IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO.44 OF 2014

BETWEEN

GLADWELL WANGECHI KIBIRU ……APPLICANT

AND

LORD MELVIN JOHN BLACKBURN ……1ST RESPONDENT

LADY KATHLEEN BLACKBURN ……..2ND RESPONDENT

AMINA PAUL KANZE

(*FOR THE ESTATE OF LORD*)

MELVIN JOHN BLACKBURN) ……3RD RESPONDENT

AND

THE HONOURABLE ATTORNEY GENERAL ……1ST INTERESTED PARTY

JUSTUS MULWA NDUYA ……..2ND INTERESTED PARTY

(Being an appeal against the Ruling of the High Court of Kenya at Malindi (Meoli,J.)

dated 21st March, 2014

In

Pet. No.4 of 2014)

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RULING OF THE COURT

The Applicant is seeking an order of stay of execution pending the hearing and determination of her intended appeal against the consolidated ruling of ***C.W Meoli, J.*** delivered on 24th October, 2014.The application is a Notice of Motion dated 7th November, 2015 brought under rule 5 (2) (b) of the Court of Appeal Rules and Articles 164 and 159(2) of the Constitution.

In the main, the application seeks that:

"

a. *Spent*
b. *Spent*
c. *Pending the hearing and determination of the intended appeal, there be a stay of further execution of the decree dated 5/7/2011 in HC MISC CIVIL. APP. NO.19 OF 2007 (MALINDI) between Lady Kathleen Blackburn (Applicant)/ Decree Holder- Versus -Kibiru Emporium, Gladwell Wangechi Kibiru and Lord Melvin John Blackburn (Respondent) for Kshs. 28,867,789.72 set for further hearing on 17th November 2014.*

(d) The costs of this application be provided for."

The events leading to the application as narrated by the applicant are that the 2nd respondent advanced a loan of Kshs. 13,898,284.98 to Kibiru Emporium Ltd, "*the company*." The loan was granted during a time when the company was undergoing some financial crisis and/or constraints. The applicant and the 1st and 2nd respondents were the only shareholders of the company. In the year 2006 a dispute arose concerning the repayment of the loan and the 2nd respondent invoked a clause in the Articles of Association of the company and referred the dispute to arbitration. The arbitrator is the 2nd interested party. On 30th March, 2007 the arbitrator found for the 2nd respondent and awarded her Kshs. 13,898,284.98 as against the company, the 1st respondent and the applicant "*jointly and severally*." To the applicant however, the award did not have a link to the facts as the evidence of the 2nd respondent was that she had given an interest free commercial loan to the company and her case was solely against the company. The applicant therefore felt that , there was no fair hearing of the dispute before the arbitrator since there was no evaluation of the evidence adduced. Indeed he had decided the dispute neither on evidence, nor on the applicable law. Because of this omission, the Arbitrator breached Section 70(c**)** of the repealed Constitution. Consequently, the applicant filed in the High Court an application dated 15th May, 2009 to set aside the arbitral award on grounds that the arbitration did not fall within the purview of the arbitral agreement, that a clause in the agreement was not followed in the selection of an arbitrator and finally, that the proceedings were conducted in a manner detrimental to the applicant. The application after being heard interpartes was dismissed with costs on 7th May, 2009. Pursuant to the dismissal, the 2nd respondent filed HC Misc. Application No.19 of 2007 (Malindi) for enforcement of the arbitral award, which the court granted and a decree was issued on 15th July, 2011 for Kshs. 15, 241, 935.00 plus costs and interest. The 2nd respondent then commenced execution proceedings against the applicant as the 1st respondent had allegedly passed on in the year 2013.

The Applicant then took the view that under Sections 10 and 32 of the Arbitration Act, the decree dated 5th July, 2011 was not appealable. However, as the arbitrator did

not base the award on evidence tendered before him, the decree ensuing therefrom was

unconstitutional and against public policy. Accordingly, in a constitutional petition

No. 27 of 2014, filed in the High Court at Mombasa, the applicant sought several

declaratory orders to impugn the award. Contemporaneously with the the filing of the petition, the applicant took out a motion on notice seeking stay of execution of the decree. ***Meoli, J.*** struck out the petition as well as the application on grounds of *res judicata,* abuse of court process and the public policy requirement that there be an end to litigation. Aggrieved by the ruling, the applicant filed a notice of appeal, pursuant to which she filed the instant application.

The applicant in the grounds in support of the application contends that the High Court sitting in its capacity *as 'a constitutional court can revisit judgments, awards, orders and decrees issued prior to 27th August, 2010 and correct any unconstitutional defects therein.'* That this court has jurisdiction to determine the constitutionality of the arbitral award and the resultant decree and find them

unconstitutional, and therefore uneforceable. She states in addition, that as the decree was unconstitutional, the execution thereof was contrary to Article 40 of the Constitution and on that basis alone, she had *locus standi* to make the challenge via Articles 19 and 22, and that the High Court had the jurisdiction to grant appropriate remedies under Article 23.

In the affidavit in support of the application, she contends that the intended appeal will be questioning the applicability of the doctrine of *res judicata* in cases seeking declaratory orders and whether the principle of finality is applicable in constitutional litigation. All these issues according to the applicant, make the intended appeal not frivolous but arguable. The applicant depones further that she is in poor health aggravated by the execution process and that personal liberty, health and the right to property are fundamental rights guaranteed by Chapter 5 of the Constitution. Further, that the 2nd respondent is a foreigner and only comes to Kenya on a tourist visa so that once execution is complete there is no guarantee of her coming back and without an order of stay , the applicant will suffer substantial loss and damage thereby rendering the intended appeal nugatory.

The 2nd respondent in opposing the application filed a replying affidavit sworn 28th November, 2014. In it she concedes that she had acquired shares in the company and advanced the said loan, save that it was an advance not only to the company, but to the the applicant and the 1st respondent as well. That she sought the arbitration process as the applicant and the 1st respondent had locked her out of the operations of the company. She reiterates that the applicant made an application to set aside the arbitral award which was dismissed on 7th May, 2009 thereby exhausting her remedies under **sections 10 and 32** of the Arbitration Act. She goes further to depone that the applicant is a vexatious litigant who had, over the same issue, filed 3 applications for stay of execution

in HC Misc Case No. 10 of 2007, a constitutional application in Mombasa Petition No. 27 of 2014 (subsequently transferred to Malindi upon the objection of the 2nd respondent) and Malindi Civil Application No. 8 of 2014 in the Court of Appeal. To the 2nd respondent, there is no appeal filed, that the applicant is being vexatious, and abusing the court process with scant respect for court orders. In addition she states that as the decree was against the applicant, the 1st respondent and the company jointly and severally and as such, she was entitled to execute it against all or any of them. The execution process being legal, there was no breach of constitutional rights of the applicant as claimed. She maintained that there was no constitutional issue raised as the dispute emanated from a purely commercial transaction. The applicant had submitted herself to the arbitration process and it would be against public policy for the appeal to be entertained. She was entitled to the fruits of her judgment and will suffer great loss, damage and prejudice if stay was granted. On the basis of all the foregoing the 2nd respondent took the view that the intended appeal was frivolous and not arguable at all. Finally, she deponed that there was no proof of poor health claimed by the applicant which in any case was not a consideration for stay of execution.

At the hearing of the application on 14th May, 2015, the applicant through ***Mr. Munyithia***, learned counsel reiterated what we have already set out above as grounds supporting the application as well as the affidavit in support thereof. However, he emphasized the fact that the intended appeal was arguable as the petition and the

application for stay of execution had been struck out on the grounds of the principle of finality and doctrine of *res judicata.* He submitted that the principle of finality is not absolute and it gives room to exceptions such as the existence of fraud, mistake, lack of jurisdiction and anything that may be unconstitutional. The applicant had demonstrated that there was a mistake and therefore the arbitral award was unconstitutional. He went on to submit that the facts established before the 2nd interested party were that the loan was advanced to the company, yet the Judge proceeded to enter judgment jointly and severally against her, the 1st respondent and the company. Thus the order was oppressive and against Article 165(3) of the Constitution. That the judge also made a conclusion that the arbitral process had run its course and the applicant had approached the court too late in the day. The applicant is however of a contrary view and maintains that the High Court had jurisdiction and the Judge had therefore erred in holding that a violation of constitutional rights was not subject to limitation of time. The petition sought declaratory orders and according to the applicant, such orders could not be subjected to the doctrine of *res judicata.* Hence, the court if minded should only have dismissed the application but not the petition.

On the aspect of whether the intended appeal would be rendered nugatory, the applicant submitted that the execution process would involve the disposal of her personal property thus divesting her of her right to property as enshrined in Article 40(a) of the Constitution. Further, the 2nd respondent being a foreigner, once the decree was executed and she left the jurisdiction of the court, the applicant would be unable to

recover the said money in the event that her appeal was successful.

Mr. Juma, learned counsel for the 2nd respondent, countered the applicant's arguments by submitting that there existed no arguable appeal. He urged that the present decree was as a result of a process the parties had submitted themselves to. He maintained that the same objection was raised by the applicant before the 2nd interested party and the High Court, but was rejected. Consequently, the arbitral award became final and the High Court had no jurisdiction over it. The 2nd respondent in addition submitted that the appeal arises from proceedings filed in Mombasa Constitutional application No. 27 of 2014 in which the 2nd respondent raised an objecction and the proceedings were transferred to Malindi as the applicant was forum shopping according to ***Meoli, J***. it was submitted further that there was no constitutional issue raised, that the right under Article 40(a) of the Constitution is not absolute and execution of a lawful decree limits such a right. The exceptions to the principle of finality did not apply in this case as those exceptions were lacking and the applicant was merely attempting to re-open proceedings that had been concluded and in which she had had her day in court for 10 years. On the foreign status of the 2nd respondent, he submitted that the Court ought to strike a balance between the parties, as foreigners too have rights and the debt was proved. He further submitted that the authority of ***Peter M. Kariuki v AG*** **[2014]eKLR** was irrelevant as it arose from criminal proceedings.

The 1st interested party, did not file any papers in response to the application but

through its counsel, **Ms. Wanjiku Mbiyu**, submitted that the application was an abuse of process, there was no arguable appeal as the same issues had been addressed by ***Ombija , J***, that, as the applicant had submitted to the arbitral process, she was estopped from challenging the award. The decree was therefore lawful and execution thereof cannot be termed as unconstitutional. In addition the 2nd interested party submitted that under Article 156 (6) of the Constitution, his role was to ensure that the rule of law is upheld and urged that the application be dismissed as the applicant had engaged in total abuse of the court process that ridiculed the court. Hence, this Court ought to stamp its authority and bring the matter to finality.

The issues to be resolved are; whether the intended appeal is arguable and, whether the lack of an order of stay of execution would render the intended appeal or nugatory. The existence of an appeal or intended appeal grants this Court jurisdiction to entertain the application at hand. The 2nd respondent however submits that there is no appeal or intended appeal on record and therefore this court lacks jurisdiction to entertain the application.

This Court in ***New Ocean Transport Limited & another v Anwar Mohamed Bayusuf Limited [2014] eklr*** held that:

> *".....under rule 5(2) (b), such an application must be anchored on an appeal or intended appeal and nothing else***."** *(own emphasis)*

In *Safaricom Limited –v- Ocean View Beach Hotel Limited & 2 others Civil Application No. 327 of 2009* ; Omolo, JA sitting with Waki and Nyamu JJA explained the application of Rule 5 (2) (b) thus:

> *"At the stage of determining an application under Rule 5(2) (b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of*

> *appeal the Court of Appeal would have no business to meddle in the decision of the High Court."(own emphasis)*

See also **in Montague Charles *Ruben & 9 others Vs. Peter Nderito &***

Another [1989] KLR 459.

In the circumstances of this case there is no record of appeal filed. However there is on record a notice of appeal dated 3rd November, 2014 lodged as per rule 75 of the court of Appeal Rules, which in essence evinces the intention of the applicant to appeal. This court therefore has jurisdiction to entertain the application.

Is the intended appeal arguable? *Otieno J.A* in Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eklr held that

> *" …. I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law one arguable point suffices for that finding…..and I must add here for what it is worth that arguable points need not be points that will succeed. All I am saying is that it raises points worth ventilation by the Court, and that the success if it were to succeed would be rendered nugatory"*

The applicant urges this Court to consider that since the arbitrator failed to base the arbitral award on evidence before him, he acted contrary to public policy thereby

rendering the arbitral award and the resultant decree and all execution proceedings unconstitutional. It is her view that the High Court could still be moved under the Constitution to correct this error.

We consider it arguable that the award in question can be challenged on constitutional grounds, the applicability or otherwise of the doctrine of *res judicata* and finality in litigation. In the result the decree and execution process then becomes challengeable and the argument that the process may be in breach of the applicant's constitutional rights may be tenable.

Will the intended appeal be rendered nugatory if stay of execution is denied? The purpose of stay of execution orders is to preserve the substratum of an appeal or intended appeal. See ***Chairman Board of Governors Ng'iya Girls High School v Meshack Ochieng' T/A Mecko Enterprises & 4 others*** **[2015] eklr.** In our view, it is for all intents and purposes granted to give the concerned party an opportunity to be heard. The Constitution champions fair hearing which must also include preservation of the substratum of an appeal or intended appeal in appropriate cases. However, the applicant must aptly demonstrate this limb. The colossal sum involved notwithstanding, it would be an insufficient ground, at least on its own, to sustain a claim that an appeal would

thereby be rendered nugatory. Further we agree with the 2nd respondent that the ill health of the applicant, which in any event has not been demonstrated so far, is also not under the circumstances a ground to grant stay. The 2nd respondent may be a foreigner

but the law applies to all equally. It does not discriminate against foreigners and locals. She too must be protected irrespective of her nationality. After all she has a judgment in her favour. In other words, the 2nd respondent has gained fruits of her legal labour whose

legality the applicant has challenged in various fora albeit unsuccessfully. This Court must therefore strike a delicate balance. Finally, the applicant has not countered the 2nd respondent's assertion that she possesses wealth enough to refund the decretal sum in the event that the applicant is successful in her appeal. We must also not lose sight of the fact that this is a money decree. As a general rule, an appeal arising out of money a decree cannot be rendered nugatory if stay is refused. ***See Kenya Shell Ltd v Benjamin Karuga Kibiru & another (1992-88)1 KAR.*** It is absolutely necessary that the applicant

demonstrates that if stay is not granted, and execution issues, the respondent will be unable to repay the amount should he succeed in the appeal.

It has not been demonstrated to our satisfaction that the 2nd respondent is incapable of repaying the amount in the event that the appeal is successful. Indeed, the 2nd respondent is categorical that she has the means to repay. We have no reason to doubt that assertion.

In an application of this nature, the applicant must satisfy both limbs, (arguability

and nugatory aspect of the appeal.) Much as the applicant has been able to demonstrate the arguability of the appeal, she has nonetheless failed to show that the appeal shall be rendered nugatory if stay is not granted. Accordingly, the application fails and is dismissed with costs.

Dated and delivered at Malindi this 29th day of May, 2015

ASIKE-MAKHANDIA

……..……..

JUDGE OF APPEAL

W. OUKO

……..……..

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR