Wanjohi & 2 others v Acorn Properties Ltd (Civil Application 137 of 2017) [2024] KECA 249 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 249 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 137 OF 2017

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

MARCH 8, 2024

BETWEEN

ISAAC GATHUNGU WANJOHI ..... 1ST APPLICANT

ISABELLA NYAGUTHI WANJOHI ..... 2ND APPLICANT

GUMBA INVESTMENTS LTD ..... 3RD APPLICANT

AND

ACORN PROPERTIES LTD ..... RESPONDENT

(Being an application for stay of execution pending appeal and leave to appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Olga Sewe, J.) delivered on 2nd June 2017 In HCCC Misc. App. No. 320 Of 2016)

RULING

1. The applicants moved this Court vide their Notice of Motion dated 16th June 2017 seeking: leave to appeal against the ruling of the High Court (Olga Sewe, J.) dated 2nd June 2017 in High Court Commercial Misc. Civil Application No. 320 of 2016; stay of execution of the said ruling pending appeal; and costs of the application.

2. The applicants' Motion is supported by the annexed affidavit of the 1st applicant, Eng. Isaac Gathungu Wanjohi, sworn on 16th June 2017. The motion is also anchored on 22 grounds set out on the face thereof, most of which are in the nature of submissions, but which we need not replicate here.

3. Suffice it to observe that the salient grounds on which the application is made are: that the applicants were aggrieved by the impugned ruling and prefer an appeal to this Court; that they have lodged the requisite notice of appeal and requested for certified copies of the proceedings; that the respondent is taking steps to execute the Award; that the intended appeal lies with leave of the Court in accordance with section 39(3) and (4) of the *Arbitration Act*, 1995 as read with Rules 39, 42 and 43 of the *Court of*

Appeal Rules, 2010 (Now Rules 41, 44 and 45 of the 2022 *Rules*); that the intended appeal raises points of general importance, some of which were overlooked by the learned Judge, and the determination of which will substantially affect their rights or those of the respondent; that the intended appeal raises grounds that merit serious judicial consideration; that, unless the orders hereby sought are granted, the 1st and 2nd applicants shall suffer financial loss, and the 3rd applicant's business shall be destroyed; that, if the applicants pay to the respondent the amount awarded, the intended appeal will be rendered nugatory; the applicants are ready and willing to provide to the respondents such security as the due performance of such decree as may be ultimately be binding on it; that the applicants have satisfied the requirements under Rule 5(2) (b) of this *Court's Rules* for grant of stay of execution pending appeal; and that unless stay is granted, the applicants' intended appeal will be rendered nugatory. They urge us to grant their application as prayed.

4. The respondent opposes the applicants' Motion vide the replying affidavit of Peter Njenga, the Chief Operations Officer and a Director of Acorn Group Limited of which the respondent is a subsidiary, sworn on 21st July 2017.

5. Opposing the Motion, the respondent contends that the applicants' application to the High Court to which the impugned ruling relates was made pursuant to section 35(1) and (2) of the *Arbitration Act*; that the application did not seek the determination of any question of law arising in the course of the arbitration or out of the award as contemplated in section 39 of the *Act*; that there was no agreement between the parties hereto to have any question of law arising in the course of the arbitration or out of the award to be submitted to the High Court for determination; that section 39(3) of the *Act* is not applicable herein; that the impugned ruling only dismissed the applicants' Originating Notice of Motion dated 27th June 2016 with costs to the respondent; that an order for dismissal is a negative order which cannot be stayed by this Court; and that this Court lacks the requisite jurisdiction to hear and determine the intended appeal. The respondent prays that the applicants' Motion be dismissed with costs to the respondent.

6. It is noteworthy that none of the parties have filed written submissions either to support or contest the Motion before us. However, learned counsel for the applicants, M/s. Kamau Kuria and Company, have advanced detailed arguments and cited numerous authorities to substantiate the grounds on which the applicants' Motion is anchored, all of which we have considered.

7. In our considered view, two main issues fall to be determined, namely: whether the application for stay of execution pending the intended appeal is merited; and whether this is a proper case for grant of leave to appeal against the impugned ruling.

8. On the first issue, it is common ground that the impugned ruling of Olga Sewe, J. in respect of which stay of execution and leave to appeal are sought was delivered on 2nd June 2017 dismissing the applicants' Originating Notice of Motion dated 27th June 2017 by which they sought orders: to set aside the arbitral award of Eng. Paul T. Gichuhi dated 27th May 2016 pursuant to section 35(1) and (2) (a) (iv) of the *Arbitration Act* (Revised 2012), 1995; and that a fresh arbitration be conducted by an arbitrator other than Eng. Paul T. Gichuhi.

9. It is noteworthy that the impugned ruling merely dismissed the applicants' Originating Notice of Motion without more. An order dismissing an application or suit is what is commonly referred to as a negative order, which is incapable of being stayed. This Court in *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya)* [2015] eKLR had this to say:

> " Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b) application the Court has identified negative orders as

orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in Executive Estates Limited v Kenya Posts & Anor. [2005] 1 E.A. 53 where it was stated that "... the order which dismissed the suit was a negative order which is not capable of execution..."

10. Likewise, the Court of Appeal in *George Ole Sangui & 12 others vs. Kedong Ranch Limited* [2015] eKLR held:

> " 20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted."

11. In addition to the foregoing, the respondent drew our attention to the fact that the applicants had offered to settle, and were in the process of settling, the decretal amount by instalments. Having carefully considered the applicants' Motion for stay of execution of the impugned ruling pending determination of the intended appeal, we reach the inescapable conclusion that the application fails. That leaves us with the issue as to whether this is a proper case for grant of leave to approach this Court on appeal.

12. The applicants' request for leave to appeal is essentially made under section 39(3) and (4) of the *Arbitration Act*, which reads:

> " 39. Questions of law arising in domestic arbitration
>
> 3. Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—
>
> a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
>
> b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).
>
> 4. An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of

Court applicable, as the case may be, in the High Court or the Court of Appeal."

13. To obtain leave to appeal pursuant to section 39(3) and (4) of the *Act*, an applicant must satisfy two conditions, namely: that prior to the delivery of the award, the parties agree that an appeal shall lie; or that a point of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties.

14. Having carefully examined the record as put to us, we find nothing in the record, or in the Developer Management Agreement and, in particular, the Deadlock and Dispute Resolution clause 13, to suggest that the parties thereto had agreed prior to delivery of the award in issue that an appeal would lie in that regard. The only question that remains for our determination is whether a point of law of general importance is involved, and the determination of which will substantially affect the rights of one or more of the parties as required under section 39(3) (b) of the *Act*.

15. Our examination of the grounds on which the applicants' Originating Notice of Motion is made discloses in ground No. l8 issues that, according to the applicants, "merit serious judicial consideration" in the intended appeal. These are:

> "i. Whether the arbitral award made on 27th May, 2016 deals with a dispute not contemplated by or not falling within the terms of the reference to the arbitration or contains decisions on matters beyond the scope of the reference to arbitration within the meaning of section 35 (2) (a) (iv) of the *Arbitration Act*?
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> ii. Whether the arbitrator applied the correct principles applicable to the construction and interpretation of commercial documents?
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> iii. Whether the arbitrator deduced a written agreement from the submissions of the Respondent herein and its Statement of Claim whose effect was to rewrite the agreement dated 1st August, 2009 and thereafter, apply the same to the parties?
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> iv. Whether the arbitrator purported to award the Respondent herein a relief not provided in the said agreement thereby going outside the scope of the arbitration agreement?
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> v. Whether the arbitrator purported to introduce a measure of remuneration which was not provided for in the contract and contradicted himself as to what the dispute was between the parties?
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> vi. Whether the arbitrator purported to make to the respondent herein an award of quantum merit which had not been specifically pleaded for contrary to the rule in *Provincial Insurance Company of East Africa v. Nandwa* [1995 -1998] 2 EACA 288?
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> vii. Whether the arbitrator misinterpreted the terms of Schedule VI; there was a clear demonstration that there was no meeting of minds between the Applicants and Respondents with regard to Schedule VI?

viii. Whether according to the contract which the arbitrator made for the parties, the Respondent herein did not need to satisfy a condition precedent set out in Rule 1 of Schedule VI of the Development Management Agreement?"

16. In *Kenya Shell Limited vs. Kobil Petroleum Limited* [2006] eKLR, this Court held:

> " Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered. Some guidance in that regard was given by this Court in Machira t/a Machira & Company Advocates v Mwangi & Anor. [2002] 2 KLR 391 as follows: -
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> > "The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration."

17. The first question is: which of those grounds sought to be advanced on appeal by the applicants raise points of law of general importance" Secondly, which of the issues may be considered, in the public interest, to be examined by this Court? Thirdly, does the applicants' case raise a novel point or an issue where the law requires clarifying? Those three questions must be answered in the affirmative to meet the test under section 39(3) (b) of the Act to merit leave to appeal.

18. What then may be viewed as points of general importance to warrant judicial scrutiny in the intended appeal? This question was addressed in *Memphis Limited vs. Kenya Ports Authority* [2022] KECA 105 (KLR), where the Court of Appeal held:

> " 18. ... For leave to appeal to be granted, the applicant needs to demonstrate that the points of law are "of general importance" "the determination of which will substantially affect the rights of one or more of the parties."

19. The Act does not however provide direction on what may be considered to be "of general importance". We think what the Supreme Court of Kenya stated in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone* [2013] eKLR though in the context of certification under Article 163(4)(b) of the *Constitution*, does provide guidance in interpreting the words

> " of general importance" under Section 39(3)(b) of the Act. In that case, the Supreme Court stated thus:
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> > "Before this Court, "a matter of general public importance" warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public

interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern. [Emphasis added]

20. In the same decision, the Supreme Court endorse the pronouncement by this Court in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*, Civil Appl. No. Sup.4 of 2012 (UR3/2012) that:

> "The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law".

21. Of the 8 issues advanced by the applicants as requiring serious judicial consideration, we see none that raises a serious point of law of general importance. To our mind, none can be said to be of such impact, or of such substantial consequences, or so broad-based as to transcend the litigation interests of the parties. Neither can they, or any of them, be considered as bearing upon the public interest. Simply put, they do not transcend the litigation interests of the applicants and the respondent, whose competing claims were private matters founded on a contractual relationship.

22. In reaching our conclusion, we are mindful of the fact that the categories constituting "public interest" are not closed. In the circumstances, the burden falls on the intending appellants to demonstrate that the matter in question carries "specific elements of real public interest and concern" (see the *Supreme Court decision in Hermanus Phillipus Styn vs. Giovanni Gnecchi-Ruscone* [2013] eKLR). In our respectful view, they do not. Neither do we consider any of the issues sought to be raised in the intended appeal to be of such public interest as to require examination by this Court. Finally, the applicants have not demonstrated that their case raises a novel point or an issue where the law requires clarifying. In view of the foregoing, the applicants' Motion for leave to appeal fails.

23. Having carefully considered the applicants' Motion, the affidavit in support and in reply, the grounds on which it is anchored, the arguments and judicial authorities advanced by learned counsel for the applicants, relevant statute law and rules of procedure, we find that the applicants' Notice of Motion dated 16th June 2017 fails and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CIArb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR