IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, MUSINGA & KIAGE, JJ.A)

CIVIL APPLICATION NO. 7 OF 2017

BETWEEN

TELKOM KENYA LIMITED.....APPLICANT

AND

AFTRACO LIMITED.....1ST RESPONDENT

EXCLUSIVE ESTATES LIMITED.....2ND RESPONDENT

POSTEL HOUSING CO-OPERATIVE SOCIETY LTD.....3RD RESPONDENT

(Application for stay of proceedings pending the determination of an

appeal from the High Court of Kenya at Nairobi (Olga Sewe, J.)

dated 28th September, 2016 in **H.C.C.C.** ***NO. 443 OF 2011)***

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RULING OF THE COURT

By its motion dated 25th January, 2017 the applicant, Telkom Kenya Limited, seeks from this Court an order that;

> ***"2. There be a stay of the arbitral proceedings before Ms. Z. Jan Mohamed, Arbitrator, In the matter of an arbitration between Exclusive Estates Limited and Telkom Kenya Limited, Postel Housing Co-operative Society Limited and Aftraco Limited and the arbitral proceedings before Mr. A.F. Gross in the matter of an Arbitration between Aftraco Limited and Telkom Kenya Limited pending the hearing and determination of the intended appeal against the order of the High Court dated 28th September 2016."***

The grounds in which the application is premised are on its face and include, in summary, that the applicant's intended appeal raises a fundamental issue of constitutional interpretation with reasonable chances of success; the impugned ruling by which the High Court was reluctant to intervene was based on this Court's decision in ***NYUTU AGROVET LIMITED vs. AIRTEL NETWORKS LTD*** **[2015] eKLR** about which "latter" (sic) decisions have expressed doubts; two parties, both claiming to be entitled to LR No. 7656 owned by the applicant have commenced separate arbitral proceedings

before different arbitrators and the applicant will suffer substantial loss and its appeal be rendered nugatory should the arbitral proceedings proceed with the risk of two conflicting awards being published and the applicant will be unable to comply.

The application is supported by the affidavit of **Robert Irungu** who describes himself as the applicant's legal advisor sworn on 25th January 2017. In it he recounts how the applicant filed an application before the High Court seeking to have the two arbitral proceedings, namely; before Ms. Z. JanMohamed *In the matter of an Arbitration between Exclusive Estates Ltd and Telkom Kenya Limited; Postal Housing Co-operative Society Ltd and Aftraco Ltd* and before Mr. A.F. Gross, *In the Matter of an Arbitration between Aftraco Ltd and Telkom Kenya Ltd*, consolidated and heard by a single arbitrator who would issue a single award, and how the same was rejected by Sewe, J. The applicant intends to appeal against the dismissal of the consolidation application but in the meantime seeks stay of the two arbitration proceedings pending the hearing and determination of the intended appeal.

The motion is opposed by way of replying affidavits. The first, on behalf of Aftraco, the 1st respondent, was sworn by its director, **Salim Sadru**, on 8th March 2017 in which he stated that the two arbitrations sought to be stayed were "*knowingly and expressly*" initiated by consent before the two arbitrators. He questioned the applicant's attempt to stay those proceedings which have been on for more than four years and in which the evidence of some of the parties has already been taken by the arbitrators. He swore at paragraph 13 that the applicant's failure to seek consolidation for more than four years "*established*" that;

> ***"a. First that the applicant has failed to demonstrate in any way or manner how the applicant will suffer if this application is not allowed. If anything it is the 1st respondent that will suffer irreparable loss and prejudice if the application is allowed as it will delay the conclusion and determination of the arbitration currently pending before Mr. A.F. Gross.***
>
> ***b. Further, the fact that the applicant consented to the arbitrations in the first place, the applicant cannot now be heard to say or assert that they would suffer substantial loss if the two arbitrations proceed.***
>
> ***c. The argument that the two arbitral awards being made was speculative in nature and it would therefore not serve the ends of justice for the grant of the orders for stay pending appeal.***
>
> ***d. That this application as framed is a mere attempt to frustrate and delay the conclusion and determination of the 1st respondent?s statement of claim before Hon. Arbitrator A.F. Gross. Such actions on the part of the applicant should not be entertained by this honourable court."***

He therefore urged that the application be dismissed.

For the second respondent, Exclusive Estates Ltd, its director, **Francis Mburu Mungai**, swore on 7th March 2017 that the application is overtaken by events as the hearing of the two arbitrations had already begun and he himself had testified before Jan Mohammed. He charged that the applicant and the 1st respondent have frustrated the 2nd respondent in its attempt to proceed with its arbitration before Jan Mohammed. He went on to aver that the applicant's draft memorandum of appeal did not disclose an arguable appeal for the reasons that he enumerated, including that this Court does not have jurisdiction to entertain the intended appeal which does not lie from an arbitral matter.

The deponent swore further that the applicant had not demonstrated how the appeal intended would be rendered nugatory. He asserted that based on the decision of this Court in ***EXCLUSIVE ESTATES LTD vs. THE REGISTRAR OF TITLES OTHERS*** Civil Appeal No. 135 of 2013, which found that the other two parties had tried to steal a march on the 2nd respondent and reinstated the caveat on the property in dispute, it is the arbitration before Jan Mohammed that lawfully addresses the issue of specific performance. He swore that it was in the interests of justice that the already delayed arbitration do proceed to completion and urged us to dismiss the application.

At the hearing of the motion, **Mr. Kiragu Kimani**, learned counsel who appeared with **Mr. Lawson**

Odieki for the applicant, relied on the supporting affidavit and the written submissions filed. He submitted that the two arbitrations are intertwined and that no party would suffer any prejudice from their consolidation yet the learned Judge erroneously refused to consolidate them. She wrongly failed to exercise the High Court's supervisory jurisdiction over arbitral proceedings. He expressed fears that should a stay be denied and the two arbitrations proceed to conclusion, there would be a real risk that the applicant will face awards it cannot satisfy since the respondents claim some 79 acres and 60 acres respectively of the same land and were specific performance to be ordered, it would be impossible to comply and it would be in contempt. Moreover, awards should not be made in vain.

Mr. Kiragu attempted to distinguish the **NYUTU** case on the basis that in that decision the issue of the High Court's supervisory jurisdiction over arbitral matters was not raised or decided, that consolidation of arbitration proceedings is not a matter governed by arbitral process and could therefore be appealed against; and that the arbitral processes relevant herein started at the High Court and therefore under **Order 46** of the Civil Procedure Rules and not under the Arbitration Act. **Mr. Kiragu** concluded his submissions by arguing that there was sufficient cause for ordering the stay sought to stop a substantial public company finding itself in "*an awkward position*" of inability to comply with arbitral orders. Such stay, he contended, would not cause the respondents any prejudice.

Opposing the application, **Mr. Ahmednassir Abdullahi**, learned Senior Counsel for the respondent, launched a three-pronged response. First, he submitted that under **Rule (5)(2)(b)** of our Rules, an application to stay proceedings before an arbitrator cannot be granted as the jurisdiction to order stay of proceedings is directed at proceedings at the High Court yet in the instant case there are no High Court proceedings targeted by the stay sought.

Senior Counsel drew our attention to an application by chamber summons filed by the applicant on 12th September, 2012 by which it sought to stay further proceedings in the suit and the High Court pending mediation and/or arbitration as provided under Clause 16 of the sale agreement between itself and the 1st respondent. The 1st respondent consented to the stay sought and that is how A.F. Gross came to be appointed arbitrator. To him, that closed those proceedings until the applicant on 16th August 2016 filed the application for stay of proceedings, consolidation and appointment of an umpire to hear the consolidated arbitration, leading to the impugned ruling which counsel defended as having properly dismissed the said application. The proceedings in the High Court having come to an end with an order for arbitration, there are no proceedings capable of being stayed and so ***Rule 5(2)(b)*** cannot aid the applicant.

Turning to the principles governing this Courts dealing with applications for stay, Mr. Abdullahi asserted that the applicant has no arguable appeal. An arguable appeal, he stated, can only be founded on a cause of action pleaded or a defence filed but the applicant filed no other pleadings and is therefore in no position to demonstrate a grievance known to law. Having itself moved the High Court to refer the matter to arbitration; it can only be playing games for it to seek to stay the same arbitral proceedings. Counsel then drew our attention to a consent order recorded before A.F. Gross on 2nd August 2016 which provided thus;

> ***"It was agreed and is hereby DIRECTED***:
>
> ***1. By consent the Claimant through its advocate HHM wishes to consolidate the arbitrations before myself and Ms. Jan Mohamed. In the absence of consent by all parties in the two arbitrations, the Claimant now wishes to make an application for consolidation to the High Court, which application will be made within fourteen days hereof and proof of the filed application served upon the Arbitrator and the respondent.***
>
> ***2. In the event that he court finds no merit in the application for consolidation of the two arbitrations before Ms. Jan Mohamed, this„Gross Arbitration?, will proceed with no further delay.***
>
> ***3. Pursuant to any order of judgment in respect thereof, parties will liaise with each other and***

suggest a one day hearing date to be held at my offices from 9.00am on the selected day.

Costs in the cause of the arbitration."

(our emphasis)

Counsel's understanding of that consent was that the applicant bound itself to continue with the arbitration in the event the learned Judge did not order consolidation and that it had reneged on the commitment to do so by choosing to pursue the intended appeal.

On whether the intended appeal would in the absence of stay be rendered nugatory, Mr. Abdullahi contested the assertion by contending that the arbitral path was chosen by the applicant itself when it applied for it. He therefore sought to persuade us to respect party autonomy and not interfere so that the arbitral process so-chosen should proceed to its logical conclusion. He added that his client's cause of action is based on a written contract with clear terms which include clause 16 on arbitration. He proceeded to say that there will be no impossibility of compliance with any awards especially because the 2nd respondent's claim includes an alternative prayer for damages. He therefore urged us to dismiss the application.

When learned counsel **Mr. Anzala** rose to address us for the 2nd and 3rd respondents, he adopted Mr. Abdullahi's submissions in opposition to the application. Recalling that the dispute between the applicant and the 2nd and 3rd respondents originated in **H.C.C.C. No. 1158 of 2001** in which the parties entered a consent to refer the matter to a single arbitrator as also happened in **H.C.C.C. 445 of 2011**, counsel noted that no application was ever made in either suit to vary those consent orders. He urged us to endorse the position taken by Arbitrator Jan Mohammed in her ruling dated 2nd September 2014 rejecting an application to consolidate the two arbitration thus;

"17. The proposition that the two arbitrations be consolidated is an attractive idea but unfortunately

1. There are two different causes of action.

2. Two different arbitrators involved in this matter and I have no jurisdiction to issue such orders unless the parties agree to the same.

As we are all aware an arbitration is a process which is party driven."

Counsel was emphatic that the 2nd and 3rd respondents do not want to be involved in the arbitration between the applicant and the 1st respondent which arose from an agreement dated 2011 when the previous proceedings had been in place for a decade. He therefore urged us to dismiss the application.

Mr. Kiragu Kimani's rejoinder was that the two arbitrations are closely linked and should be heard together. The fact that there is an alternative claim for damages in respect of one of them does not negate the need for a common forum. He went on to state that under **section 3A** & **B** of the Appellate Jurisdiction Act, are designed for the doing of justice between the parties and that the court has the same jurisdiction as does the High Court in view of **section 3(3)** of the some Act. He urged that **H.C.C.C. 443 of 2011** was "not dead as such" the parties having only changed the form from the High Court to the arbitrator. He disputed that the applicant had in the consent before A.F. Gross expressly consented not to appeal. He conceded that delay and consents entered may be a factor in determining whether consolidation should have been allowed but contended that they should not have been taken away the court's supervisory jurisdiction. He again criticized the learned Judge for falling back on the ***NYUTU*** decision even after considering the application before her on merit. He conceded, however, that consolidation lies in the discretion of the Judge.

We have given the application, the various affidavits, authorities cited and the addresses of learned counsel due consideration. The principles upon which this Court acts in a consideration of an application for stay of proceedings under ***Rule 5(2)(b)*** are notorious: the applicant must establish both of two tests

namely that he has an arguable appeal, one that is not frivolous or trifling; and that such appeal would be rendered nugatory in the event the stay sought is denied. See ***JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS vs. KILACH*** **[2003] KRL 249** and ***STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS*** **[2013] eKLR** for a thorough discussion of these principles as gleaned from the case law**.**

Does the draft memorandum of appeal exhibited disclose an arguable point? We are cognizant that such a point need not be one that must necessarily succeed, it being sufficient that it should raise a question worthy of answer by the respondent and interrogation by the Court. The grounds all seem to revolve around the question whether the Judge was right to hold that she could not order a consolidation when parties had entered into separate arbitrations out of their own volition and were not now consenting to consolidation. We think that it is trite that arbitral processes are by definition consensual. Further, a process entered into by consent can only be altered in character with the consent of the same parties. Considering that the issue lies in the discretion of the judge before whom it is raised as all parties concede, we have very serious doubts whether the appeal intended raises any arguable issue. We need only add, without in any way appearing to prejudge the appeal, that the respondents have also raised the very crucial point of delay in bringing the application for consolidation which was running into four or so years. The less we say about the matter, we think, the better.

Besides being unpersuaded that the applicant has an arguable appeal, we are definite that such appeal would not be rendered nugatory if the stay is denied. There is first a doubt whether a stay can be granted by this Court directed at the arbitral proceedings. Under ***Rule 5(2)(b),*** the jurisdiction of this Court is engaged once an appeal is instituted by way of a notice of appeal. Only then can an application for stay of execution, injunction or stay of further proceedings be entertained. As the notice of appeal relates to a decision of the court appealed from, it must mean that a stay of further proceedings can only relate to proceedings of that court appealed from. In the same way this Court in ***BENARD GICHUBI NJIRA vs. KANINI NJIRA KATHENDU & ANOR*** Nyeri Civil Appln. 24 of 2015 (UR16/2015) doubted that it had jurisdiction to grant orders under ***Rule 5(2)(b)*** directed at subordinate courts, we are extremely doubtful that we can direct a stay of arbitral proceedings that are not challenged directly before this Court.

That jurisdictional question apart, what loss, harm or prejudice is likely to befall the applicant of such a character or magnitude as to render the intended appeal nugatory, or, in other words, futile, academic or illusory? From the affidavit in support and the submissions before us, it would seem the applicant's grouse is no more than an apprehension that the two arbitrations may proceed to conclusion and give rise to two conflicting awards which may put it in an "*awkward position*" of being unable to comply and thus expose it to the possibility of being cited for contempt. We think, with respect, that such an eventuality is at best speculative. We also think that it is as likely as not that the arbitral proceedings will culminate in one or the other of the respondents contending over the land in dispute being awarded the land or they may both miss out. Indeed, it was argued before us that one of them seeks an alternative remedy of damages. Any of those scenarios would present no difficulty to the applicant and will definitely not render the intended appeal academic.

Bearing in mind that the arbitral proceedings have been ongoing for several years and that one of them was actually resorted to on application by the applicant itself with the consent of the first respondent with no attempt at consolidation being made sooner, it would seem that the applicant for long never considered the existence of the two arbitrations as anathema to its interests. The consolidation attempt seems to have been an afterthought. We also are mindful of the centrality of party autonomy and the need for arbitral proceedings, as an alternative mode of dispute resolution, to proceed with speed and economy. In the face of strident protests by the respondents against attempts to force them into an arbitral cohabitation against their will, coupled with complaints that their respective arbitrations are being needlessly delayed, we think that it conduces to the doing of justice that no clog or fetter should be placed in the path of the arbitrations and in our discretion decline the stay. See ***KENYA OIL CO. LTD & ANOR vs. KENYA PIPELINE & ANOR*** Civil Appeal No. 102 of 2012 and, generally, the *Model Law on International Commercial Arbitrations* adopted in 1985 by the United Nations Commission on International Trade Law (UNCTRAL).

For all those reasons we conclude that this application is devoid of merit. It is accordingly dismissed with costs.

Dated at Nairobi this 1st day of December, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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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.

DEPUTY REGISTRAR