IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MARAGA & WARSAME, JJ.A)

CIVIL APPLICATION NO 233 OF 2013 (UR 168/13)

BETWEEN

MUMIAS SUGAR COMPANY LTD…….....APPLICANT

VERSUS

MUMIAS OUTGROWERS COMPANY (1998) LTD…...RESPONDENT

(an application for stay of proceedings pending the hearing and determination of an appeal from the decision of the High Court of Kenya at Nairobi (Mr. Justice E. K. O. Ogola) dated 6th October 2012

in

HCCC No. 189 of 2012)

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RULING OF THE COURT

Before us is an application under rule 5 (2) (b) of this Court's rules, in which the applicant, **MUMIAS SUGAR COMPANY LIMITED**, seeks two main orders. These are that:

1. ***There be a stay of proceedings pending before the sole arbitrator Mr. Ahmednasir M. Abdullahi pending the hearing and determination of the intended appeal against the order of the High Court; and***
2. ***There be a stay of the taxation of the bill of costs dated 7th August 2013 and filed on 8th August 2013, and of any other enforcement proceedings pending the hearing and determination of the appeal against the order High Court.***

The application is supported by the affidavit of **EMILY KADENYI OTIENO,** the Company Secretary and Legal Affairs Director of the Applicant, sworn on 28th August 2014, and opposed by grounds of objection dated 20th November 2013 and a replying affidavit of even date sworn by **JUSTIN RAPANDO.**

The applicant is a public company engaged in the business of commercial milling and production of sugar and related products, while the respondent is an outgrower company comprised of sugar cane farmers who have bought shares in the Applicant company. In March 2010, after a dispute had arisen between the

parties, the Chairman of the Law Society of Kenya referred the matter to Mr. Ahmednasir Abdullahi, Advocate, for arbitration. The arbitration dispute is currently pending before him.

In those arbitral proceedings, the respondent is the claimant, and has claimed an amount in excess of Kshs 3.7 billion from the applicant, and the applicant has on its part a counter claim in excess of Kshs 3.5 billion.

The present application arises out of the dismissal of an application to the High Court made on 28th March 2012 in which the applicant sought orders first that, Mr Ahmednasir M. Abdullahi be removed from acting as the sole arbitrator in the dispute, and his appointment as such be terminated, and second, that the respondent do furnish security in the sum of Kshs 208,000,000.00 which sum it had admitted as being due to the applicant. This application was dismissed on 6th November 2012 with costs. The applicant has since filed an appeal in this court, being Civil Appeal No 67 of 2013.

The applicant then filed in the High Court, an application for stay of proceedings before the sole arbitrator. That application was dismissed with costs by Kamau J on 12th July 2013. The respondent has since taken steps to tax its bill in respect of the two failed applications, and the proceedings before the arbitrator are also on course, which has prompted the applicant to bring the present application.

When the application came up for hearing before us, Mr Kiragu Kimani, learned counsel for the applicant, submitted that this Court has unfettered discretion to stop the taxation and stay the proceedings before the arbitrator. In his view, a party exercising the right to appeal is entitled to have a stay.

Learned counsel urged that the appeal seeking removal of the arbitrator and seeking an order for security has already been filed before the Court, and that there are peculiar circumstances, in that the respondent has already admitted owing money to the applicant and to having financial problems, a fact that had been ruled upon by the arbitrator on 20th February 2012.

Mr Kimani argued that since Section 7 (2) of the Arbitration Act provides that a ruling made in the course of arbitral proceedings will have conclusive effect, and that the arbitrator improperly exercised his power. This, according to counsel, clearly shows that there is an arguable appeal. In addition, counsel for the applicant urged that because the dispute involves substantial amounts of money, and since the respondent has admitted to being in dire financial straits, then the High Court was plainly wrong in refusing the order for security for the amount owed.

In opposition to the application, Mr Lutta, who acted on behalf of the respondent, submitted that the jurisdiction of this Court to grant the orders sought is constrained as the matter is currently before an arbitrator and there has been no dispute arising out of the arbitration to warrant any input from this court. In addition, learned counsel argued that there is no law that allows this Court to stop proceedings before an arbitrator.

He further submitted that the orders sought in this application have been overtaken by events as both the taxation of the bill of costs and the arbitral proceedings are already on course, with both parties willingly participating.

In addition, learned counsel for the respondent submitted that the applicant has not placed any material before this Court to warrant a stay of proceedings before the arbitrator. He is of the view that this application is designed to delay the arbitral proceedings and asked us to dismiss it so that the dispute before the arbitrator may be ventilated.

In response, Mr Kimani argued that this Court has the same power as that of the High Court to supervise subordinate courts and tribunals, and therefore can issue orders as appropriate. He further submitted that the appeal was filed in good time, and that there will be no prejudice suffered should the orders be granted.

In an application of this nature, the onus lies on the applicant to demonstrate to the court first, that the intended appeal is not frivolous, or that it is arguable, even on a solitary ground, and secondly that the appeal would, should it succeed, be rendered nugatory unless the interim relief is granted. See ***Githunguri v Jimba Credit Corporation (No. 2) [1988] KLR 838*** and ***Jackson Kipkemboy Kosgey & Another v Bishop Samuel Muriithi Njogu & 8 Others [2008] eKLR.*** These principles were also recently summarised in ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR (Civil Application 31 of 2012)*** in the following manner:

> ***i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court...;***
>
> ***ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;***
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> ***iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75...;***
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> ***iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances...;***
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> ***v) An applicant must satisfy the court on both of the twin principles...;***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...;***
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> ***vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...;***
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> ***viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal...;***
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> ***ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling...;***
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> ***x) 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 party aggrieved...;***
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> ***xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim...;***

The main issue surrounding this application is the removal of the arbitrator. As was correctly noted by Warsame J, as then he was, in ***Alliance Media Kenya Limited V Monier 2000 Limited & another [2007] eKLR****:*

> ***"… no doubt disqualification is a serious matter, which must be taken seriously. The seriousness of seeking disqualification is a true reflection or testimony that one party either by design, default and/or genuinely has no faith in the determination of his case by a particular judicial officer…. In my understanding the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice. In my view justice is deeply rooted in the public having confidence and trust in the determination of disputes before court. It is of paramount importance to ensure, that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made"***

In that case, the applicants, Alliance Media Kenya Limited, brought an application seeking an order staying arbitral proceedings between itself and Monier 2000 (K) Ltd as well as the removal of the sole arbitrator, Mr Njoroge Regeru. The basis of the application was that the arbitrator was biased, and had failed in his duty as an impartial arbiter to inform the parties that an advocate on record for the 1st Respondent, Mr Nelson Havi, was married to an advocate who had previously worked in the arbitrator's law firm. After evaluating the test for removal of an arbitrator for bias, the court found that allegation against the arbitrator did not meet the test for his removal or disqualification, and that the applicant's apprehension was too remote to warrant any suspicion that justice would not be done by the arbitrator.

We are aware that an arbitrator is not like a judicial officer, and the test for removal is quite different. An arbitrator is often appointed by mutual consent of the parties, or through a legal mechanism provided under the Arbitration Act. The process of appointment is personal to the parties, and more representative of the rights and interests of the parties to the arbitral proceedings. On the other hand, a judge, who derives his authority from the Constitution, from the Judicature Act and the Judicial Service Act, is appointed through a constitutional mechanism and takes his oath before the President of the Republic. The responsibility of the arbitrator therefore cannot be equated to that of a judge because a judge has a weightier constitutional and legal responsibility.

However, we are of the firm view that once allegations against an arbitrator are brought, and a party seeks his disqualification, then the Court must apply its mind to the reasons advanced and make a decision, and we need no persuasion that a Court will easily debar an arbitrator where an allegation of bias is brought and proved. Indeed, this position was set out by this Court in ***Musiara Ltd v Ntimama [2004] 2 KLR 172*** at ***174:***

"… The Court of Appeal has jurisdiction to re-open an appeal (or an application) if an appearance of bias can be demonstrated on the part of one of the members of the Bench that had determined the appeal. But it is a jurisdiction which should be exercised with utmost care and the Court should do so only after it has first ascertained all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the court was biased."

We now turn to consider whether the applicant has an arguable appeal. As we have earlier said, the main thrust of the appeal surrounds the removal of the sole arbitrator. Section 13 (3) of the Arbitration Act provides that an arbitrator may be challenged if:

"circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so."

We note that in the present circumstances the reason for which the arbitrator is challenged does not fall under the conditions set out in the Arbitration Act, as the actions for which he is accused of arose out of his conduct of the arbitral proceedings.

The procedure for such a challenge is outlined in section 14 of the Arbitration Act, and includes an aggrieved party making an application to the High Court for the removal of the arbitrator. Section 14 (6) provides that:

"The decision of the High Court on such an application shall be final and shall not be subject to appeal."

We are alive to the fact that in applications of this nature, the applicant need only show that the appeal deserves the Court's consideration. See ***Dennis Mogambi Mongare V Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011) (unreported).*** Without making a determination on the applicant's appeal, we have doubt as to whether the appeal is an arguable one. We approve the sentiments of Kamau J in paragraph 43 of her ruling where she states that:

"There can, however, never be a stay of arbitral proceedings by the court once the mechanism for arbitral proceedings has been instituted. Once parties have chosen a particular mode of dispute [resolution], they must be left to their own devices, the court can only intervene in arbitral proceedings as has been provided for in the Act."

We are not persuaded that the applicant has satisfied the first precondition that would warrant relief under Rule 5 (2) (b), and it follows that it is not entitled to the order of stay of proceedings before the arbitrator.

We turn now to the second prayer which seeks a stay of the taxation proceedings. In ***Reliance Bank Ltd v Norlake Investments Ltd EALR [2002] 1 EA 227 (CAK)*** held that in monetary decrees, the amount of the decretal sum is one of the factors to be considered determining whether the appeal would be rendered nugatory. The Court expressed itself in the following manner:

"And in the Attorney General v Equip Agencies Case, the Court took into account the fact that the money was to be paid from the public funds and further that the amount involved was so large that immediate payment of it might cripple the operations of the Ministry of Health. All these are legitimate factors for the Court to take into account when it is considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted."

Again, it was held by the Court in ***Oraro and Rachier Advocates v co-operative Bank of Kenya EALR [1999] 1 EA 236*** at 239 that:

"We must weigh the claims of both sides. If Messrs Oraro and Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the Respondent Banks is kept out of the sum of Kshs 10,000,000.00 it would not be affected. This is in our view, in this case, the position, where we are considering the situation, the balance of convenience overall favours the applicant."

As we have said, this Court has unfettered discretion to make orders, in appropriate cases that may be necessary for the ends of justice, or to prevent an abuse of the processes of the Court. (See ***Jackson Kipkemboy Kosgey & Another v Bishop Samuel Muriithi Njogu & 8 Others (Supra)).***

We believe that continuation of the taxation proceedings in the High Court may jeopardise the progress and outcome of the arbitral proceedings, and defeat the intention of arbitration which is to ensure that there is an amicable and quick resolution of the dispute. We are also of the view the applicant has raised genuine concerns concerning the pending taxation. There is the possibility of unfairness and irreparable loss if each party is allowed to demand and tax costs for every application or objection determined before the final determination of the dispute. In our humble view, the correct and prudent approach in the present case is to await full and final determination of the dispute before the arbitrator. To pursue costs awarded on interim and interlocutory applications would result in unnecessary disputes and burden to the respective parties.

In view of the peculiar circumstances in this matter, which involves parties who have had, or continue to have, a close business relationship, and being alive to the substantial amount in contest, where each party claims in excess of Kshs 3 billion from the other, it would be improper to allow a party who is in dire financial problems to get costs which could well be paid after the resolution of the dispute.

In addition, the amount taxed is Kshs 62,246,318.37, a substantial amount by any standards, and payment of this sum would clearly give the respondent an interim advantage over the applicant. This would be unjust, as justice demands that the parties ought to be on equal footing until the final determination of the dispute by the arbitrator.

In granting a stay under rule 5 (2) (b) of the Rules, the Court must address itself to the prevailing situation between the parties and weigh the claims of both parties. Having done so, we think that it is only fair and just to grant an interim stay in respect of the taxation, and we hereby do. The issue of costs is not frivolous, and to refuse stay here would render the appeal nugatory if it is successful.

In the result, the application succeeds to the extent that an order is hereby granted staying the taxation of the bill of costs dated 7th August 2013 and filed on 8th August 2013 pending the outcome of the resolution of the dispute before the arbitrator. The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 14th day of March, 2014

R. NAMBUYE

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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