



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & KIAGE

CIVIL APPLICATION NO. 323 OF 2020

BETWEEN

MAHAN LIMITED.....APPLICANT

AND

VILLA CARE LIMITED.....RESPONDENT

(Being an application for stay of execution of the orders of the High Court at Nairobi (F.Tuiyott, J) dated 22nd November 2019.) in **(Nairobi Miscellaneous application no. 216 of 2018)**

RULING OF THE COURT

The dispute between the applicant and the respondent was arbitrated upon by **Ms. Kethi Kilonzo**, a Chartered Arbitrator, who delivered a final award on the 2nd February 2018 in favour of the respondent and awarded it Kshs 7,432,000 plus costs and interest. The applicant was aggrieved by the decision and filed in the trial court an application dated 2nd May 2018 seeking to stay and or set aside the arbitral award. On the other hand, the respondent filed an application dated 9th October 2018 seeking to enforce the award as the decree of the court. Both applications were canvassed before Tuiyott J. In a ruling delivered on 22nd November 2019, the applicant's application was dismissed whereas the respondent's was allowed.

Dissatisfied by the ruling and order, the applicant filed a notice of appeal evidencing its intention to appeal the ruling. Apprehensive that the respondent may enforce the orders, the applicant by a motion on notice dated 16th October 2020 pursuant to rules 5(2)(b), 41 and 42 of this court's rules and section 3A and 3B of the Appellate Jurisdiction Act, has asked us to grant stay of execution of the said ruling and order pending the hearing and determination of the intended appeal.

The grounds in support of the application are that: it is aggrieved by the ruling and intends to appeal; it is apprehensive that the respondent may commence execution any time for the amount which is colossal, it would suffer irreparable loss if execution was to ensue; it's appeal is arguable with a high chance of success; it was willing to deposit security as may be ordered by the court and it was in the interest of justice that the said orders be granted.

In support of the motion is an affidavit by Moses Muhoro, the Operations Manager of the applicant who reiterated and expounded on the grounds aforesaid. He further deposed that were it to pay the colossal amount it may be forced to close down its business and thereby suffer irreparable loss in the absence of stay.

The respondent opposed the application by deposing that this court lacked the jurisdiction to entertain the application as there was no competent appeal arising out of the invocation of section 35 of the Arbitration Act; that the applicant had not met the threshold set by the Supreme court in the case ***Nyutu Agrovat Ltd v. Airtel Networks Kenya Ltd & another(2019) eKLR*** with regard to appeals to this court arising out of arbitration proceedings and in particular section 35 of the arbitration Act and further that the applicant did not have an arguable appeal.

In its submissions, the applicant urged us to be guided by the principles set out in the case of in ***Githunguri v. Jimba Credit Corporation Ltd(no.2)[1988]eKLR*** to the effect that for an applicant to succeed in an application of this nature, it must demonstrate an arguable appeal and secondly, in the event that the application is denied and the appeal succeeds, the appeal would have been rendered nugatory. On arguability it was urged that the trial court had failed to appreciate that the arbitrator had gone beyond her jurisdiction in making the final award. Further that the high court had erred in making a finding that the grounds urged in support of the application were contrary to the provisions of section 35 of the Arbitration Act. That the decretal sum was huge, and as a real estate company which relies on investor's

money, if execution took place it would be unable to satisfy its obligations. The execution would be irreversible and an award of damages would not remedy the situation.

On the other hand, the respondent urged this court to find that the applicant had not met the threshold for admitting an appeal out of arbitration proceedings as laid out in the Nyutu case (supra) and that there was no competent appeal to sustain the present application having regard to the provisions of section 35 of the Arbitration Act.

We have considered the application, the rival affidavits, the submissions by both parties and the authorities cited. The application is premised on rule 5(2)(b) of this court's rules. The rule purposes to preserve the substratum of the intended appeal before the appeal is heard and determined.

This court has jurisdiction under article 164(3) of the Constitution to hear appeals from the High court and any other court or tribunal as prescribed by an Act of Parliament. However there are matters or disputes whose appeal to this court is not automatic. There are matters which may require leave of the trial or even this court before instituting such an appeal. One of those matters are appeals to this court arising out of arbitration proceedings pursuant to section 35 of the arbitration Act. In *Nyutu Case*, (Supra) the Supreme Court held that a party who desires to appeal such proceedings to this court must first obtain leave court of either the trial or even this court to do so. The court observed thus **"Para 78: In stating as above, we reiterate that courts must draw a line between legitimate claims which fall within the ambit of exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High court and the court of appeal particularly have the onerous yet simple task. A leave mechanism as suggested by Kimondo J and the interested party may well be an answer to the process , by which frivolous, time wasting and opportunistic appeals may be nibbled in the bud and hence bring arbitration proceedings to a swift end...."**

The applicant sought no such leave, at least that has been raised by the respondent without the applicant's rebuttal. The applicant having failed to seek and obtain leave of the trial court or indeed this court so as to file notice of appeal or indeed the main appeal this application is based on quicksand, the requirement for leave being mandatory. Accordingly in the absence of such leave this application is incompetent and is therefore for striking out. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR