



Zakhem International Construction Limited v Oil Fields Engineering and Supplies Limited; Eco Bank Kenya Limited & 3 others (Interested Parties) (Civil Application E503 of 2024) [2025] KECA 280 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 280 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E503 OF 2024
F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA
FEBRUARY 21, 2025

BETWEEN

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED APPLICANT

AND

OIL FIELDS ENGINEERING AND SUPPLIES LIMITED RESPONDENT

AND

ECO BANK KENYA LIMITED INTERESTED PARTY

ECO BANK NIGERIA LIMITED INTERESTED PARTY

AZICON KENYA LIMITED INTERESTED PARTY

LJA ASSOCIATES LLP INTERESTED PARTY

(Being an application under rule 5(2)(b) of the Court of Appeal Rules 2022 emanating from the ruling of the High Court – Commercial and Tax Division at Nairobi (P. J. Otieno, J) delivered on 30th September 2024 in HCCOMM No. E042 of 2021 Consolidated with HCCOMM No. E036 of 2024)

RULING

1. The notice of motion dated 3rd October 2024 arises from proceedings before the High Court Commercial and Tax Division in HCCC Arbitration E042 of 2021, Zakhem International construction Limited *vs Oilfields Engineering Supplies Limited consolidated with HCCC Arb. No. E056 of 2021*, Oilfields Engineering Supplies vs Zakhem International Construction Limited. The motion said to be brought under the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 5(a)(b), 47 and 49 of the Rules of this Court seeks twin orders of stay of proceedings before the



High Court and stay of execution of the orders of Justice P. J. Otieno issued on 30th September 2024 pending the hearing and determination of the intended appeal therefrom.

2. Zakhem International Construction Limited (Zakhem or the applicant) has cast aspersions on the conduct of Justice P.J. Otieno and had been before this Court in Civil Application No. E420 of 2024 Zakhem International Construction Limited, Oilfields Engineering and Supplies Limited. There, by consent of the parties, an order of stay of proceedings was issued in the following terms:

- “ 1. There shall be an order of temporary stay o proceedings before the High Court in Commercial and Tax Division HCC Arb No. E042 of 2021, Zakhem International Construction Ltd v Oilfields Engineering Supplies Ltd consolidated with HCC Arb No E036 of 2021 Oilfields Engineering Supplies Ltd v Zakhem International Construction Ltd, pending submission of the Report of the Director of Criminal Investigations within 45 days as ordered by the High Court.
2. All parties to these proceedings shall maintain the status quo prevailing as of today in all other respects pertaining to the said proceedings.
3. Today’s costs shall be in the intended appeal”

3. Zakhem, in an affidavit sworn by Ibrahim Zakhem on 3rd October 2024 in support of the motion, deposes that notwithstanding the orders, Hon. P.J. Otieno set the matters for hearing on 30th September 2024 without giving an opportunity to the DCI to conclude its investigations and before a report was tabled as to whether the allegations made against him were merited. Zakhem complains that on 30th September 2024, the honourable Judge altered the scope of the investigation defined in his Ruling of 8th August 2024.

4. In the Ruling of 8th August 2024, the learned judge ordered as follows:

- “ 23. It is however not a light matter that it has been alleged that the said Mr Amina has alleged being part of a conspiracy to circumvent the course of justice. Both counsel on either side should have answered to their statutory duty to assist the court find out the veracity of the allegations by having the person file an affidavit to confirm or deny the allegations. Both failed. The court is not content on leaving that allegation to just pass. The court directs that the Deputy Registrar of the court causes this judgment to be served upon the Director Criminal Investigations who is hereby directed to take statements from both Mr Ibrahim Zakhem and Francis Amina Juma on the allegations that the court has been approached by Prof Ojienda with a view to impartially determining the dispute in the favour of the respondent. The Deputy Registrar shall follow up with the office of the DCI to have the report ready within 45 days from today.”

5. The learned Judge is said to have changed the earlier directions to read:

- “a) Ms Asli’s client shall visit the DCI offices within 72 hours from now, and record a statement on his allegations of what he was told by one Mr. Amina on the possible outcome of the case.



- b. Let the DCI file a report in court establishing whether Mr Amina and or Mr Zakhem have done anything that compromises, perverts or defeats the fair and just determination of the dispute in this matter.
 - b. The matter is stood over to 11.10.2024 at 9.30 am for hearing of the pending applications, such hearing shall proceed unless there shall have been a contrary order by a competent court.”
6. Zakhem posits that the directions shifted the focus of investigations from allegations that Prof. Ojienda had approached the Judge to influence the determination of the dispute in favour of the respondent to an investigation whether Mr. Amina Juma or Mr. Zakhem had engaged in any action that compromises the fair resolution of the dispute. Zakhem was apprehensive that a scheduled hearing fixed for 11th October 2024 (a date passed) presupposes that the DCI will issue a report exonerating the Judge of allegations of bribery and corruption.
7. Further, Zakhem sought to draw the High Court’s attention to a letter dated 3rd September 2024 written by the DCI requesting certain clarification from the Court in respect to the orders inviting the DCI to carry out investigations, clarification on:
 - “(a) whether the directed investigations were limited to recording statements from the two individuals only; and
 - (b) whether the court directed the DCI to conduct a general inquiry into the allegations that would extend to all areas of interest.”
8. Zakhem contends that the new direction by the learned Judge not only undermines the authority of the court but also creates a significant conflict, putting the integrity of the judicial process at risk. We are implored to issue the said orders so that the intended appeal is heard before any further actions are taken by the Judge in the best interest of justice which will contribute to maintaining public confidence in the legal system.
9. The application is opposed. The respondent, speaking through an affidavit sworn by John Huba Waka sworn on 10th October 2024, asserts that this Court lacks jurisdiction to entertain appeals from interlocutory applications emanating from proceedings under sections 35 and 36 of The Arbitration Act, 1996. The affidavit then sets out the events leading to the allocation of the matter to Hon. Justice P. J. Otieno on 14th March 2024.
10. Six (6) days later on 20th March 2024, Zakhem sought an adjournment on the basis that it was going to file an affidavit detailing evidence of corruption. The matter was slated for hearing of the main applications on 6th May 2024 but the applicant successfully sought an adjournment on the basis that the applicant’s advocate Senior Counsel Ahmednassir Abdullahi was not available and had gone to pick his children from school.
11. After two other hearings failed, the court delivered a ruling on 8th August 2024 and directed that the deponent of affidavit who allegedly averred the allegations of the judge’s alleged biasness do record a statement with the DCI within 45 days of the ruling. A further hearing dated was set for 30th September 2024.
12. By that time, Zakhem’s director was yet to record his statement and on that basis, the court directed that the director to record a statement with the DCI within 3 days in compliance with the orders issued on



8th August 2024 and deferred hearing to 11th October 2024. On this latter day, hearing did not proceed as the DCI requested for additional time to conclude the investigations, a request that was granted.

13. Oilfields asserts: that the applicant has previously filed several applications for recusal of judges including Justice Mshilla, Justice Okwany, Justice Majanja and Justice Mugambi; that no prejudice will be suffered by the applicant should the matter proceed to conclusion; the intended appeal will not be rendered nugatory; arbitration is meant to fast-track determination of disputes without delay but the applicant has made several attempts to ensure that the matter does not proceed; and that the applicant has failed to demonstrate that it would suffer irreparable loss not capable of being compensated in the event the appeal succeeds.
14. We have read and understood the application and responses to it, the written submissions for and against the motion as supplemented with highlights by Mr. Ahmednassir SC appearing with Ms Asli Osman for the applicant and Prof. Tom Ojienda SC appearing with Mr. Okubasu for the respondent. We have also considered the short address by Mr. Luseno for the 1st and 2nd interested parties in support of the application.
15. Before us are two prayers for stay. One of stay of execution of a court order and the other of proceedings. Principles upon which we grant those orders are well known. The applicants must show an arguable appeal. One which even if unsuccessful eventually, raises at least one point worth of interrogation by the Court hearing the appeal. (See Peter Gathecha Gachiri v Attorney General and 4 Others (Civil Application NAI 24 of 2014 (unreported)). The second is that the appeal will be rendered nugatory if stay is not granted. The word nugatory, it has been stated, needs to be given its full meaning, that is, worthless, futile, invalid or trifling. (Reliance Bank Limited vs Norlake Investments Limited [2002] 1 EA 227). Regarding stay of proceedings, it is a drastic order and will only be granted in exceptional circumstances (see Atsango Chesoni [2002] eKLR).
16. But before delving into the merit of the application, Oilfields invites us to find that we have no jurisdiction to hear this application because it emanates from proceedings under sections 35 and 36 of the *Arbitration Act* for which leave is necessary (See Nyutu Agrovat Limited v Airtel Networks Kenya Limited;

Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR)). The applicant counters that argument by contending that the order issued on 30th September 2024 does not require leave as it is premised upon Article 50 of *the Constitution* on the cardinal right to fair hearing.
17. While it is true that the impugned order was made in proceedings under sections 35 and 36 of the *Arbitration Act*, the order itself is not a determination of those proceedings. That is, the order is not one setting aside the award or enforcing it. It is simply an order within the undetermined proceedings. For that reason, it is not so obvious to us which way the argument, that leave is required to appeal against that order, with go. The occasion to fully ventilate, consider and reflect on that contestation would be a striking out application, which is not the motion before us. We prefer to treat our jurisdiction as properly triggered by the notice of appeal that has been duly filed and to reserve the more involved question regarding leave to a striking out motion, which we were advised by Mr Okubasu had been filed.
18. The applicant seeks to impeach the order of 30th September 2024 as derogating from the orders issued earlier by the same Court on 8th August 2024. It is contended that the first order directed the DCI to investigate allegations that the court has been approached by Prof. Ojienda with a view to partially determining the dispute in favour of Oilfields. The latter order does seem to differ from it as it directs



the DCI to establish whether Mr. Amina and Mr. Zakhem have done anything that compromises, prevents or defeats the fair and just administration of the dispute in this matter.

19. There will, certainly, be rival arguments about the impugned order. Zakhem contends that the order shifts the focus of the investigations from the court and Prof. Ojienda to Mr. Zakhem and Mr. Amina. While Oilfields will be arguing that the latter order does not change the scope of the investigation contemplated by the earlier order making the supposed alteration a difference without a distinction. While we do not know where the chips will fall, we have little doubt that the complaint raised by Zakhem is worthy of consideration by the Court that will hear the appeal.
20. We now turn to consider the effect of not granting the order on the intended appeal. If we were to decline stay, then the investigations will proceed on the basis of the second directive as opposed to the first. If that was to happen, then the appeal, if the applicant were to succeed, would well be futile as the investigations are not an end to itself but for purposes of determining the recusal application, and the outcome of the investigations may have a determinative or significant bearing on the recusal application. We think that the second limb for grant of stay has also been made out.
21. Regarding whether we should stay proceedings, a question of partiality and bias had been raised against the learned Judge even before the grant of the order of 30th September 2024. There is now an allegation of further bias because of the impugned order. There is contention, as we understand it, that the learned Judge is entrenching the bias he already holds. Given that the two orders, prima facie, seem to be at odds, then the compounded apprehension by Zakhem is not trivial. We think that on the basis of the material before us, an exceptional circumstance is revealed making an order for stay of proceedings deserving.
22. Ultimately, we allow both limbs of the application of 3rd October 2024 with the result that there shall be stay of execution of the order of the High Court issued on 30th September 2024 in HCCC Arbitration E042 of 2021, Zakhem International construction Limited *vs Oilfields Engineering Supplies Limited consolidated with HCCC Arb. No. E056 of 2021*, Oilfields Engineering Supplies vs Zakhem International Construction Limited and stay of those proceedings pending the hearing and determination of the intended appeal. Costs of the motion shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

F. TUIYOTT

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

