



**Kenya Electricity Transmission Co. Limited (Ketraco) v Instalaciones Inabensa S.A  
(Miscellaneous Application E56 of 2021) [2021] KECA 151 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 151 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
MISCELLANEOUS APPLICATION E56 OF 2021  
MSA MAKHANDIA, A MBOGHOLI-MSAGHA & M NGUGI, JJA  
NOVEMBER 19, 2021**

**BETWEEN**

**KENYA ELECTRICITY TRANSMISSION CO. LIMITED  
(KETRACO) ..... APPLICANT**

**AND**

**INSTALACIONES INABENSA S.A ..... RESPONDENT**

*((Application for stay of execution and leave to appeal the ruling of  
the High Court of Kenya at Nairobi (Maureen Odero, J) dated 12th  
February, 2021 in Miscellaneous Civil Application No. E445 of 2019))*

**RULING**

1. In the application dated 24<sup>th</sup> February 2021 expressed to be brought under the provisions of Article 164(3) of the [Constitution of Kenya](#), sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#) Cap 9, Rules 5(2)(b), 39(b), 41, 42 and 43 of the Court of Appeal Rules 2010, the applicant seeks the following orders:
  1. (Spent)
  2. That pending inter partes hearing and determination of this application the Honourable Court be pleased to stay execution of the ruling and orders of Hon. Justice Maureen A. Odero delivered on the 12<sup>th</sup> February, 2021.
  3. That this Honourable Court do grant leave to the applicant to file its appeal to the ruling and orders of Hon. Maureen A. Odero delivered on 12<sup>th</sup> February, 2021.



4. That this Honourable Court do grant a stay of execution of the ruling and orders of the Hon. Justice Maureen A. Odero delivered on the 12<sup>th</sup> February, 2021 pending the hearing and determination of the applicant's appeal.
  4. That this Honourable Court be pleased to grant any other relief it may deem fit.
  4. That costs of this application be provided for.
2. The application is based on the grounds set out on the face of the application and is supported by an affidavit sworn by Eng. Anthony Wamukota, its Ag. General Manager in Charge of Design and Construction on the 24<sup>th</sup> of February 2021. A Further Affidavit in support of the application, sworn on 28<sup>th</sup> April 2021 by Lydia Wanja, the applicant's Manager, Legal Services, was filed, albeit without leave, in support of the application.
  3. The brief background to the present application is as follows. The applicant is a state corporation incorporated on 2<sup>nd</sup> December 2008 under the *Companies Act* (now repealed). It had entered into two contracts with the respondent for construction of an electricity transmission line and extension of an existing sub-station in April 2013. In April 2016, disputes arose between the parties and were referred to arbitration. The arbitral tribunal found in favour of the respondent and ordered the applicant to pay to the respondent Euro 30,887,820.39; interest of Euro 6,477,870.77; legal costs, arbitrators costs and administrative costs of Kshs.102,165,144.20, 83,520,000 and 2,000,000.00 respectively.
  4. Dissatisfied with the award made in favour of the respondent, the applicant filed a Chamber Summons application dated 20<sup>th</sup> November 2019 in which it prayed that the High Court sets aside the arbitral award dated 30<sup>th</sup> July, 2019 and published on 26<sup>th</sup> August, 2019. It also asked the court to make such further orders or directions as it deemed just in the circumstances, and for the costs of the application.
  5. The application was premised on the provisions of sections 19, 35(1) 92)(a) (iv), 35(2) (b) (ii) and 35(3) of the *Arbitration Act*, 1995 and Rules 7 and 11 of the Arbitration Rules 1997 as read with Article 159(2) (c), 201 and 227 of the Constitution of Kenya.
  6. On its part, the respondent filed a Chamber Summons application dated 27<sup>th</sup> November 2019 brought under section 36 of the *Arbitration Act* 1995, Rule 6 of the Arbitration Rules 1997 and section 3A of the *Civil Procedure Act* in which it sought orders that the arbitral award dated 30<sup>th</sup> July, 2019 and filed in court on 30<sup>th</sup> September 2019 be recognized as binding and be enforced by the court. The respondent also sought the costs of its application. The applications were heard together by the High Court and the ruling dated 12<sup>th</sup> February 2021 impugned in the present application rendered.
  7. The gravamen of the applicant's case before the High Court was that the arbitral award unjustly enriches the respondent at the expense of the Kenyan taxpayer and is against the public policy of Kenya. Further, that it is contrary to Article 227(1) of the Constitution of Kenya, 2010 which requires that contracts entered into by state organs and public entities must be utilized in a cost effective manner; and that it was also contrary to Article 201 of the Constitution which provided that public money be used in a prudent manner.
  8. The case of the respondent was that the matter at issue was a purely commercial dispute between contracting parties and not a matter of public finance. The award at issue was final and therefore the High Court had no jurisdiction to interfere with it.
  9. After considering the submissions by the parties, the High Court noted that the applicant was inviting the court to re-examine the evidence before the arbitral tribunal and to reach a different decision. It was



asking the court to interrogate the merits of the amounts awarded to the respondent before us and to reduce the award. The High Court dismissed the applicant's application dated 20<sup>th</sup> November, 2019 but allowed the application dated 27<sup>th</sup> November, 2019.

10. In its application before us, the applicant asks the court to grant it leave to lodge an appeal before this court, and to stay the execution of the orders issued in the ruling of 12<sup>th</sup> February 2021. It submits that it has a bona fide arguable appeal which is not frivolous; and unless the orders of stay are granted, its appeal would be rendered nugatory if it eventually succeeds, thereby occasioning severe prejudice to the applicant.
11. The applicant submits that it has met the threshold for grant of leave to appeal to this court; that the intended appeal is an appeal from the decision of the High Court in exercise of its jurisdiction under section 35 and 37 of the *Arbitration Act*; and that this court has a limited jurisdiction to hear appeals from the said section only with leave. The applicant cites the decisions of the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR for the submission that where the High Court has stepped outside the grounds set out in section 35 and made a decision so grave, so manifestly wrong and which has completely closed the door of justice to a party, or where allegations of such manifest unfairness have been made, the Court of Appeal has jurisdiction to entertain an appeal under section 35 of the *Arbitration Act*. Its submission is that in the present case, the High Court summarily allowed the respondent's application seeking recognition of the award in its favour and thereby took away crucial due process protection from a party seeking to resist enforcement under section 37 of the *Arbitration Act*.
12. The applicant further submits that by awarding the respondent an amount exceeding 180% of the contract sum, the arbitral award resulted in the unjust enrichment of the respondent, which is contrary to the universal principles of justice and morality and therefore contrary to the public policy of Kenya. Accordingly, the applicant was entitled to leave to appeal against the decision of the High Court.
13. It is its argument further that for the same reasons that it has advanced for the grant of leave to appeal to this court, it has proved that it has an arguable appeal. Its appeal is premised on process as opposed to merit challenges to the decision of the High Court, and it accordingly falls within the jurisdiction espoused by the Supreme Court in the *Nyutu Agrovet case*.
14. As to whether the appeal will be rendered nugatory should orders of stay not be granted, the applicant submits that the respondent is a foreign company; has no known assets or physical place of business within the court's jurisdiction; and that it is of questionable liquidity as its parent company has filed for a Voluntary Declaration of Bankruptcy in Spain. Should the applicant's appeal succeed, it will be unable to recover the colossal amount in dispute at all or without considerable difficulty.
15. The respondent opposed the application before us and filed an affidavit sworn by Miguel Angel Masera Gutierrez on 12<sup>th</sup> March, 2021. The respondent avers that in their final award, the arbitrators unanimously found and held the applicant liable to pay the respondent's claim amounting to Kshs. 37,365,691, interest and costs, which award was registered in High Court Misc. Application No. E445 of 2019.
16. It is the respondent's submission that this court lacks the jurisdiction to entertain the present application; that the orders issued by the High Court are not capable of being stayed, and that the applicant has not met the threshold for orders of stay set under Rule 5 (2)(b) of the Court of Appeal Rules.



17. With regard to the requirement for leave, the respondent submits that section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules set out the orders from which an appeal lies as of right; that such orders do not include an order setting aside or refusing to set aside an arbitral award under section 35 of the Arbitration Act; and that application for leave under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within 14 days from the date of such order.
18. The respondent cites the case of Peter Nyaga Muvake vs Joseph Mutunga [2015] eKLR in which this court held that where an applicant has not obtained leave to appeal from the High Court, this court has no jurisdiction to entertain such an application.
19. It is the respondent's submission, secondly, that the orders sought to be appealed from were orders of dismissal of the applicant's application. They are not, accordingly, capable of being stayed. The respondent observes that the applicant was seeking stay of the decision of the High Court, not execution of the arbitral award pending appeal.
20. Finally, it is the respondent's case that the applicant has not satisfied the two principles under Rule 5(2)(b). It has not demonstrated that it has an arguable appeal, as the issue of the arbitral award being against public policy is not arguable in the intended appeal. Further, it has not demonstrated that the appeal would be rendered nugatory as the award is a money decree.
21. We have considered the application before us as well as the averments and written submissions of the parties. The application seeks two substantive orders from this court. First, that a stay of execution of the orders of the High Court made on 12<sup>th</sup> February 2021 be granted; and secondly, that the applicant be granted leave to file an appeal before this court against the ruling dated 12<sup>th</sup> February 2021.
22. We consider first the application for leave to file before this court an appeal from that ruling. In doing so, we observe that the application before us seeks orders of stay of execution of a decision made by the High Court in relation to an application made under section 35 of the Arbitration Act. An appeal from a decision setting aside or refusing to set aside an arbitral award under section 35 of the Arbitration Act does not lie as of right, and requires the leave of the High Court. This is not disputed by the applicant, hence its application for leave. Where such leave has been sought but is not granted by the High Court, Rule 39 of the Court of Appeal Rules allows for the making of such application before this court. Where leave has not been obtained from the High Court in a matter where leave to appeal is required, then, as was held in Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR cited by the respondent, there can be no valid notice of appeal filed.
23. It is trite that the jurisdiction of this court to entertain an application under Rule 5(2)(b) is dependent on a valid notice of appeal. In the present circumstances, there is no valid notice of appeal before us, and we therefore have no jurisdiction to entertain the application under Rule 5(2)(b).
24. Supposing, however, for the sake of argument, that there had been a valid notice of appeal before us, has the applicant met the two conditions required to be satisfied under Rule 5(2)(b)? Has it presented before us an arguable appeal, which would be rendered nugatory if stay of execution is not granted? We observe, first, that there is no positive order from the ruling of the court dated 12<sup>th</sup> February 2021 capable of being stayed. The decision of the High Court that the applicant seeks to appeal against is an order of dismissal of its application to set aside the arbitral award made in favour of the respondent.
25. The applicant argues that the award made will lead to unjust enrichment of the respondent, will be prejudicial to the Kenyan taxpayer, and is against the public policy of Kenya. It appears from these arguments that the applicant seeks to have this court enter into an interrogation of the facts considered



by the arbitral tribunal and the conclusions arrived at. The question, however, is whether there is an arguable appeal arising from the decision of the High Court in dismissing the application for setting aside.

26. The applicant argues that such appeal arises because the High Court, upon dismissing its application, summarily allowed the application by the respondent seeking recognition and enforcement of the arbitral award, and that it thereby took away from it the crucial due process protection available in law for a party desirous of resisting enforcement under section 37 of the Arbitration Act. It is also the applicant's case that it has an arguable appeal in that the High Court failed to appreciate that unjust enrichment of any party is contrary to public policy and where there is clear evidence of unjust enrichment, the court ought to set aside the award pursuant to section 35(2)(b)(ii) of the Arbitration Act.
27. The law is that in an application under Rule 5(2)(b), a party should show that it has an arguable appeal, which appeal need not be one that will eventually succeed. We are satisfied that the applicant has satisfied the first limb.
28. The second limb is whether the appeal would be rendered nugatory if a stay was not granted. In the arbitral award, the applicant was ordered to pay Euro 37,364, 691, costs and interest to the respondent. This, in other words, is a money award, and it has been held that ordinarily, an appeal would not be rendered nugatory by payment of a money decree.
29. The applicant has argued, however, that the respondent is a foreign company with no known physical place of business within this court's jurisdiction. Further, that its parent company, Abengoa SA, has requested for voluntary bankruptcy in Seville, Spain and would therefore not be in a position to repay the amount of the award should the applicant's appeal succeed.
30. This contention, however, has not been supported by evidence to show that indeed the respondent would not be in a position to repay the decretal amount should the applicant's appeal succeed. Consequently, even had we found that there was a valid notice of appeal before us, the applicant has not satisfied the second condition under Rule 5(2)(b).
31. Accordingly, it is our finding and we so hold that the present application has no merit. It is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

**MBOGHOLI MSAGHA**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*



DEPUTY REGISTRAR

