



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 89 OF 2019

BETWEEN

YOOSHIN ENGINEERING CORPORATION.....APPLICANT

AND

AIA ARCHITECTS LIMITED.....RESPONDENT

(An application for Stay of Proceedings in the High Court of Kenya at Mombasa (P.J. Otieno, J.) dated 23rd September, 2019

in

H.C.C. Suit No. 36 of 2019.)

RULING OF THE COURT

1. By an application dated 8th October, 2019, **Yooshin Engineering Corporation**, the applicant, seeks stay of execution of the ruling and subsequent orders and directions issued in **Mombasa HCCC No. 26 of 2019** on 23rd September, 2019 by **P.J.O. Otieno, J.** and all subsequent proceedings, pending hearing and determination of an intended appeal.
2. The background to this application may be summarized as follows: the applicant and the respondent entered into a sub-consultancy agreement dated 18th August, 2017 in respect of construction of the **Lamu Port South Sudan Ethiopia Corridor Project (LAPSSET)**.
3. On 4th May, 2019 the applicant issued a notice of termination of the sub-consultancy agreement, due to alleged breach of contract by the respondent.
4. The respondent filed a suit challenging the termination of the sub-consultancy agreement, among other reliefs. The respondent also filed an application dated 8th May, 2019 seeking several interlocutory orders, including an order to suspend the effective date of the notice of termination of the sub-consultancy agreement pending interpartes hearing of the application; that the respondent do continue working on the project as per the terms of the contract pending hearing and determination of the suit; and that the respondent be allowed to continue holding on to the soft copies of the designs of the buildings and associated infrastructure pending hearing and determination of the application and the suit.
5. The respondent obtained ex parte orders restraining the applicant from terminating the contract and allowing the respondent to continue holding on to the soft copies of the designs for the buildings and associated infrastructure pending interpartes hearing of the application.
6. The application dated 8th May, 2019 and the ex parte orders aforesaid were served upon the applicant on 11th May, 2019.
7. On 20th May, 2019 the applicant filed and served a notice of appointment of advocates. On the same day the High Court gave directions regarding filing of responses and submissions.
8. On 24th May, 2019 the applicant filed a notice of Preliminary Objection to the effect that the High Court had no jurisdiction to hear and determine the matter; and that the matter ought to be referred to arbitration in accordance with the contract entered into between the parties.

9. Notwithstanding the preliminary objection raised, the applicant filed a replying affidavit to the respondent's application dated 8th May, 2019 and the ex parte orders.

10. On 31st May, 2019 the respondent filed another application seeking several interlocutory orders of injunction, among them, to restrain the applicant and/or any person working under them from constructing, supervising and or doing any works on the buildings and structures in respect of the LAPSSET Project pending the hearing and determination of the suit.

11. In his ruling, the learned judge overruled the preliminary objection, citing the provisions of **section 6(1)** of the **Arbitration Act** which provides:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

12. Dismissing the preliminary objection, the learned judge held:

“Here the appearance was entered on the 20/5/2019 before filing the preliminary objection on the 24/5/2019. It is my finding that by the time the objection was filed the statutory time for insisting on the arbitration clause had passed and the defendant was thus deemed to have forfeited the right to insist on reference to arbitration, stay or lack of the court's jurisdiction to entertain the matter and to have it referred to arbitration.”

13. Regarding the respondent's applications, the learned judge was satisfied that the subject tender was premised on the joint bid by the two parties as necessitated by the provisions of **section 157(9)** of the **Public Procurement and Asset Disposal Act**; that the respondent had an established proprietary interest in the tender that was well founded before the Sub-Consultancy Agreement came into being.

14. Having so found, the learned judge granted prayers 3, 4 and 7 of the respondent's application dated 8th May, 2019 and prayers 3 and 5 of the application dated 31st May, 2019. He also awarded the costs of the application to the respondent.

15. In effect, the High Court ordered that pending the hearing and determination of the suit, the effective date of the notice of termination of the contract be suspended; the respondent to continue working on the project as per the terms of the contract of the tender; the respondent to continue holding on to the soft copies of the designs of the buildings and associated infrastructure; the applicant be restrained from constructing, supervising and/or doing any work on the said LAPSSET Project; and that the applicant be restrained from conducting the design of work, construction and supervision of buildings and associated infrastructure of the said project.

16. Being aggrieved by the said ruling, the applicant filed a notice of appeal dated 25th September, 2019, upon which the application for stay of execution of the ruling is predicated.

17. **Mr. Sang**, learned counsel for the applicant, submitted that the application is arguable. He referred the Court to the draft memorandum of appeal that raises 16 grounds. He argued, *inter alia*, that the learned judge erred in his interpretation of **section 6(1)** of the **Arbitration Act**; by failing to appreciate that the applicant had not filed a defence and as such had not admitted jurisdiction of the trial court; that the learned judge erred law in making conclusive findings in the ruling that the applicant and the respondent jointly bided, an issue that forms part of the main dispute.

18. The applicant's counsel further argued that the effect of the orders given by the learned judge was to compel the parties to work together, and at the same time allow the respondent to continue holding on to the soft copies of the designs.

19. Regarding the nugatory aspect, Mr. Sang submitted that the respondent had obtained an interlocutory judgment in default of defence; that the respondent's claim is for over KShs.400 million that is payable in instalments; that unless the order sought is granted the intended arbitration may be frustrated since the matter may have been heard and determined.

20. The respondent opposed the application. A replying affidavit sworn by **Mohamed Munyanya**, an Architect and one of the directors of the respondent was filed on 18th November, 2019.

21. **Mrs. Ashioya**, learned counsel for the respondent, submitted that the intended appeal is not arguable and therefore cannot be rendered nugatory.

22. Counsel submitted that the learned judge was right in his interpretation of the provisions of **section 6(1)** of the **Arbitration Act**; that the applicant had submitted to the trial court's jurisdiction by submitting to taking of directions and filing a replying affidavit as well as filing an application to set aside the interlocutory judgment. She cited several authorities in support of that line of submission, among them ***UAP Provincial Insurance Company v Michael John Beckett [2013] eKLR***

and **Adrec Limited v Nation Media Group Limited [2017] eKLR.**

23. The respondent's counsel further submitted that the issues it had raised in the suit are outside the arbitration agreement and therefore the dispute could not be referred to arbitration.

24. We have considered the record of appeal and submissions by counsel. The principles that guide this Court in its consideration of an application under **rule 5(2)(b)** of this Court's Rules are now well settled. The applicant must first satisfy the Court that the appeal or intended appeal is arguable and secondly, that unless the Court grants the orders sought, the appeal will be rendered nugatory. See **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1EA 227.**

25. On the first limb, the applicant referred the Court to the draft memorandum of appeal which contains a raft of grounds of appeal. The applicant's counsel told the court that the substantive appeal had already been filed and served.

26. Having looked at the grounds of appeal, we do not think that the appeal can be said to be frivolous. It is accepted that an arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the Court's consideration. See **Dennis Mogambi Mong'are v Attorney General & Others [2012] eKLR.**

27. At this juncture, we do not have to analyse each and every ground of appeal to determine their arguability; even one arguable ground would suffice. Further, in an application of this nature, we cannot go into a detailed analysis of the grounds of appeal, that is a function of the bench that shall hear the appeal. All we need to do is to reach a *prima facie* finding as to whether the appeal is arguable or not; which we have. We are persuaded that the appeal is arguable.

28. On the second limb, the amount claimed by the respondent is quite substantial, Kshs.413,900,005, among other reliefs. Shortly after delivery of the impugned ruling, the applicant was directed to file its defence within 14 days and a date for a pre-trial conference was fixed. It is therefore apparent that unless the order sought is granted, the hearing shall proceed expeditiously. If that happens, the intended appeal shall have been rendered nugatory.

29. In view of the foregoing, we are inclined to grant prayer 5 of the applicant's application dated 8th October, 2019. Consequently, pending hearing and determination of the applicant's appeal, we hereby order stay of execution of the ruling and subsequent orders and directions issued in Mombasa HCCC No.36 of 2019 on 23rd September, 2019 as well as all subsequent proceedings in the said matter.

30. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 3rd day of April, 2020

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR