



Kenya Electricity Generating Company Plc v Lantech (Africa) Limited & 4 others (Civil Application E454 & E460 of 2023 (Consolidated)) [2023] KECA 1670 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1670 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E454 & E460 OF 2023 (CONSOLIDATED)
K M'INOTI, M NGUGI & F TUIYOTT, JJA
DECEMBER 15, 2023**

BETWEEN

KENYA ELECTRICITY GENERATING COMPANY PLC APPELLANT

AND

LANTECH (AFRICA) LIMITED 1ST RESPONDENT

GEOHERMAL DEVELOPMENT COMPANY 2ND RESPONDENT

CENTRAL BANK OF KENYA LIMITED 3RD RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 4TH RESPONDENT

KCB BANK KENYA LIMITED 5TH RESPONDENT

(An application for stay of execution pending the hearing and determination of an appeal from the Ruling and order of the High Court of Kenya at Nairobi (A. Mabeya, J) delivered on 20th September 2023 in H.C. Misc. Application No. E776 of 2020)

RULING

1. The garnishee proceedings which are the subject of two motions for stay of execution that are before us were fast paced, leaving behind an intriguing tale. For the purpose of what we are asked to determine, we give a very brief account of it as gathered from those averments that are uncontested in the affidavits filed either in support or in opposition to the motions.
2. On 12th November, 2019, an arbitral tribunal (Mr. Kyalo Mbobu) published an award in favour of Lantech (Africa) Limited (Lantech) against Geothermal Development Company Limited (GDC) in the sum of USD 18,206,548.72 together with interest at 14% p.a. until payment in full. On 16th December, 2020, the High Court (Okwany, J.) made an order adopting the award as a decree of the court. The decree was not satisfied and Lantech sought to enforce it. It did so by taking out garnishee



proceedings first by a notice of motion dated 23rd June, 2022 which yielded a sum of Kshs.1,558,173.80 from the GDC's bank account at Kenya Commercial Bank of Kenya (KCB). A paltry sum against the million-dollar decree.

3. In a second garnishee application dated 27th February 2023, Lantech cast its net wider. In it, Lantech sought to attach funds supposedly held by GDC in accounts with Central Bank of Kenya Limited (CBK), Co-operative Bank of Kenya Limited (Co- op Bank) and KCB, along with receivables from the sale of steam by Kenya Electricity Generating Company PLC (KenGen) for the benefit of GDC. A decree nisi was issued but came under challenge by way of two preliminary objections by GDC. Only one objection is relevant for now. GDC asserted that account No. 021201xxxxxxx in its name held by Co-op Bank could not be the subject of a garnishee order as it had a charge and title in favour of Co-op Bank. The basis of this argument was an assignment agreement dated 21st November, 2011 in which GDC assigned the steam charge receivables from KenGen to the bank.
4. Regarding the objection, the court ((Mabeya J) held:

“ Accordingly, the court is satisfied that the funds in the Receivables Account are not available for garnishment and the objection succeeds to that extent. However, the other accounts are subject to garnishment.”
5. Lantech was aggrieved by the decision and sought to review it through an application dated 26th May 2023. Lantech argued that Co-op Bank had confirmed that account Number 020212xxxxxxx belonged to GDC and was not encumbered. This motion together with the substantive garnishee application of 27th February, 2023 were determined in a composite ruling on 20th September, 2023, the subject of two of the intended appeals. The application for review was found to be without merit and was dismissed. Regarding the main application, the Court made the decree nisi absolute in the following terms:
 - a. That the 2nd Garnishee do forthwith pay over to the decree-holder, all sums of money that stand in credit in all the accounts held by it on behalf of the judgment-debtor save for Ac. No. 021201xxxxxxx.
 - b. That the 4th Garnishee having admitted indebtedness to the Judgment debtor but failed to disclose the extent of such indebtedness in respect of the Steam Sale Receivables, it is to pay over to the decree-holder the decretal sum of US\$ 26,687,017/47, less any sums received by the decree-holder from the 2nd Garnishee.
 - c. That in order to effect order (b) above, an order hereby issues directed to all banks within Kenya maintaining any account(s) for and on behalf of the Kenya Electricity Generating Company PLC (KenGen), to pay over to the decree-holder all such sums of US\$ 26,687,017/47 less any sums paid over by the 2nd Garnishee.
 - d. That the costs of the 1st Garnishee to be paid by the Judgment-Debtor assessed at Kshs. 150,000/=.”
6. The 2nd garnishee was Co-op Bank while the 4th garnishee was KenGen.
7. The ultimate orders aggrieved both GDC and KenGen who filed separate notices of appeal evincing their attention to challenge that decision. Both are now before us seeking stay of execution of the entire ruling through two separate applications which were consolidated for purposes of hearing and



disposal on 18th October, 2023 when they came up for hearing. The application by KenGen is dated 29th September, 2023 and that of GDC is dated 4th October, 2023. The latter application also seeks stay of an order of 28th September, 2023 which was fast coming under the circumstances we now set out.

8. Two days after the ruling of 20th September, 2023 KenGen filed before the High Court an application for stay of execution of the ruling. On 25th September, 2023, the High Court (Mabeya, J.) certified the application as urgent and ordered that it be heard on 27th September, 2023 at 8.00 a.m. On 26th September, 2023, a day before the appointed hearing date, the learned Judge made the following ex parte orders;

“It is hereby ordered: -

1. That there be a stay of further execution of the order of 20/09/2023 in the following terms;
 - a. All the Accounts of the Fourth Garnishee be and are hereby released from the order of this court of 20/09/2023 save for the account held by the Fourth Garnishee at Standard Chartered Bank Branch.
 - b. The funds in account number 010407- 412-1900 held at Standard Chartered Bank be frozen until further orders of the Court.
 - c. There be liberty to file Further Affidavits before inter parties hearing on 27/09/2023 at 7:30 am.”
9. On its part, and notwithstanding that it filed a notice of appeal, GDC moved the High Court through an application dated 26th September, 2023 for review of the ruling of 20th September, 2023. The application was argued and was reserved for ruling on 9th October, 2023. The ruling was not delivered because of certain developments that are explained below.
10. On 27th September, 2023, the learned Judge, in the presence of counsel, set out directions for an expedited disposal of the two applications, and then made the following further orders;

“7. That in the meantime, the court reiterates the orders made on 26/09/2023 that there be partial stay as follows: -

- a. Save for the account with Standard Bank all the other accounts of the fourth Garnishee in ABSA Bank, KCB, NCBA are hereby released from the order of 20/09/2023. Those banks be paid costs of Kshs. 50,000 each by the Decree Holder.
- b. The freezing order on the Standard bank account said to hold over Kshs.3.8 Billion is hereby set aside and the bank directed to forthwith pay to the Award-Holder 50% of the Decretal Sum in the sum of USD 13,400,000.
- c. Thereafter the 4th Garnishee be at liberty to operate the said account with a view to pay for power and other utilities at the end of the month.”



11. What stands out from this order is that Standard Chartered Bank was directed to forthwith pay out a sum of USD 13,400,000 to Lantech. The Bank, which was not a party to the proceedings, must have been startled when it was served with an order and a letter by the advocates of Lantech on the very day the order was made demanding payment of USD 26,697,017.47 by 3.00 pm of that day, failing which Lantech would take up proceedings against the Bank. Faced with that threat, the Bank on that busy and dramatic day filed an application for stay pending review of those orders. As it turned out the High Court had been fed with some fairy tale information when it hurriedly made the order in which it stated that Standard Chartered Bank supposedly held “over Ksh 3.8 billion” for KenGen when in reality it only held a total sum of Kshs.34,023,540.40 in four accounts in favour of KenGen. The Bank was obviously not in a position to satisfy the Court order which directed it to pay many fold what it held for its customer.
12. Not one to let up, Lantech followed through its threat and on 28th September 2023, it filed an application dated 27th September, 2023 seeking to cite the officers of Standard Chartered Bank, KenGen, and GDC for contempt of the orders of 20th September, 2023, 26th September, 2023 and 27th September, 2023.
13. In the face of this untidy state of affairs, the learned Judge observed that the Court had been misinformed into making the orders of 26th and 27th September 2023 and made further orders on 28th September 2023. These are the further orders;

“It is hereby ordered:

1. That from the affidavits thereon, it would seem that the court was misinformed to make the orders of 26th and 27th September, 2023.
 2. That consequently, the order of this court made on 26th and 27th September, 2023 are hereby varied and set aside and it is hereby directed as follows:
 - a. The order of 20/9/2023 is hereby reinstated save that the 4th Garnishees bankers are not to pay over to the Award- holder the sum set out therein until further orders of the court.
 - b. All the Accounts of the 4th Garnishee held at Standard Chartered Bank, Absa Bank, Cooperative Bank and KCB be and are hereby garnisheed.
 - c. The said banks do file full and satisfactory evidence of the monies they are holding for and on behalf of the 4th Garnishee in all their accounts within 48 hours of service of this order upon them.
 - d. The said banks do appear in court on 2/10/2023 at 8.30 am to show cause why the order of 20/9/2023 should not be executed against them.
 3. That the applications dated 27/9/2023 be responded to within 24 hours of service and the parties file and exchange submissions in respect thereof within 24 hours thereafter.
 4. That the submissions be highlighted on 2/10/2023.”
14. In the affidavits in support of the applications for stay, the applicants state why, from their standpoint, the intended appeals are arguable and how they will be rendered nugatory if an order of stay of



execution is not granted. Co-op Bank supported the applications, CBK was neutral, while KCB chose to sit out.

15. In answer to the application for stay by KenGen, Lantech, through a replying affidavit sworn by Aquinas Wasike, a director of the company, raises the following issues: that there is no valid notice of appeal by KenGen because while the notice of appeal demonstrates an intention to partially appeal against the said ruling, it does not specify which part of the impugned ruling is challenged as required by Rule 77(3) of the Rules; and further there is no order by the superior court below granting KenGen leave to appeal as KenGen abandoned its application for leave already filed before the superior court. Lantech contends further that KenGen's application before us is an abuse of the process of the court as it filed a similar application before the High Court which was to be heard on 3rd October, 2023 had it not been for interim orders we issued on 18th October, 2023 when we heard the consolidated motions.
16. Regarding whether the nugatory aspect has been proved, Lantech states it has the ability to refund money to the applicants in the unlikely event that the alleged intended appeal succeeds.
17. For the application by GDC, Lantech states that the notice of appeal dated 22nd September 2022 is an abuse of the process of the Court as GDC has no right of appeal under law having already filed and argued the application for review of the impugned ruling and which was awaiting ruling on 9th October 2023, a date now past and frustrated by interim orders issued by this Court; similar to the argument against to the notice of appeal by KenGen, no leave has been sought or granted to GDC to appeal; it is not efficacious to grant stay as the subject value now stands at USD 28,138,326.70 and on which interest continues to accrue, and Lantech has only recovered a total sum equivalent of USD 536,551.56; the operations of GDC have not been paralysed and it is keeping enormous amounts of money in fixed deposit accounts with its bankers; and Lantech repeats its ability to repay any decretal sum it will have received. Further, GDC is accused of failing to disclose filing of an application for stay of execution and/or enforcement of the final Arbitral Award in Civil Application No. E230 of 2022 which was declined by this Court and subsistence of a new suit in the superior court being HCCC No. 329 of 2023 which constitutes a collateral challenge to the final Arbitral award in which GDC has filed an application to stay execution of the final award.
18. At the hearing of the motion, Mr. Ochwa and Mr. Abuja, learned counsel, appeared for KenGen, Mr. Okubasu and Ms. Osman learned counsel, for GDC, Mr. Masika, learned counsel, for Lantech, Mr. Chege, learned counsel, represented CBK while Co- op Bank was represented by learned counsel, Mr. Wanga.
19. The two conditions to be met in an application for stay of execution under Rule 5(2)(b) of our Rules, both of which must be satisfied, are that the intended appeal must be arguable and it will be rendered nugatory if stay is not granted.
20. Some preliminary issues were raised by Lantech which, if upheld, would be dispositive of the application and it is those issues that must be determined first.
21. Lantech contends that the notices of appeal filed against the decision of 20th September, 2023 are non-starters because no leave to file an appeal against the ruling was sought and obtained in contravention of section 75 of the [Civil Procedure Act](#) (CPA) which reads:

“75: Orders from which appeal lies

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making



such order or of the court to which an appeal would lie if leave were granted—

- a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- b. an order on an award stated in the form of a special case;
- c. an order modifying or correcting an award;
- d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e. an order filing or refusing to file an award in an arbitration without the intervention of the court;
- f. an order under section 64;
- g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h. any order made under rules from which an appeal is expressly allowed by rules.

2. No appeal shall lie from any order passed in appeal under this section.”

22. Order 43 Rule (1) of the Civil Procedure Rules (CPR) sets out the orders from which an appeal lies as contemplated by section 75(1)(h) CPA. It has to be beyond peradventure that in relation to garnishee proceedings the only order against which an appeal lies as of right is order 23 Rule 7, which is on a trial of a claim of third person in attachment of debts. Yet the provisions of Rule 7 must be read with Rule 6 to give full understanding to what is a claim of a third person and the nature of a trial of claim of a third person. The two rules read: -

- “6. Claim of third person [Order 23, rule 6.] Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third person to appear, and state the nature and particulars of his claim upon such debt.
7. Trial of claim of third person [Order 23, rule 7.] After hearing the allegations of any third person under such order, as in rule 6 mentioned, or of any other person who by the same or any subsequent order the court may order to appear, or in case of such third person not appearing when ordered, the court may order execution for levying the amount due from the garnishee, together with the costs of the garnishee proceedings, or order any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person or make such other order as the court shall think fit.”



23. Lantech’s argument is that the impugned ruling was a trial of liability of a garnishee under order 23 Rule 5 and is one from which no appeal lies as of right and requires leave to be sought. It contended that KenGen, well aware of this provision, sought leave in an application dated 22nd September, 2023 which it appears to have abandoned.
24. KenGen’s answer is that no leave was required because, under Order 23 Rule 1, a garnishee is referred to as the third person and as it denies indebtedness to GDC, an execution against it as a third person can only be made pursuant to order 23 Rule 7, an order from which an appeal lies as a matter of right. KenGen argues further that it filed its application for leave dated 23rd September 2023 only out of abundance of caution.
25. While we agree with counsel for Lantech that the law, generally, is that an application for stay of execution pending an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water (See Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR), we hasten to add that this Court will only make that finding where it is crystal clear and obvious that leave is required and equally plain that leave was not obtained. If, however, these two questions or any one of them can only be resolved through protracted or involved arguments, then it has to await the opportunity that a striking out motion under Rule 84 of our Rules affords the parties.
26. Here, we have little hesitation in reaching a decision that notices of appeal that challenge the decision of 20th September, 2023 do not fall in the category of those which can be given short shrift. This is because at the heart of KenGen’s answer to the garnishee proceedings was that it only receives payments for the steam charge connected to GDC wells from Kenya Power and Lighting Company (KPLC) and remits them to the receivables account at Co-op Bank by virtue of a deed of assignment of receivables entered into between GDC and Co-op Bank. In which event it had to be determined whether the receivables were a charge to and encumbered in favour of Co-op Bank or belonged to GDC as long as they had not reached the receivables account. It can therefore be argued that for purposes of determining that very question, Co-op Bank is a third party in terms of rules 6 and 7 of Order 23 CPR. The High Court held:
- “ 56. With greatest respect, there can be no breach where a party is acting in compliance with a court order. The monies that can be said to be ringfenced by the Assignment Agreement are those that hit the receivables account held by the 2nd Garnishee. This is so because, it is from that account then that the loan to the 2nd Garnishee is payable. However, the monies in the hands of the 4th Garnishee from the Steam Charge same remain a debt owed to the judgment- debtor which is attachable by way of garnishment until paid over to the receivable account.”
27. A second objection to KenGen’s notice of appeal is that it is defective since, while it evinces an intention to partially appeal the decision, it does not specify the part complained of contrary to the requirement of Rule 77(3)(a). We take the view that, while the complaint may well be a ground for urging a striking out motion, the draft memorandum of appeal attached to KenGen’s motion is explicit as to which part of the decision is impugned. For purposes of a stay application, the notice of appeal, read in conjunction with the draft memorandum of appeal, suffices.
28. To the last objection. Can it be said, as contended by Lantech, that in the circumstances of this matter, the application now before us is an abuse of process of court because KenGen had filed a similar application for stay before the High Court which is yet to be argued? The answer lies in the manner in which the High Court treated that application. First, the learned Judge certified the application urgent for hearing on 27th September 2023. On 26th September 2023, a day before the



hearing and in circumstances which are not apparent from the material before us, the learned trial Judge made an order, releasing all accounts of KenGen but in a twist in the tale froze account number 010407-412-1900 held by KenGen at Standard Chartered Bank. Further, a day after, on 27th September 2023, the learned judge makes a rather intriguing order, which we reproduce:

“The freezing order on the Standard Bank account said to hold Kshs.3.8 billion is hereby set aside and the bank directed to forthwith pay to the award holder 50% of the decretal sum in the sum of USD 13,400,000/-.”

29. Intriguing because those orders were directed against Standard Chartered Bank which up to that point was not a party to the proceedings and before it was heard on whether it could satisfy the Court order. As alluded to earlier, there was an embarrassing moment in the proceedings before the High Court when it became apparent that the Bank held only a sum of Kshs.34,023,640.40 in favour of KenGen and not the whopping Kshs.3.8 billion referred to in the order. While the freezing order to preserve the funds in the account could be justified, the rushed payout order made without affording the parties involved an opportunity to be heard is not easy to comprehend.
30. The two orders of 26th September, 2023 and 27th September, 2023 geared towards enforcing the order of 20th September, 2023 had leap frogged the application for stay of execution which had been at the front of the queue and was due for hearing on 3rd October 2023. The foray of orders and rather unusual circumstances must have left KenGen exasperated and bewildered. It turned to this Court for rest and solace. As will be apparent shortly from the outcome of this application, to turn away such an applicant would be to accentuate a possible injustice. In the circumstances of this application, we are satisfied that the applicant is not an abuser of process but rather a victim of it.
31. Now to a second objection against the motion of GDC. It is submitted that the notice of appeal is an abuse of process of court as the applicant filed and prosecuted an application for review which was reserved for ruling on 9th October, 2023.
32. In answer, GDC cites the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, Nairobi Civil Appeal No. 77 of 2012 and submits that this Court has jurisdiction to hear and determine its notice of motion application dated 4th October 2023 in so far as the superior court has not set aside the said orders of 20th September 2023 (thereby extinguishing the substratum of its intended appeal) for the following reasons:
 - (a) where an application for review has been presented by a party to the suit and an appeal is afterwards preferred from the same order or decree, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application for review;
 - (b) the power to review exists so long as the appeal is not heard because it is only when the appeal is heard that the decree or order is final and the application for review can no longer be proceeded with;
 - (c) on the other hand, if the application for review is granted and a new decree or order is passed, the appeal cannot be heard and it must be dismissed for the decree or order appealed from is superseded by the new decree or order; and
 - (d) an intended appeal will not be moot unless the orders sought to be appealed from still remain in force and the substratum of the intended appeal still exists.
33. We have read the decision of this Court (in which M’Inoti JA sat) and right away say that it is distinguishable from the circumstances in this matter as we are dealing with an applicant who pursues



a right of review under section 80 CPA and at the same time files or has filed a notice of appeal unlike in Nguruman where the applicant pursued a reversal or review of an injunction order pursuant to order 40 rule 7 CPR and at the same time filed notice of appeal. Nguruman explains the distinction as follows:

“(21) We agree with Mr. Pheroze Nowrojee, Senior Counsel, that the authority from Mulla on the Code of Civil Procedure relates to an application for review under the equivalent of our section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules rather than an application for discharge, variation or setting aside of an order under Rule 40 (7). We are cautious against applying that authority in the present appeal because even a plain reading of Order 45 leaves no doubt that an application for review and an appeal are intended to be alternative remedies. We do not find a similar limitation under Order 40 (7), although it must be plainly obvious whether an appeal can be sustained after a successful application for variation must depend on the extent of the variation of the order appealed from.

(22) In our view, it would be too restrictive an approach, to adopt the position that an appellant who resorts to Order 40 (7) by that fact alone, forfeits his right of appeal. First, the law has availed to an aggrieved party the remedy of appeal and that of an application for discharge, variation or setting aside of the order without any express edict that the remedies are available only as alternatives. Secondly, it is conceivable that an application under Order 40 (7) may result in the discharge, variation or setting aside of an order, or it may be allowed in part or entirely dismissed. It cannot be the case that in all those eventualities an aggrieved party must forfeit the right of appeal. In our view, the true test of whether an application under 40 (7) precludes an appeal is the extent to which the order appealed from has been varied or altered.”

34. GDC will nevertheless find support in this Court’s decision in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR where Ouko (P) (as he then was) gave a detailed explanation why filing a notice of appeal only as opposed to lodging of an appeal proper cannot be a legal bar to an intending appellant seeking review of the same decision under order 45 CPR. The Learned Judge observed:

“The consistency in these authorities is inescapable. As indicated, although Mumbi Ngugi, J. lumped *Equity Bank V. Westlink* (supra) together with *Kisya Investments* (supra) as authority for saying that a party who has lodged a notice of appeal is barred from filing an application for review, my careful reading of *Equity Bank V. Westlink* (supra) does not support that position. In *Kisya Investments* (supra), the Court (Kwach, Tunoi and Lakha, JJ.A) took new tangent and broke the long established chain when it declared that;

‘The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law’.

The only other case that appears to have followed the same path as *Kisya Investments* (supra) is *Tanjali Investments Ltd V. El Nasr Export & Import Company* (2004) eKLR (Tunoi, Okubasu, and O. Otieno, JJ.A). In that case, after judgment was entered against



the appellant, it filed a notice of appeal but failed to file the record of appeal. Being out of time, it applied to a single judge of this Court in chambers for extension of time to bring the appeal out of time. It was dismissed. With the notice of appeal still on record, it returned to the Judge in the High Court to review or set aside the judgment. On the ground that it had filed a notice of appeal, the respondent raised a preliminary objection and the application for review was dismissed. On appeal to this Court, and though counsel for the appellant cited *Motel Schweitzer (supra)*, *Yani Haryanto (supra)*, and *Thomas Edward Cunningham, (supra)*, and counsel for the respondent, on the other hand cited *Kisya Investments (supra)*, the Court went by the conclusions in the latter; that the appellant having filed a notice of appeal it could not by a subsequent application made thereafter proceed by way of review. In agreeing with the finding of the High Court and borrowing from *Kisya Investments (supra)*, the Court said;

‘Mr. Amin brought to our attention this Court’s decision in *Kisya Investments Limited v. The Attorney - General & R. L. Odupoy – Civil Appeal No. 31 of 1995 (unreported)*... But even more important is the fact that the appellant applied for a review after its efforts for lodging an appeal had come to naught’.

While it cannot be denied that *Kisya Investments (supra)* case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position....

....In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

35. GDC cannot be faulted for mounting an application for review on 26th September 2023 even after filing a notice of appeal dated 22nd September 2023. The notice of appeal dated 22nd September 2023 was the foundation upon which GDC could properly move this Court under its 5(2)(b) jurisdiction as it did on 4th October 2023. Of course there will be occasion when it will be an abuse of process for a party to file an application for review before a superior court below and then move this Court for stay of execution of the same decision when the review application is pending. Each matter will turn on its unique circumstances. In respect to this one, its peculiarities which we have narrated and discussed exonerates GDC’s motion.
36. We make some short observations about the other objections. In its stay motion GDC not only discloses that it instituted a fresh suit against Lantech on the basis of an alleged breach of fundamental right to trial before the arbitral tribunal but also attaches the pleadings and a copy of its motion of 26th July 2023 seeking to stay the garnishee proceedings pending the hearing and determination of that suit. The allegation of non-disclosure against GDC is therefore not well taken. Regarding Civil Application No. E230 of 2022, this was a notice of motion in which GDC sought stay of execution of the order declining its application to set aside the award and the order enforcing it. This Court dismissed the application on 16th December 2022 after making findings that there was no proper notice of appeal



before it as GDC had not sought leave as the proposed appeal arose from an application under section 35 of the *Arbitration Act*; and putting the hardship of the parties on scale, the balance tipped in favour of Lantech. Yet in so far as no argument is made that the current motion is res judicata the already decided stay motion, we have jurisdiction to hear and determine it on its own merit and on the basis of the material before us. Turning to the proceedings in Civil Application No. E029 of 2021 in which Laibuta JA., sitting as a single Judge, enlarged time to enable GDC file an application for leave to appeal against the order of enforcement of the award, its materiality and relevance to the matter at hand is not clear to us.

37. Now to the arguability of the intended appeals, we begin with those challenging the decision of 20th September 2023. We think that the argument made by the intended appellant that it was problematic for the High Court to find that there was no proof that the proceeds from the steam charge were assigned to Co-op Bank in the face of the deed of assignment and even after holding that Account No. 021201xxxxxxx which held the receivables was protected from garnishee is at least one single point that deserves the attention of the Court that may hear the intended appeal. As to the decision of 28th September 2023, the argument that the trial court purported to sit on appeal over its own orders when it suo moto reversed the orders of 26th and 27th September, 2023 is not trivial.
38. Many arguments have been made about why the intended appeals will be rendered nugatory if stay of execution is not granted. One catches our attention and is sufficient. The amounts involved are colossal, about USD 26,687,017.47 and are public money as long as they have not been paid out to Lantech. Faced with a challenge to demonstrate its ability to repay that amount if the appeal were to succeed, Lantech simply states that it is able without a scintilla of evidence of this ability. Lantech failed to discharge the evidential burden that was placed on it when the applicants asserted that it did not have the ability to repay the decretal sum in the event the intended appeals prevailed (see *ABN Amro Bank N.V V Le Monde Foods Limited* [2002] eKLR). We must therefore conclude that it is unable to repay such a huge sum if eventually asked to do so and this could imperil the intended appeals.
39. In the end, it is clear to us now as it was when we issued the interim orders on 18th October, 2023 that both applications have merit and are for allowing. The applications of 29th September, 2023 and 4th October, 2023 are allowed. Costs shall be paid by Lantech.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

J. M'INOTI

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

