VS Hydro Rwanda Limited v Omnihydro Limited & 5 others (Civil Application E169 of 2021) [2023] KECA 826 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 826 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E169 OF 2021

DK MUSINGA, K M'INOTI & GWN MACHARIA, JJA

JULY 7, 2023

BETWEEN

VS HYDRO RWANDA LIMITED .... APPLICANT

AND

OMNIHYDRO LIMITED .... 1ST RESPONDENT

BANK OF KIGALI PLC .... 2ND RESPONDENT

I & M BANK RWANDA LIMITED .... 3RD RESPONDENT

SIDIAN BANK LIMITED .... 4TH RESPONDENT

NCBA BANK LIMITED .... 5TH RESPONDENT

I & M BANK LIMITED .... 6TH RESPONDENT

(An application for stay of execution of the Ruling and Orders of the High Court at Nairobi (Majanja, J.) delivered on 9th April 2021 in High Court Comm. Case No. E069 of 2021)

RULING

1. Before this Court is a Notice of Motion dated 20th May 2021 which is brought by the applicant under the provisions of sections 3A of the *Appellate Jurisdiction Act* and rule 5(2)(b) of the Rules of this Court. The principal orders sought in the application are: that this Court be pleased to grant conservatory orders directing the 1st respondent to deposit the value of the performance bonds/ guarantees into Court or into a joint interest earning account pending the lodgment, hearing and determination of the intended appeal; and that this Court be pleased to issue conservatory orders restraining the respondents jointly and severally from taking any adverse steps against the applicant on the basis of the payment of the subject performance bonds/guarantees pending the lodgment, hearing and determination of the intended appeal.

2. The background to the application is that the applicant and the 1st respondent entered into a contract dated 8th June 2017 for the design, engineering, procurement, construction, commissioning and testing of Mushitso Rukarara Hydropower Project in Rwanda. As mandated under the said contract, the applicant through the Bank of Kigali (the 2nd respondent) issued the 1st respondent with Performance and Advance Payment Guarantees No. 0222949, 0222950, 0222951 and 0222952, all dated 4th September 2020, while I & M Bank Rwanda Plc (the 6th respondent) issued the 1st respondent an Advance Payment Guarantee No. 0410/CAD/ME/APG/0396- 2002 on 16th October 2020.

3. According to the applicant, despite performance on its part of the contract, the project was delayed due to several unforeseen force majeure events such as catastrophic landslides and the covid-19 pandemic.

4. Sometime in August 2020, the 1st respondent notified the applicant that due to the delay occasioned by the aforesaid force majeure events, it had decided to separate the remaining scope of works into two parts, with some of the original scope of works to be completed by the applicant, while the remainder would be completed by the 1st respondent and its new owners, engineers and advisors, M/S Sivest (Pty) Limited. On 18th May 2020, Sivest (Pty) Limited was formally introduced into the project. The terms of this new agreement and/or arrangement were to be captured in Amendment 6 of the contract.

5. The applicant contended that despite the new arrangement, the 1st respondent continuously acted in bad faith in altering its position on issues agreed upon despite Sivest (Pty) Limited having taken over the agreed scope of works; that on 26th November 2020, the 1st respondent called on the bonds subject of the project and requested the 2nd and 3rd respondents to honour the call of the subject bonds issued by the applicant to the tune of USD. 1,535,563.24 and Euros 930, 460.90. On their part, the 2nd and 3rd respondents requested the 4th, 5th and 6th respondents to process the subject payments.

6. The applicant argued that the call on the bonds by the 1st respondent was non-compliant, erroneous, null and void for reasons that the amounts called under the Advance Payment Guarantee were over and above the value claimable under the terms of the bonds, and that the same contravened Article 17(e) of the ICC Uniform Rules for Demand Guarantees, which stipulates, inter alia, that a demand for an amount greater than that available under the guarantee will be non-compliant and should not be honoured. It was further contended that any dispute in respect of the bonds was to be resolved through arbitration and in accordance with the Law of England and the Arbitrator would sit either in Nairobi or Kigali for ease of access. The arbitral award would be final as per the provisions of clause 12 of the contract.

7. Notwithstanding the provisions of clause 12 of the Contract, the applicant contended that under section 7 of the *Arbitration Act*, it was not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection. In this connection, therefore, the applicant approached the High Court vide a Notice of Motion dated 3rd February, 2021 seeking orders that pending the inter partes hearing and determination of the application as well as the arbitral proceedings, the court be pleased to issue an interim measure of protection restraining the respondents, their servants and/ or agents from processing and/or releasing the payment of the sum of USD. 1,535,563.24 and Euros 930, 460.90 or any part thereof as demanded vide the 2nd and 3rd respondent's swift messages calling on the Bonds No. 0222949, 0222950, 0222951, 0222952 and 0410/CAD/ME/APG/0396-2002 for the subject project.

8. The High Court (Majanja, J.) vide a ruling dated 9th April 2021 dismissed the application with costs. At paragraphs 28 and 29 of the ruling, the learned judge held as follows:

> "In its application and the suit, the Plaintiff has invoked Clause 12 of the respective Bond documents as a basis of its application, yet it is not a party thereto. Since the Plaintiff is not a party to the arbitration agreement it now seeks to rely on, it has not established the first condition for the grant of an interim measure of protection laid down in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (Supra).
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> The jurisdiction to grant interim orders of protection rests on an arbitration agreement between the parties to the dispute. As the Bonds are separate agreements between the Banks and 1st Defendant, it follows that the Plaintiff's case lacks any foundation and as a result the application is dismissed with costs to the Defendants."

9. The applicant was dissatisfied with the decision of the trial court and intends to lodge an appeal to this Court. The applicant contends that its intended appeal is arguable and has high chances of success. Although the applicant did not annex a draft Memorandum of Appeal to its applications, the grounds on arguability as borne out of the face of the motion and in the affidavit in support sworn by Usgoda Arachchige Mantula Kositha Santeewa, its Logistics Manager, are that the learned judge erred in law and fact by, inter alia: finding that the applicant was not a party to the arbitration clause and could not invoke the same; in finding that the applicant was not a party to the arbitration agreement; exceeding its jurisdiction contrary to the provisions of section 7, 10 and 17 of the *Arbitration Act*; in intervening in matters solely within the purview of the arbitral tribunal pursuant to the *Arbitration Act*; in prejudicing the outcome of the arbitration by exceeding its jurisdiction with respect to the provision of section 7 of the *Arbitration Act*; and in failing to correctly address the principles for the grant of an interim measure of protection as set out in section 7 of the *Arbitration Act*.

10. On the nugatory aspect, it is contended that the respondents are in the process of making payments of the Performance bonds/guarantees to the 1st respondent, which is not domiciled within the jurisdiction of this Court; and that there is an imminent threat that the 4th respondent shall proceed to realize the securities issued by the applicant with respect to the performance bonds/guarantees thereby rendering the entire appeal nugatory.

11. At the hearing of this application there was no appearance for any of the parties, despite service of a hearing notice upon all of them. However, the applicant had filed written submissions, which are dated 10th June 2021, long before the application was set down for hearing. None of the respondents filed submissions. Pursuant to the provisions of rule 58(1), the Court chose to dispose of the application on the basis of the applicant's submissions.

12. Appreciating the colossal amounts involved in the matter, and noting that the parties' non-appearance for the hearing of the application could be inferred to mean that the matter had been resolved or abandoned, the Court Registrar was directed to write to the advocates on record for all the parties, requesting them to indicate the status of the matter.

13. The Court did not receive any response from the applicant's advocate but received a response from the firm of Gikera & Vadgama, Advocates for the 1st respondent. The said advocates forwarded to the Court a replying affidavit that had been filed and served by its client in response to the application, which affidavit apparently had not been availed to the judges.

14. The replying affidavit was sworn at Mauritius by Jacques Phillipe Henri Marrier d'Unienville, a director of the 1st respondent. It is contended in the replying affidavit that upon dismissal of the applicant's

application by the High Court, the 1st respondent received and utilized the value of the performance bonds/guarantees; that the funds are not available to be deposited in court or into a joint account as prayed by the applicant; and that the 1st respondent will suffer prejudice if this application is allowed as it cannot be able to comply with the orders sought.

15. We have carefully perused the record, the written submissions by the applicant's counsel, and considered the applicable law. It is trite law that in an application of this nature an applicant must demonstrate that the appeal or intended appeal is arguable, which is to say that the same is not frivolous. The applicant must also show that the appeal would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe vs. Tony Ketter & Others* [2013] eKLR.

16. The applicant contends, inter alia, that the learned judge in arriving at the impugned decision exceeded his jurisdiction contrary to the provisions of section 7, 10 and 17 of the *Arbitration Act*. That, in our view constitutes an arguable issue which can only be interrogated on appeal. We are mindful that a single bonafide arguable ground of appeal is sufficient. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

17. Turning to the nugatory aspect, the 1st respondent confirms having received and utilized the value of the performance bonds/guarantees, applying the proceeds thereof to the performance of the contract it had with the applicant. In essence, therefore, the funds are not available to be deposited in court or into a joint account as prayed by the applicant. That contention was not denied by the applicant.

18. The applicant seeks to stop that which has already taken place. The funds were released to the 1st respondent and have already been utilized. An order of stay is intended to prevent execution of an order or decree pending appeal or further action in the proceedings before a court. In the present circumstances, granting the orders sought would be an exercise in futility, as execution has already taken place. The applicant therefore has not demonstrated how its intended appeal would be rendered nugatory in the absence of orders of stay.

19. As the applicant has satisfied only one of the two limbs that are required in this kind of applications, the application fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY JULY, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR