IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & G.B.M KARIUKI, JJ.A.)

CIVIL APPLICATION NO. NAI. 154 OF 2013 (UR 103/2013)

BETWEEN

INVESCO ASSURANCE COMPANY LIMITED …….. APPLICANT

AND

DAVID KABUBII KURIA …… RESPONDENT

(An application for stay of further proceedings pending the hearing and determination in the intended appeal from the ruling of the High Court of Kenya at Nairobi (Havelock, J.) dated 24th January, 2013

in

HCCC NO. 624 OF 2012)

****

RULING OF THE COURT

1. The notice of motion before us seeks one substantive order under ***Rule 5(2)(b)*** of the Rules of this Court:

> *THAT this Honourable Court be pleased to grant a stay of further proceedings in High Court Civil Case Number 624 of 2012 pending the hearing and determination of the intended appeal to this honourable Court against the Ruling of Hon. Mr. Justice Havelock delivered on the 24th January, 2013 dismissing the applicant's application dated 24th October, 2012.*

It is an order this Court has the discretion to grant provided that the applicant shows to the satisfaction of the court , not only that the intended appeal is arguable, even on one *bona fide* issue, but also that if the order is not granted and the intended appeal eventually succeeds, the success will be rendered nugatory. Those are well trodden principles which both parties acknowledged before us and based their arguments on.

What is the background to the application?

2. On 24th January, 2014, the High Court, Havelock, J. dismissed an application made by ***M/s Invesco Assurance Company Ltd*** (Invesco) for stay of proceedings in **HCCC No. 624** of **2012**,

which was filed by ***David Kabubii Kuria*** (Kuria) on 26th September, 2012. Kuria was not only a Director appointed by the shareholders of Invesco under a shareholders' agreement dated 14th December, 2011, but was also a shareholder of Invesco in his own right. Under ***Clause 24.1*** of that agreement, if any dispute arose between the members in connection therewith, it would be amicably settled through mediation or conciliation, failing which it would go for Arbitration. A proviso to that clause however stated thus:-

> ***"This shall not affect a party's right, where appropriate, to seek an immediate remedy for an injunction, specific performance or similar court order to enforce the obligations of the other party."***

There were also further provisions, both under the Agreement and the Articles of Association of Invesco, that any disputes shall be settled through Arbitration.

3. On 25th May, 2012, the Board of Directors of Invesco passed a resolution to remove Kuria from the Board and quickly followed up with stoppage of his remuneration and other benefits. Kuria protested that the dismissal was unlawful, null and void as the Board had no powers to remove him. He tried to reverse the action without success before filing the suit aforesaid, which sought a declaration that the removal was null and void and a permanent injunction to restrain the Board from interfering with his position as Director. Together with the suit, he took out an application for a temporary injunction.

4. Upon being served with the summons to enter appearance and the application, Invesco filed an application under ***Section 6*** of the **Arbitration Act, 1995** seeking a *"stay of the suit pending Arbitration in accordance with the provisions of the Shareholders Agreement"*. That is the application heard and dismissed by Havelock, J. In dismissing the application, the learned Judge relied on the proviso in the shareholders' agreement (supra) and on ***Section 7(1) of the Arbitration Act, 1995*** which provides:-

> ***"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."***

Kuria himself gave an assurance that he was seeking an interim measure pending arbitration.

5. In submissions made before us, learned counsel for Invesco, Mr. Charles Kanjama sought to persuade us, firstly, that the intended appeal was arguable. He referred us to a raft of seven grounds in a draft Memorandum filed with the application, the main thrust of which is that the learned judge misapprehended the nature of the Shareholders agreement and further failed to appreciate the contractual nature of arbitral issues and the universally accepted autonomous nature of the arbitral process. He also submitted that ***Section 7 of the Arbitration Act***, which may only be invoked through a miscellaneous application, was misapplied, with the result that Kuria's suit which was commenced by Plaint, was allowed to proceed contrary to express agreement between the parties that they should resort to arbitration. In his view, the proviso to ***clause 24.1*** (supra) meant no more than what ***Section 7 of the Arbitration Act*** itself provided, and indeed reproduced the same terminology. The refusal by the High Court to grant stay of the suit would therefore compel Invesco to enter appearance and defend the suit contrary to contractual and legal provisions. The right thing to do, he concluded, was to stay both the suit and the motion that derived its life from it, and allow Kuria to file his application for interim relief when the matter goes to arbitration.

6. On the other hand, learned counsel for Kuria, Mr. Mbugwa, found nothing arguable in the intended appeal. There was nothing wrong in commencing a suit by Plaint and still allowing applications for interim orders to be made. The High Court was right to allow the agitation of the motion for injunction even if the main suit was to be stayed pending arbitration because, in his view, there was an illegality in this case which was about to be committed by Invesco and it has to

be stopped urgently.

7. We have considered the rival submissions on this aspect of the matter and in the end we agree with Mr. Kanjama that the intended appeal is not frivolous. In so saying, we do not assess any chances of success of the appeal since this is the province of the appellate court seized of the matter in due course. The appeal shall revolve around the interplay between ***Sections 6 and 7*** of the Arbitration Act on the one hand, and the express provisions of the contract between the parties relating to their chosen method of resolving their disputes or differences. What procedure was, for example, envisaged under the proviso to ***Clause 24.1*** above and how does the proviso affect, if at all, the rights of the parties under ***clause 24.2*** and ***Sections 7(1)*** of the Act? Does the filing of a Plaint together with a notice of motion seeking interim relief under that suit, invalidate the prayers for interim relief? There are other searching questions raised in the draft Memorandum of Appeal, which in our view, are arguable.
8. The crucial question is whether the success of the intended appeal shall be rendered nugatory if we do not grant stay as sought at this stage? Mr. Kanjama tells us it will. That is because the intended appeal is principally for safeguarding Invesco's contractual right to arbitration which will be lost if the suit before the High Court is allowed to proceed, for then Invesco will be required to file appearance and defence and proceed with the suit. That is the import of ***Section 6 (3)*** of the Arbitration Act. Furthermore, insurance companies are regulated by the Insurance Regulatory Authority and there will be significant effect on Invesco's profitability if the litigation is allowed to proceed in the manner embarked on by Kuria. With an order for stay, which is intended to be obtained on appeal, the parties will go to arbitration and resolve their matters away from public glare. As of now, he contended, Kuria remains removed from the directorship of Invesco until he obtains an injunction to reverse the resolution of the Board.

9. In response, Mr. Mbugwa, retorted that Kuria was still a Director and was invoking an express provision of the agreement between the parties to obtain an injunction. In his view, there was nothing in the motion before the High Court to stop the parties from going for arbitration, whether or not the application was successful. The rejection of this application for stay pending appeal would thus not affect the rights of the parties.

10. We have anxiously considered this aspect of the application and in the end we are not persuaded that the applicant has satisfied the test for grant of stay. Firstly, it is common ground that under the relevant agreement, Articles of Association and the Arbitration Act, there are provisions for resolution of the dispute between the parties through arbitration. The High Court was alive to this when it rejected the application for stay, remarking, thus:-

> *"one way or the other the plaintiff can expect his*
>
> *dispute … to be referred to arbitration".*

Whatever happens before that court will therefore not go beyond consideration of the motion for interlocutory relief. Whichever way it goes, orders may then be given for stay of the main suit and reference to arbitration, failing which this court may do so, if they are warranted, in the course of prosecution of the intended appeal. In the authority cited and relied on by the applicant, ***(University of Nairobi v. K.N Brothers Ltd, [2009] KLR 249),*** the proceedings were commenced by Plaint but that did not stop the court from considering the matter. We are aware that procedure is one of the contentious issues raised in the intended appeal, but it does not detract from the view we hold at this stage, that the High court may consider the application for injunction, which, on the face of it, the parties envisaged under the proviso to ***Clause 24.1***(supra).

11. Secondly, as correctly observed by Mr. Kanjama, the business of insurance is fairly sensitive. All the more reason why the Insurance Regulatory Authority and insured persons should know who the officers of the company are at any one point in time. If the disputing parties cannot quickly resolve issues relating to those officers, the court would consider any interim measures properly sought, pending arbitration. We do not propose to interfere with that process before the High

Court as, in our view, it will not affect the outcome of the intended appeal.

12. For those reasons, we reject the application for stay and order that it shall be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of June, 2014.

P. N. WAKI

…….……..

JUDGE OF APPEAL

R. N. NAMBUYE

……..……..

JUDGE OF APPEAL

G. B. M. KARIUKI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR