



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, G.B.M. KARIUKI & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. NAI 135 OF 2016 (UR 106/2016)

BETWEEN

**SHREE HAREE BUILDERS LIMITED .....APPLICANT**

**AND**

**BAZARA ALEX TABULO..... 1ST RESPONDENT**

**WALTER ODUNDO.....2ND RESPONDENT**

*(Application for stay under Rule 5(2)(b) of the Court of Appeal Rules pending the hearing and determination of an intended Appeal from the Ruling and/or Orders of the High Court of Kenya, Nairobi (Aburili, J.) given on 17th day of May, 2016*

in

**Miscellaneous Application No. 489 of 2015**

\*\*\*\*\*

**RULING OF THE COURT**

**Background**

[1] The applicant, **SHREE HAREE BUILDERS LIMITED** (hereinafter referred to as 'the applicant') filed a Notice of Motion dated **30th May, 2016** expressed to be brought under **Rules 5(2)(b)** of this Court's Rules by which it sought the following orders:

***“1. That pending the lodging, hearing and determination of the applicant's intended appeal, the Arbitral proceedings and/ or any further proceedings before Mr. Walter Odundo, the 2nd Respondent herein, be stayed,***

***2. That the costs of this application be awarded to the Applicant in any event.”***

[2] The subject matter of the proceedings before the learned Judge was that the applicant and the 1st respondent entered into a written contract dated **20th May, 2010** wherein, the 1st respondent engaged the services of the applicant to carry out the construction works of residential apartments at Kizingo-Mombasa on **L.R. No. Mombasa/Block XXVI/1102** for a contract sum of Kshs. 257,973,000. A dispute arose between the parties which was referred to Arbitration in accordance with the express terms of the

contract. The 2nd respondent was appointed as the sole arbitrator on **21st June, 2013**.

[3] The applicant claimed from the 1st respondent, Kshs. 68,673,000 being professional fees and damages for breach of contract. In the course of proceedings before the 2nd respondent, a statement of challenge dated **25th September, 2015** raising the Arbitral Tribunal's independence and/or partiality was filed. Based on the foregoing, the applicant filed before the 2nd respondent an application seeking his recusal. Prior to that, on **23rd July, 2015**, the 1st respondent had filed a Supplementary Notice of Preliminary objection claiming that there was no written arbitration agreement between the parties.

[4] The 2nd respondent, opted to hear the objection raised by the 1st respondent prompting the applicant to take out an Originating Summons dated **4th November, 2015** (1st application' hereinafter) before the High Court.

In the 1st application, two main reliefs were sought namely; an order terminating the 2nd respondent's mandate and secondly, that a substitute Arbitrator be appointed by the Chairman, Architectural Association of Kenya. Contemporaneously with the 1st application, the applicant filed an application dated **4th November, 2015** (2nd application) seeking stay of the Arbitral Proceedings pending the hearing and determination of the 1st application. In opposing the 1st application, the 1st respondent filed a replying affidavit on **30th November, 2015** contending that in his application **23rd July, 2015**, he had expressed his intention to challenge the jurisdiction of the arbitral tribunal to hear and determine the dispute pending before it.

[5] The learned Judge considered the arguments in respect of the 2nd application and in a ruling dated **17th May, 2016** framed one substantive issue for determination as follows:-

*"Whether this court can intervene in arbitral proceedings particularly when a similar application for the arbitrator to cease arbitrating over the material dispute for alleged bias and on account that he has no jurisdiction to hear and determine the dispute is pending before him".*

[6] The learned Judge found that the 2nd respondent had the discretion to determine the relevance and materiality of the 1st respondent's submission on jurisdiction before hearing the challenge to his independence; further, that in the event that the applicant was dissatisfied with that decision, it was free to apply to the High Court to determine the matter. The learned Judge declined to grant stay of proceedings that were before the 2nd respondent.

[7] Aggrieved by the above orders, the applicant lodged a Notice of Appeal on 20th May, 2016 and subsequently, filed this application.

[8] The application is supported by the affidavit of **SAILESH KERAI**, sworn on 4th November, 2015.

### **Submissions by Counsel**

[8] When the application came up for hearing, **Mr. O. K. Odera**, learned counsel for the applicant submitted that the applicant has an arguable appeal with good prospects of success; that the learned Judge failed to appreciate that the applicant would not obtain substantive justice before the 2nd respondent who had exhibited bias and that the learned Judge failed to appreciate that the issue was not whether an application for recusal of the 2nd respondent was pending, but rather, and of significance, which of the two applications should be heard first in the circumstances.

[9] On the nugatory aspect, counsel submitted that the impugned ruling paved way for the arbitral proceedings to proceed before the 2nd respondent. Accordingly, if stay is not granted and the intended appeal succeeds, the intended appeal will be rendered nugatory as the applicant seeks to stop the 2nd respondent from proceeding with the arbitral proceedings on grounds of lack of independence/partiality. Counsel urged us to allow the application with costs.

[10] In response to the above submissions, **Mr Ogendi** holding brief for **Mr. Sospeter Arung'a**, learned

counsel for the respondent contended that the learned judge was correct in finding that the issue of jurisdiction ought to be dealt with first; that this was the same decision reached by the arbitrator and that jurisdiction is key. Counsel urged that the application be dismissed with costs.

**Determination**

[11] The jurisdiction of this Court in applications of the nature as the one before us is donated by **rule 5(2)(b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary. In the case of **Stanley Kang’ethe Kinyanjui -v- Tony Keter & 5 Others, Civil Application No. NAI. 31/2012**, this Court stated *inter alia*:

***“That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.*”**

[12] In exercise of that discretion, two principles guide the court. Firstly, for an applicant to succeed he/she is obliged to show that his/her appeal or intended appeal is arguable, or differently put, that it is not frivolous.

Secondly, that unless he is granted a stay or injunction is granted as the case may be, the appeal or intended appeal if successful will be rendered nugatory.

[13] In considering this application we shall bear in mind these principles. On the issue of arguability, the applicant has set out several grounds under this limb including; the issue of bias; jurisdiction of the 2nd respondent and the issue of which of the two applications was to be heard first. This Court is minded to avoid going into the merits of the appeal, as this will be the preserve of the bench that will hear the main appeal. The applicant has faulted the learned judge for dismissing his application for stay of proceedings and for finding that the issue of jurisdiction took precedence over that of recusal. We are satisfied that the applicant has an arguable appeal, *inter alia*, whether the issue of jurisdiction or prejudice should be heard and determined first.

[14] On the nugatory aspect, the position in law is that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the successful appellant **Stanley Kangethe Kinyanjui versus Tony Keter & 5 Others (Supra)**. The applicant seeks to stay the 2nd respondent from proceeding with the arbitral proceedings. If stay is not granted, and the intended appeal succeeds, the intended appeal will be rendered nugatory. We are satisfied that the applicant has made out a case for a stay and we are inclined to grant the same.

[15] In the result we allow the application dated **30th May, 2016** as prayed in the Motion. Costs in the appeal.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of October , 2017.***

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**G. B. M. KARIUKI, SC**

.....

*JUDGE OF APPEAL*

*J. MOHAMMED*

.....

*JUDGE OF APPEAL*

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

**DEPUTY REGISTRAR.**