Crop Health Technologies Ltd & 2 others v Agritechno East Africa Ltd (Civil Appeal (Application) E226 of 2020) [2022] KECA 630 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 630 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E226 OF 2020

AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

CROP HEALTH TECHNOLOGIES LTD ..... 1ST APPLICANT

PHILIP KING'OO TONDE ..... 2ND APPLICANT

SPIRE BANK LTD ..... 3RD APPLICANT

AND

AGRITECHNO EAST AFRICA LTD ..... RESPONDENT

(Being an application for stay of proceedings against the Ruling of the High Court of Kenya at Nairobi (W. A. Okwany, J.) dated 23rd April 2020 in HCCC No. E299 of 2019)

RULING

1. Before us is a Notice of Motion dated 5th October 2021 in which the applicants herein (Crop Health Technologies Ltd, Philip King'oo Tonde and Spire Bank Ltd) seek, inter alia: a stay of all proceedings in the appeal lodged by the respondent (Agritechno EA Ltd) pending the hearing and determination of their Request for Arbitration in ICC 26518/AZO; any other order/directions for the interest of the parties; and that costs of this application be in the cause.

2. The applicants' Motion is made under "section 6 of the *Arbitration Act*, "Order 51, *Court of Appeal Rules*, Rule 5 *Civil Procedure* 3A, 3B, 1A, 1B and All Enabling Provisions of the Law" [sic], and is made on the grounds set out on the face of the Motion, namely that the applicants herein lodged the arbitration request on 23rd August 2021 and paid a sum of $5,000 (KShs. 500,000); that the applicants have received a demand to deposit a sum of $40,000 and that the respondent has been served; that, therefore, the ICC is fully seized of the matter; and that any step taken by the Court of Appeal will render the jurisdiction of the ICC unhelpful.

3. In addition to the grounds on which it is anchored, the Motion is supported by the annexed affidavit of Philip King'oo Tonde (the 2nd applicant) sworn on 5th October 2021. In it, the 2nd applicant re-states the grounds on which the application is made and depones, inter alia, that he is a Director of the 1st applicant; that the appeal seeks to challenge the High Court's decision that declined to entertain the case under section 6 of the *Arbitration Act* and advised the parties to move to the Paris based arbitration tribunal; that therefore, the proceedings touching on the said jurisdiction will be prejudicial to him and cause him irreparable damage and in any event, the appeal has been overtaken by events.

4. The respondent opposes the Motion, in a reply, filed an affidavit of Reuben Williams (the respondent's Managing Director) sworn on 19th October 2021.

   In paragraph 11 of his replying affidavit, Mr. Williams states that the respondent filed suit, to wit, HCCC No. E299 of 2019 and sought summary judgment for the admitted amounts based on the agreement entered into on 1st July 2019, the Bank Guarantee and cheques issued on account thereof; and that the 1st and 2nd applicants duly entered an appearance and filed a common defence to the suit. According to him, the 1st and 2nd applicants not only admitted the amount claimed, but also admitted the court's jurisdiction.

5. The suit from which the impugned ruling arose came on the heels of HCCC No. E261 of 2019 – Crop Health Technologies Ltd vs. Agritechno EA Ltd & Another, in which the 1st applicant had sued the respondent & Another for termination of the subject Agreement, but which was dismissed by the Hon. Lady Justice Kasango for want of jurisdiction on account of the existence of an arbitration agreement. However, we need to point out at this juncture that we do not have the benefit of the pleadings in the two suits in the superior court, as they are not contained in the record before us.

6. The brief background of this application is that, by a written Cooperation and Distribution Framework Agreement ("the Agreement") made on 1st November 2017 between the respondent herein (Agritechno East Africa Ltd – "Agritechno") and the 1st applicant (Crop Health Technologies Ltd – "Crop Health"), Agritechno agreed to supply to Crop Health various agricultural inputs and bio-stimulants on terms, inter alia that Crop Health would promote and sell the inputs and bio-stimulants on its behalf in Kenya for an initial term of five financial years on express terms, including, interpretation, object, appointment, duration, rights and obligations of the supplier, non- competition, territory area division, types of products, price, policy and payment terms, sales forecasts, minimum stock levels, IP and registration rights, confidentiality, termination, assignment or delegation, applicable law and jurisdiction.

7. At all material times, the respondent acted as the local agent of Agritechno Fertilizantes SL ("AFSL"), while the 2nd applicant was a Director of the 1st applicant. On the other hand, the 3rd applicant bank financed the 1st applicant's undertaking and provided a bank guarantee to the respondent in the sum of KShs. 25,000,000. It is noteworthy that AFSL, the 2nd and 3rd applicants were not party to the Agreement between the 1st applicant and the respondent, or to the arbitration agreement in issue.

8. Clause 18 of the Cooperation and Distribution Framework Agreement constitutes an arbitration agreement and provides:

   > "Any dispute arising from or in connection with this Agreement shall be submitted to the ICC (International Chamber of Commerce) International Court of Arbitration, commonly known simply as 'the Court'. The arbitral decision is final and binding upon both parties. The seat of arbitration shall be Paris ..."

9. A dispute having arisen between the 1st applicant and the respondent over and concerning sums allegedly due and owing to the respondent, the respondent filed suit against the applicants in the High Court of Kenya at Nairobi (Commercial and Admiralty Division) HCCC No. E299 of 2019 claiming, inter alia: a sum of KShs. 50,674,010/10 allegedly due on account of goods supplied; and a sum of KShs. 6,691,198 being the value of stocks allegedly held by the 1st applicant under the Agreement.

10. In addition to the agreement made on 1st July 2019 by which the 1st and 2nd applicants allegedly admitted the respondent's claim, the two entered an appearance and filed a defence on 15th October 2019. It is also noteworthy that the agreement containing the alleged admission, the Memorandum of Appearance and defence mentioned in Mr. William's replying affidavit are also not annexed to his affidavit or otherwise contained in the record before us.

11. By a Notice of Motion dated 15th October 2019 and filed in the above- mentioned High Court case, the respondent sought: inter alia, summary judgment against the 1st and 2nd applicants for the sum of KShs. 57,588,379, being the value of stock allegedly supplied by the respondent to the 1st applicant; in the alternative, judgment on admission against the 1st and 2nd applicants for the sum of KShs. 57,588,379 on account of the supplies aforesaid; and summary judgment against the 3rd applicant in the sum of KShs. 25,000,000 on account of the Bank Guarantee aforesaid.

12. On 7th November 2019, the 1st and 2nd applicants raised a Preliminary Objection to the respondent's Motion on, among other grounds, that the court lacked jurisdiction in light of the existence of an arbitration agreement; that the case offends section 6 of the Civil Procedure Act; that the case was *res judicata* in light of a ruling in HCCC No. E261 of 2019 – Crop Health Ltd vs. Agritechno EA Ltd & Another; that the proceedings were an abuse of the court process; and that the application offends Order 36 of the *Civil Procedure Rules*, Article 25 and 159 of the *Constitution*.

13. In addition to the Preliminary Objection, the applicants opposed the respondent's Motion and filed two replying affidavits. Though mentioned in the impugned ruling, the two affidavits are also not contained in the record before us. However, we discern from the impugned ruling that the 1st and 2nd applicants contended that the application and the pleadings therein were substantially and directly in issue in HCCC No. E261 of 2019 wherein the court had already pronounced itself on the dispute; and that the instant case was both res judicata and subjudice. On its part, the 3rd applicant contended that the Bank Guarantee in issue was a forgery "as the purported signatory did not have the approval from the credit team to sign the said guarantee."

14. Having heard the respondent's application and the applicants' preliminary objection, the High Court (W. A. Okwany, J.) delivered her Ruling on 23rd April 2020, holding, on the one hand, that she had no jurisdiction to entertain the respondent's application dated 15th October 2019 and, on the other hand, dismissed the said application with costs to the applicants.

15. Aggrieved by the Ruling of the learned Judge., the respondent lodged the appeal herein on 12 grounds, namely:

    1. The Learned Judge erred in fact and in law in dismissing the Appellant's Notice of Motion application dated 15th October 2019 on the basis that the Court lacked jurisdiction, given that the arbitration clause in the contract referred disputes to arbitration in Paris, and whose applicable law is that of Paris.

    2. The Learned Judge erred in fact and in law in placing reliance on the Court's finding in an earlier case, being HCCC No. E261 of 2019 Crop Health Technologies vs Agritechno East Africa Limited & Ano., in which the Hon. Lady Justice Mary Kasango declined jurisdiction

on the basis that the dispute before her emanating from the Corporation and Distributorship Framework Agreement were matters to be arbitrated upon at the International Chamber of Commerce in Paris, based on the law applicable in Paris.

3. The Learned Judge erred in law and in fact in holding that the Corporation and Distribution Agreement dated 1st November 2017 was the subject of the suit before it, while the suit and summary judgment application was singularly based on the agreement between the Appellant and the 1st Respondent dated 1st July 2019 in which the 1st Respondent acknowledged the debt of Kes. 50,650,318/-, due to Appellant, promised to liquidate the same, and which agreement was guaranteed by the 2nd Respondent on even date. It is further based on the 1st Respondent's acknowledgement of the further products it took worth Kes.6,194,369/-.

4. The Learned Judge erred in fact and in law in failing to find that the suit and the summary judgment application filed did not invite the court to delve into any contractual issues arising from, or in connection with the Corporation and Distributorship Framework Agreement between the Appellant and the Respondents herein.

5. The Learned Judge erred in law and in fact in disregarding the dispute resolution clause in the debt acknowledgement agreement dated 1st July 2019, upon which the suit before the Superior Court was premised, in which clause the disputes were to be resolved according to the laws of Kenya.

6. The Learned Judge erred in law and in fact when she failed to take cognizance of the fact that in their statement of defence filed, the 1st and 2nd Respondents expressly admitted the amount owed.

7. Further, and in any event, the 1st and 2nd Respondents having filed their statements of Defence in which they raised various flimsy defences to the matters raised by the Appellant (despite the 1st and 2nd Respondents having expressly admitted in their Defence that the amount is due), effectively invited the Court to determine the issues robustly canvassed by the parties in their respective pleadings, and the Learned Judge erred in ceding jurisdiction.

8. The Learned Judge erred in law and in fact in failing to find that by virtue of the 1st, and 3rd Respondents having filed other pleadings; the provisions of S.6(1) of the *Arbitration Act*, No. 4 of 1995 bars a matter from being referred to arbitration where the Respondents, as in this case have "acknowledged the claim."

9. The Learned Judge erred in law and in fact in declining jurisdiction, when the Respondents had in their filed defence expressly admitted the Jurisdiction of the Court and given that a party is bound by its pleadings.

10. In any event, if indeed the matter is one that ought to have been referred to arbitration, which claim is denied, the Respondents ought to have filed an application for the Court to stay the court proceedings, as the matter is referred for arbitration in Paris. This application ought to be filed at a time no later than the time it ought to have filed its appearance, and which it did not do. By failing to do so the Court in the exercise of its residual jurisdiction in civil matters became clothed with jurisdiction.

11. The Learned Judge erred in effectively referring the matter to arbitration when there was no such application before her.

12. The Learned Judge in relying on the decision of Hon. Lady Justice Mary Kasango J. in HCCC No. E261 of 2019 Crop Health Technologies vs Agritechno East Africa Limited & Ano.,

without distinguishing the fact that what Hon. Lady Justice Mary Kasango J., was faced with were disputes within the Corporation and Distributorship Framework Agreement, whereas what was being canvassed before her was an admitted amount, both prior to the filing of the said suit, and in the statements of defence filed by the principal parties, i.e. the 1st and 2nd Respondents."

16. Having carefully considered the applicants' Motion, the affidavit in support thereof, the replying affidavit of Reuben Williams, the respondent's Memorandum of Appeal, the written submissions of learned counsel for the applicants and learned counsel for the respondent, and having heard both counsel, we form the view that the applicants' Motion before us turns upon answers to two decisive questions as to whether the respondent's Memorandum of Appeal discloses an arguable appeal; and whether the application establishes a case to warrant stay of proceedings in the appeal before this Court.

17. In our considered view, decisive among the issues raised in the respondent's grounds of appeal are: whether the learned Judge erred in law in holding, on the one hand, that the court had no jurisdiction to entertain the respondent's application while, on the other hand, dismissing the said application with costs to the applicants despite section 6 of the *Arbitration Act*; whether the arbitration agreement between the 1st applicant and the respondent was binding on the 2nd and 3rd applicants so as to oust the jurisdiction of the court; whether the learned Judge erred in failing to find that the alleged admission and the filing by the applicants of a Memorandum of Appearance and Defence amounted to voluntary submission to the court's jurisdiction; whether, in light of the respective pleadings and admissions, there was in existence a dispute between the 1st applicant and the respondent capable of submission to arbitration; whether the suit in issue was res judicata and subjudice; and whether, in light of the appearance and defence, section 6 of the *Arbitration Act* barred subsequent reference to arbitration. In view of the foregoing, we reach the inescapable conclusion that the respondent's appeal is arguable with the possibility of success. Indeed, it is not idle or frivolous (see *Anne Wanjiku Kibeh vs. Clement Kungu Waibara and IEBC* [2020] eKLR).

18. Though relied upon in the Motion before us, a consideration of the orders sought by the applicants discloses that Rule 5(2) (b) of the Rules of this Court does not extend to the orders sought. That rule is not applicable to the applicants' prayers for stay of further proceedings of the respondent's appeal to this Court. For the avoidance of doubt, we hasten to observe that applications for orders under this rule for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal, are expressly restricted to stay of execution of decree or orders of the superior court from which the appeal is preferred, or to further proceedings in the superior court, or to injunctive relief in appropriate cases, pending determination of the appeal to this Court.

19. Having carefully considered the Rules of this Court and the brief background of the matter before us, we reach the conclusion that the orders sought in the application before us are not contemplated under Rule 5(2) (b). In it, the applicants seek stay of proceedings of the respondent's appeal pending hearing and determination of the applicants' reference to arbitration in the ICC. Neither does Order 51 (presumably of the *Civil Procedure Rules* – relating to resistance of execution by attachment of immovable property), which is also invoked in the applicants' Motion, apply. In the circumstances, we find no legal or practical reason to stretch the rules of practice and procedure in this Court and, in particular, the application of Rule 5(2) (b) of this Court's Rules, to justify a grant of the orders sought, which in effect seeks to stay the respondent's appeal

20. As to the applicants' reliance on section 6 of the *Arbitration Act*, which relates to stay of legal proceedings pending reference to arbitration, we respectfully abstain from pronouncing ourselves on the effect of that provision to the applicants' Motion, lest we intrude into the merits of the appeal.

That leaves us with the application of sections 3A and 3B of the *Appellate Jurisdiction Act*, 1977 on which the applicants' Motion is also anchored.

21. Section 3A of the 1977 Act impels this Court to "... facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act." To this end, the Court has a duty under section 3B to handle all matters presented before it for the purpose of attaining "the just determination of the proceedings" and "the timely disposal of the proceedings, and all other proceedings in the Court ...". The overriding objectives set out in section 3A and the duty of the Court stipulated in section 3B of the Act do not by any means stand in the way of this Court pronouncing itself on the jurisdictional issue raised on appeal from the decision of the High Court, an issue that does not intrude into the merits of the rival claims sought to be referred to arbitration in the ICC.

22. Having considered the Rules of this Court relating to stay of execution or injunctive relief pending appeal, we have no doubts in our minds that the orders contemplated in those provisions are preservative in nature and are suitably designed to preserve the substratum of the appeal. Likewise, the import of section 6 of the *Arbitration Act* relating to stay of proceedings pending reference to arbitration in appropriate cases, and the provisions of Articles 5 and 17(J) of the UNCITRAL Model Law, have the common intention of preserving the substratum of the Reference. To our mind, the appeal in issue relates to a jurisdictional challenge, which by no means threatens the substratum of the intended Reference.

23. Our reading of Article 5 of the Model Law – Extent of court intervention – leads to the conclusion that courts' intervention in matters governed by this Law are only permissible if in conformity therewith. Article 17(J) reads:

> " Article 17 J. Court-ordered interim measures
>
> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

24. That brings us to the question as to whether the arbitral proceedings in the ICC would be prejudiced if the proceedings on appeal to this Court are not stayed or, if successful, the outcome of the reference to arbitration would be rendered nugatory or, in the applicants' words, "the jurisdiction of the ICC [would be rendered] unhelpful". We do not think that denial of the orders of stay of proceedings sought herein, and the determination of the jurisdictional issue raised on appeal to this Court, would by any means prejudice the intended Reference in the ICC or otherwise render its jurisdiction "unhelpful". We use the word "nugatory" here in order to bring the applicants' Motion within the scope of rule 5 (2) (b) applications that may fall to be determined by this Court in accordance with the principles applicable in comparable cases.

25. The term "nugatory" was defined in Reliance Bank Ltd vs. Norlake

> Investments Ltd (2002) 1 EA p.227 at p.232 thus: "it does not only mean worthless, futile or invalid. It also means trifling." The Court also expressed the view that what may render the success of an appeal (or reference to arbitration, as is the case here) nugatory must be considered within the circumstances of each particular case.

26. It is clear to our minds that what falls to be determine on appeal to this Court is an array of points of law, all of which hinge on the pivotal issue as to whether the High Court had jurisdiction to hear and determine the respondent's suit against the applicants together with the respondent's application

for summary judgment/judgment on admission on their merits in light of the alleged admission, and the uncontested fact that the 1st and 2nd applicants had entered an appearance and filed a defence in the suit. Put differently, the main issue on appeal is whether, in the circumstances of this case, section 6 of the *Arbitration Act* took effect so as to clothe the High Court with jurisdiction to determine the respective claims and defenses on their merits.

27. We do not consider it prejudicial to the applicants' reference to the ICC for this Court to hear the appeal and pronounce itself on the effect of section 6 of the Act on the jurisdiction of the trial court in cases where parties to a suit exchanged pleadings, that included a defence to a claim. Neither would a finding by this Court on this critical point of law touching on the jurisdiction of the courts in similar cases render nugatory any findings by the ICC on the merits of the matter on reference. In our considered view, the Court's decision either way of the jurisdictional issue to which the proceedings sought to be stayed relate would by no means affect the merits of the rival claims, which can only be determined on trial in the appropriate forum. Accordingly, the applicant's Motion does not satisfy the test for stay of proceedings of the appeal pending reference to arbitration.

28. We reach this conclusion mindful of the decision of the High Court of Kenya at Meru (Francis Gikonyo, J.) who had this to say:

> " ...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent..." (see *Kenya Wildlife Service vs. James Mutembei* [2019] eKLR).

29. Having considered the applicants' Notice of Motion dated 5th October 2021, the affidavit in support thereof, the replying affidavit, the respective annexures thereto, the impugned ruling, the rival submissions of the parties and the cited authorities, the record as presented to us, and having heard learned counsel for the applicants and learned counsel for the respondent, we find that the applicants' Motion fails and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR