. Given the significant decretal sum and the need to balance both parties' rights, security is necessary.

Whether the intended appeal is arguable

19. Although it is not the role of this Court to assess the merits of the intended appeal, it must be satisfied that the appeal is not frivolous. The Applicant raises jurisdictional questions, including whether the arbitrator exceeded his

mandate after declaring the Diesel Purchasing Agreement invalid. Issues of jurisdiction are weighty and arguable. (See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR**).

20. I am satisfied that the intended appeal is not frivolous.

21. This Court must balance the Applicant’s right of appeal and the Respondent’s right to enjoy the fruits of its judgment. (See **African Merchant Assurance Co Ltd v Nyamai Kea [2020] KEHC 1685**). A conditional stay preserves both interests.

Disposition

22. Having considered the Motion, the law, and the circumstances of this case, I find merit in the application. Accordingly, I order:

- i. A stay of execution of the ruling and decree arising from the arbitral award dated 15th May 2023 is hereby granted pending determination of the intended appeal.***
- ii. The Applicant shall, within forty-five (45) days, deposit into a joint interest-earning account in the names of counsel for the parties a sum equivalent to fifty per cent (50%) of the decretal amount.***
- iii. The Applicant shall, within the same period, furnish a bank guarantee from a reputable financial institution for the remaining fifty per cent (50%) of the decretal amount.***

iv. Failure to comply with orders (b) and (c) shall result in the automatic lapse of the stay herein granted.

v. Costs of the application shall abide by the outcome of the intended appeal.

It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **11th** day of **December** 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Wangui h/b for Mr. Gitonga for Applicant

Mr. Kihang'a for DH/Respondent

Court Assistant: Carlos