



**National Irrigation Authority (Formerly the National Irrigation Board) v Sogea-Satom S.A.S (Civil Application E933 of 2023) [2024] KECA 97 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 97 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E933 OF 2023  
MA WARSAME, S OLE KANTAI & P NYAMWEYA, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**NATIONAL IRRIGATION AUTHORITY (FORMERLY THE NATIONAL IRRIGATION BOARD) ..... APPLICANT**

**AND**

**SOGEA-SATOM S.A.S ..... RESPONDENT**

*(Being an application for stay of execution against the ruling of the High Court at Nairobi (Majanja, J.) delivered on 26th September, 2023 in HCOMM No. E320 of 2022)*

**RULING**

1. By a notice of motion dated December 1, 2023 the applicant, National Irrigation Authority, has invoked this court’s jurisdiction under rule 5(2)(b) of the [Court of Appeal Rules, 2022](#) seeking a stay of execution against the ruling delivered on 26<sup>th</sup> September, 2023 by the High Court at Nairobi (Majanja, J.) in HCOMM No E320 of 2022, pending the hearing and determination of its appeal.
2. The application stems from a dispute over the payment of contract NIB/T/096/2011-2012 entered by the parties where the respondent SOGEA-SATOM S.A.S undertook to carry out civil works at the Mwea Irrigation Development Project in Kirinyaga County at an agreed price of Kes 3,534,724,981.00. As per the general conditions of the contract, a Dispute Board was constituted to resolve the arising dispute and it subsequently issued four decisions in favour of the respondent, awarding Kes 191,005,283.00, Kes 383,750,624.25, Kes 150,814,745.30 and Kes 16,721,426.16.
3. Consequently, the respondent filed a suit in the High Court suit being HCOMM No. E 320 of 2022 against the applicant, seeking judgment for the sums awarded by the Dispute Board and an application dated October 13, 2022 seeking summary judgment of the said sums. In response, the applicant filed an application under the provisions of the [Arbitration Act](#) seeking to refer the matter to arbitration as per the contract and to stay the High Court proceedings.



4. Upon hearing the respective arguments to the applications, the learned Judge dismissed the applicant's application, allowed the respondent's application by concluding as follows:

“...I do not see any legal or factual basis to depart from what I consider settled principle that the plaintiff is entitled to enforce the decisions of the Dispute Board as the same have not been upset by either an amicable settlement or arbitration. The enforcements of these decisions precedes any determination by way of an amicable settlement or arbitral tribunal in line with the parties' commitment to give prompt effect to such decisions. I therefore reject the defendant argument that these proceedings are premature. The inescapable result is that I must conclude that there is in fact no dispute for resolution hence there is no reason to stay the proceedings as the plaintiff is entitled to Enforce the Dispute Board's decisions regardless of whether the defendant seeks to challenge them in arbitration.

Having concluded that there is no reason to stay the proceedings, it follows that for the same reasons the Defendant does not, by affidavit or otherwise, raise any issue for trial or determination by the court.”

5. It is on that basis that the applicant has lodged its appeal and invoked our discretionary jurisdiction under rule 5(2)(b) of the [Rules](#). The application is supported by the affidavit of Eng Stephen Mutinda sworn on January 31, 2012 on the grounds that they have an arguable appeal with good prospects of success given that the trial court erred in law and in fact by concluding *inter alia* that there was no issue for trial; that it had jurisdiction to entertain the dispute despite a valid arbitration clause, that there was no distinction between a provisional decision and a binding decision of the Dispute Adjudication Board as per the contract between the parties and finding that there was no dispute for resolution between the parties and consequently refusing to refer the matter to arbitration while it was clear that the parties had not exhausted all the dispute resolution mechanisms provided under the contract.
6. Secondly, that the appeal would be rendered nugatory if the orders sought are not granted because the respondent has obtained a decree and execution is imminent. Further still, there is a real likelihood that the applicant will not recover any monies paid given that the respondent is a foreign company with no known assets within the country.
7. In opposing the application, the respondent *vide* a replying affidavit dated January 15, 2024 sworn by Mathieu Georges, country director for the respondent, deposed that the instant application was devoid of merit and the memorandum of appeal was baseless. In addition, the respondent states the applicant had not proved that the appeal will be rendered nugatory and the mere fact that the respondent was a foreign company was not a reason to grant stay as the respondent has assets outside Kenya and the law provided for means to enforce judgment against foreign companies. In addition the respondent has a branch and subsidiary located in Kenya capable of settling any sums awarded by the court.
8. We have considered the application, the affidavits, the submissions by counsel and the law. The applicable guidelines in regard to the orders sought in this regard are well settled. Firstly, that the applicant must demonstrate that they have an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See *Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd* [2002] 1 EA 227.
9. We have perused the Draft Memorandum of Appeal. Two grounds that stand out with regard to the arguability of the appeal which include the court's finding that the applicant did not raise any triable issue before it and whether there was a dispute for resolution necessitating arbitration between the parties. We need not interrogate the other issues raised by the applicant as just one issue is sufficient and



the issue does not need to succeed at the appeal. That was held in the case of; - Abmed Musa Ismael v Kumba Ole Ntamorua & 4 others [2014] eKLR: -

“An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a bona fide question to be explored and answered within the context of an appellate adjudication.”

10. On the nugatory aspect, it is undisputed that the respondent company does not own property in Kenya. It is trite law that a mere claim that the respondent might not refund the decretal sum is not sufficient. There must be reasonable grounds provided by the applicant to show that the respondent cannot refund the decretal sum after which the respondent will be called upon to discharge the evidential burden. The respondent in the instant case did not provide evidence of its financial capabilities though it maintained that it had a branch and a subsidiary company in Kenya. In that regard, we find that even though the law provides procedures to be followed in enforcing judgments against a foreign company, we need to consider and balance the interests of the parties, and their respective positions and safeguard the same in the circumstances. We are therefore satisfied that if we refuse the application the applicant will suffer hardship out of proportion to that of the respondent in the event the appeal is successful.
11. In the circumstances, the applicant has satisfied both limbs of the principle for granting an order of stay of execution. Accordingly, we allow the application and issue orders staying the execution of the ruling dated September 26, 2023 delivered by the High Court at Nairobi (Majanja, J.) in HCOMM No. E320 of 2022, pending the hearing and determination of the intended appeal. Costs of the motion will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

