IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, J. MOHAMMED & OTIENO-ODEK, JJA)

CIVIL APPLICATION NO. NAI 248 OF 2012 (UR 179/2012)

VELJI NARSHI SHAH ..... APPLICANT

AND

KANTI NARSHI SHAH ..... 1ST RESPONDENT

CHANDULAL NARSHI SHAH ..... 2ND RESPONDENT

RUSTAM HIROA ..... 3RD RESPONDENT

(Being an application for stay of execution pending the hearing and determination

of the intended appeal from the Ruling and Decree the High Court of Kenya

at Nairobi (Waweru, J.) delivered on 21st day of December, 2009

in

H.C.MISC NO.690 OF 2003

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RULING OF THE COURT

1. The applicant, Velji Narshi Shah, has applied to this Court under Rule 5(2)(b) of the Rules of this Court seeking an order that –

> ***"pending the hearing and determination of the appeal from the ruling and decree of the High Court delivered on the 18th day of December 2009, this honourable Court be pleased to grant a stay of execution of the said ruling and decree."***

2. The applicant avers in his application that he is apprehensive that unless he is granted the order for stay as prayed, his appeal to this Court, if successful, shall be rendered nugatory.

BACKGROUND

3. The record before us shows that the applicant and the two respondents are brothers. They had a dispute involving family property which resulted in arbitration in accord with an arbitral agreement between them

dated 28th February 1999 pursuant to which Mr. Rustam Hira, an advocate, was appointed as a single arbitrator. The latter rendered an arbitral award dated 20th June 2002. Kanti Narshi Shah, the 1st respondent, applied to the High Court under Section 36(1) of the Arbitration Act, 1995 (the Act) seeking an order for adoption and recognition of the arbitral award. The second respondent supported the application. However, the applicant challenged the arbitral award by filing an affidavit which constituted his challenge. The learned Judge of the High Court (Waweru J) allowed the application by Kanti Narshi Shah, the 1st respondent, and dismissed the applicant's challenge to the application by the 1st respondent on the ground that the applicant had not filed a proper application to challenge the arbitral award as required by Section 35(1) of the Act. It is this decision by the High Court that gave rise to the appeal by the applicant.

APPLICATION

4. In his notice of motion dated 9th October 2011, the applicant has annexed a copy of the decree ensuing from the adoption of the arbitral award which, together with the warrant of sale of movable property against the applicant, show that the sum of Shs.7,002,450/= which includes costs and expenses is due by the applicant to the respondents.

5. The applicant fears that if execution is not stayed he shall suffer irreparable loss as he is apprehensive that he is not likely to recover the money if he pays it in the event that his appeal succeeds.

HEARING

6. When the application came up for hearing before us, learned counsel **Mr. Georgiadis Khaseke** appeared for the applicant while learned counsel **Mr. Bernard Mugisha** appeared for the respondent.

7. Mr. Khasake submitted that the applicant's intended appeal is arguable. He pointed out that the applicant was denied an opportunity of being heard by the High Court. In his view, the High Court in rejecting his client's prayer to set aside the arbitral award erred. All that the applicant was doing, he said, was to try and persuade the High Court not to recognize the arbitral award. He contended that the High Court mistook this for an application to set aside the arbitral award and consequently rejected the applicant's prayer. Counsel further contended that the High Court ought not to have rejected the appellant's affidavit on the ground that it was not an application. Rather, it should instead have perused the affidavit and made a decision based on it bearing in mind that the grounds for refusal to recognize an arbitral award are the same as the grounds for setting it aside. It was counsel's view that the intended appeal is arguable.

8. As regards the question whether the appeal, if successful, will be rendered nugatory if stay is not granted, counsel for the applicant contended that the sum of money claimed from his client was huge. It was his case that there was no evidence that the respondents were in a position to refund it if the appeal was successful. For this reason, he contended that the appeal, if successful, would be rendered nugatory if stay was not granted.

9. **Mr. Mugisha**, learned counsel for the respondents opposed the application and relied on the respondent's replying affidavit. He contended that the application for stay was filed (on 9.10.2012) three years after the High Court decision (on 18.12.2009). It was his submission that delay in seeking an order for stay was inordinate.

10. Counsel for the respondent contended that there was no jurisdiction on the part of this Court to entertain this appeal. He referred us to the 5 Bench decision of this Court in **Nyutu Agrovet Ltd. V. Airtel Networks Ltd** (Civil Appeal No.61 of 2012) in support of that proposition.

It was counsel's contention that the decision shows that this Court can hear such appeal only on points of law.

11. It was the contention of the respondent's counsel that the intended appeal was not arguable as the applicant did not show that any issue of law was involved. Counsel indicated that the requirement of Section 39 of the Arbitration Act 1995 was not met by the applicant not least because the applicant had not made an application to oppose the arbitral award in respect of which the High Court made an order of recognition and adoption.

12. Mr. Mugisha contended that the application for stay by the applicant was an abuse of court process. He urged us to dismiss it. He noted that the appeal No.224 of 2011 filed by the applicant which seeks to set aside the decision of the High Court (Waweru J) recognizing and adopting the arbitral award is devoid of arguable issues of law.

13. In retort, Mr. Khaseke told us that he would leave to us the issue of whether this Court has jurisdiction. But Mr. Khaseke is the applicant's legal advisor and should have studied the brief to satisfy himself that the appeal was plausible and that the court in which it was being filed had jurisdiction. In our view, he should have submitted on the issue of jurisdiction. He should not have been content with the fact that the High Court granted the applicant leave to appeal.

14. We have perused the application and given due consideration to the rival submissions of the counsel for the parties. The application for the order for stay is predicated on rule 5(2)(b) of the Rules of this Court. This court has developed principles on the grant of orders under Rule 5(2)(b) to guide it in the exercise of its independent and discretionary jurisdiction. The principles are designed to balance two parallel propositions, first that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and secondly that a litigant who is aggrieved by a decision must not be deprived of his right to challenge the impugned decision to the next higher court. (see **Butt v. Rent Restriction Tribunal Jurisdiction** [1982] KLR 417. See also **Kenya Shell Ltd v. Kabiru & Another** [1986] KLR 410. These principles require that an applicant satisfies the Court first, that he has an arguable appeal. To do this, an applicant must show that the appeal is not frivolous, that it is to say that it is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. In determining whether the appeal is arguable, the Court will advisedly eschew from delving into the merits or otherwise of the appeal lest it prejudices the intended appeal. It is important to point out that an arguable appeal is not necessarily one that is bound to succeed. It is sufficient that the applicant has an appeal that is arguable even if it be on a single point of law.

15. The second or twin principle requires that an applicant satisfies the Court that if the order sought under Rule 5(2)(b) is not granted, the appeal, if successful, shall be rendered nugatory or valueless or worthless. In short, the success in the appeal would be Pyrrhic victory if stay is not granted.

16. In this application, the applicant contends that the High Court erred in making orders recognizing and adopting the arbitral award following which decree and warrant of attachment of moveable property were issued. The applicant avers that a demand of Shs.5,002,815 is being made against him and execution process has been commenced and on 3rd October 2012 a notice to show cause was issued. The applicant contends that he placed before the High Court an affidavit containing reasons for his objection to the arbitral award being recognized or adopted. Section 37(1) of The Arbitration Act, 1995 (Act 4 of 1995) sets out grounds for refusal of recognition or enforcement of arbitral award. A glance at the impugned ruling of the High Court shows that the Court did not focus on Section 37 (supra). Instead, it delved into Section 35(1) of the Arbitration Act, 1995 that deals with application for setting aside an arbitral award. The learned Judge of the High Court held that the applicant's *"affidavit was not an application as contemplated under Section 35"* of the Arbitration Act, 1995. In our view, and without wishing to pronounce ourselves on the merit or otherwise of the appeal, as that is the prerogative of the Bench that shall be seized of the appeal, we are satisfied that the appeal is not frivolous. It is arguable.

17. As to whether the appeal, if it is successful, shall be rendered nugatory if stay is not granted, we are alive to the fact that the demand from the applicant in respect of which execution may ensue is for Shs.5 million which is a considerable amount of money. It is not clear to us that the respondents would be in a position to refund it if the appeal succeeds. If the applicant pays the money now and is unable to recover

it if his appeal succeeds, his appeal shall be rendered nugatory. We are under a duty to consider the parties conflicting claims. We have come to the conclusion in this regard that the applicant has satisfied us on the twin principles and accordingly we allow the application providing that the applicant deposits Shs.1,700,000/= as a condition for the order of stay.

18. We order that pending the hearing and determination of the appeal No.224 of 2011 execution of the ruling and decree in Miscellaneous Civil Application No. 690 of 2003 in the High Court at Milimani Law Courts, Nairobi is stayed providing that the applicant deposits in this Court within 30 days from the date of delivery of this ruling the sum of Shs.1,700,000/=. Each party shall bear its own costs of this application.

Dated and delivered at Nairobi this *12th day of February 2016*.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

J. OTIENO-ODEK (PROF)

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR