IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & J. MOHAMMED, JJA.)

CIVIL APPLICATION NO. NAI 320 OF 2013

BETWEEN

MOHAMMED HASSAN MAALIM……...............1ST APPLICANT

ADAN ABDI ………………………………………………...2ND APPLICANT

GULED HOUSING COMPANY LTD. ……….3RD APPLICANT

AND

GRAVET LIMITED ..……............……………………..........RESPONDENT

*(**An application for stay of execution of the Order and Ruling of the Honourable Justice Mr. J. B. Havelock** dated and delivered at Nairobi Milimani Commercial Courts (Havelock, J.)*

in

HCCC NO.11 OF 2013)

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RULING OF KIAGE JA

By their notice of motion dated 25th November 2013, the applicants seek from this Court the following orders;

"2. THAT this Honourable Court be pleased to issue an order staying the Order and Ruling of the Superior Court (Sic) issued on the 14th November 2013 by the Honourable Justice Mr. J. B. Havelock in High Court Civil Case No.11 of 2013 pending the hearing and determination of an intended appeal.

3. THAT this Honourable Court be pleased to issue an order staying all further proceedings of the Superior Court (sic) in High Court Civil Case NB. 11 of 2013 including the intended arbitral proceedings emanating therein; pending the hearing and determination of an intended appeal."

The ruling and orders sought to be stayed were granted at the instance of the Respondent herein and were succinctly put, to the effect that the 1st and 2nd applicants were restrained by injunction in their personal capacities, and by any person acting for or on their behalf or at their instance, from dealing in any manner with the 3rd applicant's property in the City of Nairobi known as TUSKER HOUSE erected

on L.R. Number 209/798 and L.R. No. 209/6497 pending reference and determination of the dispute between the respondents and the applicants by way of arbitration. The ruling also ordered the matter referred to arbitration in accordance with an arbitral clause in a Shareholders' Agreement dated 1st July 2008.

The Motion is based on some **fifteen** grounds set out on its face and is supported by the affidavit of **MOHAMMED HASSAN MAALIM** expressed as sworn on 25th November 2013. He is the 1st applicant and swore the affidavit as a shareholder and director of the 3rd Applicant and with the authority of its Board as well as of the 2nd Applicant.

The application is opposed by the Respondent by way of a Replying Affidavit expressed and sworn on 2nd December 2013 by **IBRAHIM SUROH ISAACK**. He swore the affidavit as a Director of the Respondent competent and duly authorized by its Board.

Applications for stay of execution and of proceedings such as the one before us are daily fare before this Court. They are so common-place and this Court has pronounced on them on occasions so many that the principles on which they are determined are quite notorious. (**See <u>STANLEY KANGETHE KINYANJUI –VS- TONY KETTER & 3 OTHERS</u> [2013] e KLR)**. I will thus be deliberately brief. The first thing that an applicant must demonstrate is that he has an arguable appeal. By arguable appeal is meant no more than an appeal that raises genuine points of fact or law worthy of exploration by this Court when seized of the appeal itself. Put another way, the appeal should not be one that raises merely frivolous, trifling, speculative, ephemeral, shadowy, chimeric or academic points. The appeal must raise an issue worthy of response from the other side and decision by the Court.

An applicant need not establish any particular number of arguable points: a single one will suffice to trigger this Court's favourable exercise of its unfettered discretion so long as the ends of justice demand it. Thus, a single bona fide ground suffices to entitle an applicant to a stay. See, **<u>DAMJI PRAGJI MANDAVIA –VS- SARA LEE HOUSEHOLD & BODYCARE (K) LTD</u> CIVIL APPLICATION NO. NAI 189 OF 200)**. Such arguable point needs only be just that: arguable. There is no obligation on the part of an applicant to lay before this Court at the stage of considering a stay of execution or stay of proceedings application a ground or grounds that must succeed. See **<u>JOSEPH GITAHI GACHAU 7 ANOR. –VS- PIONEER HOLDINGS (A) LTD & 2 OTHERS GUIL APPLICATION</u> NO. 124 OF 2008.**

Applying the test of arguability to the intended appeal herein, I doubt not that the applicants do have an arguable appeal. Some of the grounds they intend to urge are on the face of the motion and they have also attached to the application a Memorandum of appeal in draft. The grant of the impugned orders by the learned Judge is assailed on multiple prongs including; but not limited to the following points to be canvassed on appeal:

i. Whether injunctive orders of the sort granted could be sought and obtained by a person who is neither a director nor a shareholder in the 3rd applicant company.
ii. Whether the Respondent had the legal capacity or *locus standi* to enforce a shareholder agreement over the 3rd applicant.
iii. Whether it was permissible or prudent to issue such orders implicating the 3rd applicant's obligations to other parties and potentially paralyzing its operations.
iv. Whether the orders granted effectively created the possibility of unconstitutional expropriation of the applicant's private property.
v. Whether the respondent had fully assigned its rights to a third party company and disclaimed any rights to the 3rd applicant's property thereby disentitling it to injunctive relief.

I make no attempt to explore, less still answer any of these questions cognizant as I am that it is for the bench to hear the appeal to address the substance of those issues. It is sufficient for me to find, as I do, that the matters raised by the applicants in their application, which their learned Counsel Senior Counsel

Mr. Abdullahi expounded and elucidated upon before us, cannot be dismissed as flimsy and devoid of substance. They warrant judicial scrutiny in the context of an appeal. I cannot of course be more emphatic than that lest I should embarrass the bench that will have to address its mind to the issue, exhaustively and independently untrammeled by any opinion I might express. Such opinion would be untoward seeing that we are not now sitting to decide the appeal notwithstanding that Mr. Abullahi Senior Counsel and his counterpart Mr. Ouma learned counsel for the respondent did make some quite expansive and elaborate submissions on this aspect of the application.

The second limb of a **Rule 5(2) (b)** application on which an applicant must satisfy the Court before it can be granted an order of stay is that unless the sought order is granted, the applicant's appeal would be rendered nugatory. The two limbs go together and must both be satisfied before the Court can grant stay. An appeal is said to be rendered nugatory when its success is reduced to a worthless and futile attainment by reason of harm, loss or prejudice having occurred in the meantime that robs it of meaning. The applicants contend that the full effectuation of the Ruling of the learned Judge would occasion them loss that would be both irreparable and irrecoverable. They insist that the respondent is not a shareholder of the 3rd applicant quite regardless of the parties having proceeded on the misapprehension that it was. They are adamant that shares cannot be acquired though a shareholders' agreement which is a document that regulates the relationship between persons who are already shareholders but not those who are not. They fear therefore that were the ordered arbitral proceedings to proceed to conclusion absent a stay order, there is every possibility of their property being given to strangers, a matter made all the more grave by the fact that the respondents are seeking 40% stake in Tusker House which is a prime property. They also apprehend loss from the fact that the injunctive orders granted have the effect of wholly paralyzing the 3rd applicant yet it has obligations including a loan that must be paid to First Mercantile Bank, disruption of which by the challenged injunction exposes the applicants to the risk of default and attendant dire consequences.

It seems quite plain to me that the matters which the applicants are apprehensive of are not trifling complaints. Were the process of arbitration to proceed unchecked and interest in the 3rd applicant be allocated in the manner feared by the applicants, the loss would be substantial. I cannot ignore it. I also find that the applicants' concern about the potential for paralysis of the 3rd applicant and the possibility of defaults in financial obligations to third parties are well-founded and sufficient to amount to the appeal potentially being rendered nugatory bearing in mind that the term 'nugatory' has to be given its full meaning. **<u>RELIANCE BANK LTD –VS- NORLAVE INVESTMENT LTD</u> [2002]1 EA 227.**

I have given due consideration to the respondent's contention that the application before us is yet another attempt by the applicants to frustrate the settlement of the dispute by way of arbitration which the parties themselves chose in the Shareholding Agreement. I am however mindful of the not insubstantial argument on the opposite side that the respondent's reliance on the agreement is doubtful by reason of its not having been a shareholder as at the date when the agreement was executed. I, in particular note the letter from the Registrar General dated 10th November 2011 by which he offered a clarification and apology regarding the shareholding of the 3rd applicant the effect of which appears to be that the respondent was not a shareholder. This, together with the disclaimer of any proprietary rights in the suit property by the respondent's shareholders dated 3rd February 2011, leads me to the conclusion that a stay of execution and of proceedings pending the hearing and determination of the intended appeal will conduce to the doing of justice herein.

Mr. Ouma did urge us to accept that there is a third consideration that the Court must bear in mind in dealing with a stay application namely that the respondent will not suffer undue prejudice if the order of stay is granted. **(<u>BALALA & OTHERS –VS- GITHERE & OTHERS</u> [2005]EA 25).** He submitted that a grant of stay herein will occasion the respondent undue prejudice as the hearing of the appeal proper may take a long time while the arbitration process would have brought the dispute herein to a timely conclusion. He urged us to remember that the Constitution enjoins us to be facilitative of alternative dispute resolution mechanisms.

While I have some sympathy for counsel's submissions, I do not see a conflict or contradiction in

granting the orders of stay sought. It is now possible for the hearing of appeals before this Court to be fast-tracked and completed in timely expeditious fashion. I also take the view that the grant of stay orders even when a party alleges applicability of an arbitral process is not at all indicative of antipathy towards ADR. It seem to me that as long as the right of appeal exists from decisions of the High Court, even those such as the one before us, then our Rule 5 (2) (b) jurisdiction can in appropriate cases be invoked and deployed with a view to meeting the ends of justice. This is one such case.

The upshot of my consideration is that the application has merit and is accordingly granted in terms of prayers (2) and (3) of the motion dated 25th November 2013.

Costs shall be in the intended appeal.

As J. Mohammed, JA agrees, it is so ordered.

Dated and delivered at Nairobi this 6th day of June, 2014

P. O. KIAGE

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JUDGE OF APPEAL

RULING OF GATEMBU J.A.

Background

1. By a plaint dated 17th January 2013 the respondent, Gravet Limited, initiated civil suit number 11 of 2013 in the High Court at Nairobi seeking permanent injunctions against the applicants, Mohammed Hassan Maalim, Adan Abdi Musa and Guled Housing Company Limited (the Company) to restrain them from dealing with the Company's property known as Tusker House situated on L. R. No. 209/798 and L. R. No.

209/6497; dealing with shares in the Company and dealing in the Company's bank accounts, amongst other reliefs, pending determination of a dispute between them by arbitration.

2. The respondent's suit was founded on a Shareholders' Agreement dated 1st July 2008 ("the shareholders agreement") made between the applicants and the respondent. Based on the shareholders' agreement the respondent averred that it has 450 shares (or 45% shareholding) in the Company while the 1st and 2nd applicants have 330 shares and 220 shares respectively in the Company (representing 33% and 22% shareholding in the Company respectively). The respondent complained that the 1st and 2nd applicants were in breach of the shareholders' agreement by among other things failing to convene meetings of the Company; excluding the respondent from participating in the Company; ignoring the respondent in the preparation of the budget of the Company; failing to consult the respondent in connection with the affairs of the Company; failing to appoint property manager to manage the Company's property Tusker House situated on L. R. No.

209/798 and L. R. No. 209/6497.

3. In their defence, the applicants denied that the respondent is a shareholder in the Company; that no consideration passed from the respondent to the applicants for the alleged shareholding; that a shareholders' agreement regulates dealings between shareholders' as between themselves and presupposes that the parties thereto are bona fide shareholders which is not the case with the respondent; that the applicants executed the shareholders agreement in the mistaken belief that the respondent would at one time pay for the shares in the Company.

4. The applicants further averred in the defence that the shareholders agreement is incapable of

creating a legally enforceable contract between the parties; that the shareholders agreement is not capable of creating a right and there is accordingly no dispute between the parties capable of arbitration; that no shares were allocated or transferred by the 1st and 2nd applicants to the respondent and the shareholders agreement is not a contract that can form the substratum of a cause of action; that the transfer of shares to the respondent was conditional upon the respondent fulfilling conditions set out in the shareholders' agreement which the respondent failed to do and is in breach thereof; that the dispute was referred to a panel of imminent Somali Elders for arbitration who resolved the dispute between the parties; that the respondent failed to adhere to the settlement agreement reached in that arbitration; that the applicants accepted the respondents' proposal to assign 40% shareholding in the Company to a nominee known as Tymco Trading Company Limited; that respondent did assign its rights to that company

and a sale agreement was entered into between the Company and the said Tymco Trading Company Limited; under which

40% of Tusker House situated on L. R. No. 209/798 and L. R. No. 209/6497 was to be transferred for consideration; and that the respondents' said nominee failed to perform its obligation under that agreement as it failed to pay the agreed amount.

5. Simultaneously with the plaint, the respondent presented a motion to the High Court under section 7(1) of the Arbitration Act, among other enabling provisions, seeking interim measures of protection by way of injunctive relief to restrain the 1st and 2nd applicants; from dealing with Tusker House situated on L. R. No. 209/798 and L. R. No. 209/6497; from dealing in the shares in the Company or dealing in the Company's bank accounts pending reference and determination of the dispute to arbitration. The basis of that motion was that the shareholders' agreement forming the basis of the respondent's claims and complaints against the applicants has provision for reference of any dispute between the parties to arbitration in accordance with clause 23 of the shareholders' agreement.

6. The applicants strenuously opposed the motion contending that the respondent is neither a shareholder nor director of the Company and therefore has no basis for maintaining the claim; that the respondent was by reason of its conduct not entitled to an equitable remedy of injunction; that the test for the grant of the equitable remedy of injunction as set out in <u>Giella vs. Cassman Brown [1973] E A 358</u> was not met; that the shareholders agreement was procured through deceit, fraud, tricks, dishonorable conduct and could not be a basis for a claim or for reference to arbitration; that the rights of third parties not privy to the proceedings would be adversely affected if the orders sought by the respondent in its motion were granted; that an agreement entered on 4th November

2011 subsequent to the shareholders' agreement which provided for arbitration in case of a dispute ousted the provision for arbitration in the shareholders' agreement.

7. After hearing the parties the High Court (the Hon. Mr. Justice J. B. Havelock) in a ruling delivered on 14th November 2013 allowed the respondents' application in terms of prayers 5,6 and 7 of the motion and ordered that:

(a) THAT an injunction be issued restraining the 1st and

2nd Defendants whether by themselves, their agents, employees, assigns, Advocates, servants or otherwise howsoever and any persons whatsoever from selling, disposing, charging, pledging, diluting, dealing, transferring, interfering with and/or intermeddling in any manner whatsoever with the

3rd Defendant's property known as Tusker House

situate and/or located on L.R. Number 209/798 and L.R. No. 209/6497, Nairobi and all the developments thereon pending the intended arbitration and Award pursuant to clause 23 of the Shareholder's Agreement.

(b) THAT an injunction be issued restraining the 1st and

2nd Defendants whether by themselves, their agents, employees, assigns, Advocates, servants or otherwise howsoever and any persons whatsoever from selling, disposing, charging, pledging, diluting, dealing, transferring, interfering with and/or intermeddling in any manner whatsoever with the shares and holding in the 3rd Defendant pending the intended arbitration and Award pursuant to Clause

23 of the Shareholder's Agreement.

(c) THAT an injunction be issued restraining the 1st and

2nd Defendants whether by themselves, their agents, employees, assigns, Advocates, servants or otherwise howsoever and any persons whatsoever from disposing, pledging, alienating, dealing, transferring, interfering with and/or intermeddling in any manner whatsoever with the 3rd Defendant's bank accounts with Barclays Bank of Kenya or any other bank account or the funds, properties or all

other assets belonging to the 3rd Defendant or otherwise disposing of the 3rd Defendant's properties or interests in the properties of any description and wherever situated pending the intended arbitration and Award pursuant to Clause 23 of the Shareholder's Agreement.

8. The learned judge further directed the matter to be referred to arbitration in accordance with the arbitration clause in the agreement with further directions that:

"The arbitrator is to be appointed as provided for under Clause 23.2, 23.3 and 23.4 thereof. Failure by the parties to invoke the said provisions within 15 business days of this Ruling and agree upon an arbitrator, then the Court shall exercise it supervisory jurisdiction and will, on application by either party, direct the Chairman of the Chartered Institute of Arbitrators Kenya Branch to appoint a suitable arbitrator to consider and determine the disputes between the parties."

9. Dissatisfied with that ruling, the applicants intend to appeal to this Court against that decision and have on 15th November

2013 filed a Notice of Appeal.

10.Pending the hearing and determination of the intended appeal the applicants, invoking sections 3A and 3B of the

Appellate Jurisdiction Act and Rule 5(2)(b) of the rules of this Court have applied to stay the orders of the High Court given on 14th November 2013 and to also stay all further proceedings before the High Court in civil suit number 11 of

2013, as well as the intended arbitral proceedings pending the hearing and determination of the intended appeal.

<u>Submissions By Counsel</u>

11.At the hearing of the application before us both parties were represented by learned counsel; Mr. Ahmednassir Abdullahi, SC, represented the applicants. The respondent was represented by Mr. K. Ouma holding brief for Mr. Ochieng' Oduol. Both counsel addressed us at length from their different perspectives on the manner in which we should apply the principles on the basis of which this Court considers applications of this nature.

12.On the question whether the applicants have demonstrated that they have an arguable appeal, Mr. Abdullahi SC submitted that the applicants will demonstrate at the hearing of the appeal that the learned judge of the High Court erred in taking the view that the respondent had *locus standi*, as a shareholder of the Company, to maintain the action; that the mere existence the shareholder's agreement does not confer

proprietary rights on the respondent to own shares in the Company; that the shareholder's agreement is a secondary document and signatories to a shareholder's agreement are ordinarily shareholder's in the company through primary documents such as articles of association; that in this case, the respondent was never a shareholder; that a shareholder's agreement regulates interaction between parties who are already shareholders in a company; that in this case the Shareholder's Agreement was meant to regulate the relationship between the shareholders, a relationship which did not exist because the respondent assumed they were shareholders when in fact they were not; that when the shareholder's agreement was entered into there was no evidence of shareholding by the respondent in the Company and that the respondent failed to produce any primary document as evidence that it was indeed a shareholder.

13.Mr. Abdullahi further submitted that the respondent's case before the High Court mutated in the course of the proceedings from a claim to shareholding based on the shareholders' agreement to a claim for agreement for transfer of shares; that there was a disclaimer signed by Mr. Ibrahim Surow Isaak and Mr. Issak Sheikh Gabow, the shareholders of the respondent, confirming that they had no claim whatsoever to the properties known as LR No. 209/798 and LR No. 209/6467 following a sale agreement between the 3rd applicant and the respondents nominee Tymco Trading Company; that the High Court failed to consider that the dispute between the parties was resolved before the elders and by a third party.

14.Mr. Abdullahi concluded by submitting that the High Court only considered the first limb of the Giella Vs. Cassman Brown (supra) and even then misapplied it. For those reasons, counsel urged us to find that the applicants' intended appeal is arguable.

15.On the question whether the appeal will be rendered nugatory unless we grant the orders sought, Mr Abdullahi submitted that because an arbitrator has already been appointed, the applicants will suffer irreparable loss since the suit properties may be given to parties who have no claim to them and thereby render the appeal academic. Counsel further submitted that if the prohibitory order is not stayed then the business of the Company would be paralysed.

16.Opposing the application Mr. Ouma submitted that there is no dispute that the parties to these proceedings are all privy to the shareholders' agreement as clearly set out in the recital thereof; that in accordance with Clause 23.1 of the Shareholders' Agreement the respondent sought consultation with the applicants without success with the result that it was constrained to invoke the arbitration provision to refer the dispute to arbitration for resolution;that having regard to Article 159(2)(c) of the Constitution of Kenya and S. 10 of the Arbitration Act the Court should be slow to intervene in the arbitration process; Citing the case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR** Mr. Ouma emphasized that the Arbitration Act is a complete code and that no court should intervene in matters before the arbitral tribunal unless as provided for in the Act and further that there is no provision for appeal from decision made under S. 7 (1) of the Arbitration Act.

17.Mr. Ouma went on to stay that the arbitral process has already begun in accordance with the orders given by the High Court; that there is nothing for this Court to stay as regards the process since no rights have been adjudicated upon; that the issues raised by the applicants are the subject of the arbitral process. He stated further that there was a resolution dated 5th August 2008 approving the transfer of shares in the Company to the respondent; that there is confirmation from the Companies' registry that the respondent holds shares in the Company; that there was an agreement between the parties to act in good faith and that steps were taken to give effect to the shareholders' agreement.

18.According to Mr. Ouma, the applicants have not demonstrated that the intended appeal is arguable or that it will be rendered nugatory if the orders sought are not granted; he argued that on the contrary, the respondent would suffer undue prejudice if an order for stay were granted and referred us to the case of **Balala and Others V Githere and others (2005) 2 EA 25** in that regard; that the effect of granting the orders sought will be to delay the arbitral process with the result that the 1st and 2nd applicant will continue to manage the affairs of the Company to the exclusion of the respondent.

19.Regarding the disclaimer by the directors of the respondent, Mr. Ouma said that the same was based

on a transaction intended to dispose the interests of the respondent to another party but that the transaction failed. With that counsel urged the Court to dismiss the application with costs.

Determination

20.The power to grant or refuse relief under Rule 5(2)(b) of the rules of this Court is discretionary and exists in order to ensure that the objective of just and effective determination of appeals is not defeated. In **Equity Bank Limited vs. West Link Mbo Limited Civil Application No Nai 78 of 2011 (Ur.**

53/2011), Githinji JA had this to say:

"It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance…

… It is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

21.The principles on the basis of which the Court is to exercise that discretion are settled. In **Ishmael Kagunyi Thande V HFCK Civil Application Nai No. 157 of 2006** this Court held:

"The jurisdiction of the court under Rule

5(2)(b) is not only original but also

discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory. "

22.Having regard to those principles, is the application before us meritorious? I am mindful that we are not at this stage dealing with the appeal from the decision of the High Court. Having considered the record of the application, the supporting affidavit, the replying affidavit and the submissions by learned counsel and the authorities cited, it is not in dispute that the parties entered into the Shareholders' Agreement. It is also not in contention that the dispute between the parties is based on the shareholders' agreement. In his affidavit in support of the application before us, the 1st applicant deposes that:

"I am advised by my advocates on record, advice I verily believe to be true that the respondent's entire suit and application are premised upon the Shareholder's Agreement dated 1st July 2008."

23.In the shareholders' agreement, which the applicants state is the basis of the dispute between the parties, they clearly chose the forum where any disputes under the agreement would be adjudicated. Clause 23.1 of the shareholders' agreement provides as follows:

"Any dispute, controversy or claim arising out of or relating to this Agreement or termination hereof, or the interpretation, breach or validity hereof, shall be resolved by way of consultation held in good faith between the shareholders. Such consultation shall begin immediately after one Shareholder has delivered to the others written request for such consultation. If within fifteen (15) days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy, claim shall be submitted to arbitration upon request of any of the Shareholders by written notice to the other Shareholders." (Emphasis added).

24.The basis on which the Ruling appealed from is faulted is that the judge erred in granting the injunctions at the instance of the respondent despite the respondent not being a director/shareholder of the Company; that the judge failed to appreciate that the respondent had not prescribed for the shares in

the Company and had no *locus standi* to claim any interest in the running of the Company or to invoke the provisions of the Shareholders Agreement; that the judge failed to appreciate the legal tenor of the shareholders agreement; that the judge erred in direction the matter to arbitration as the respondent is not a shareholder. The thrust of the applicants' complaints therefore is that the respondent is not a shareholder of the Company. Those complaints are matters arising out of or in relation to the Shareholders Agreement.

25.The issues raised by the applicants are in my view clearly within ambit of that dispute resolution clause. The 1st and

2nd applicant terms the Shareholders' Agreement as void *ab initio*. The validity or otherwise of the Shareholders Agreement is itself a matter for adjudication in the forum chosen by the parties under Section 17 of the Arbitration Act. That position is supported by the English case of **Harbour Assurance Co (UK) Ltd Vs Kansa General International Assurance Co. Ltd [1993] 3 All E.R 89**7 to which we werereferred which expounds on the principle of separability as captured in Section 17 of the Arbitration Act which provides:

"(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose -

(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause."

26.Section 7 of the Arbitration Act, under which the court granted the impugned order was designed to enable the High Court to preserve, as it did in this case, the status quo pending arbitration.

27.The issues raised by the applicant to demonstrate that it has an arguable appeal, may very well be arguable but they are not arguable before either the High Court or this Court. They are arguable before the parties chosen forum. As the High Court stated in **Century Oil Trading Company Ltd vs.Kenya Shell Limited:- High Court Misc. Civil Application**

No. 1561 of 2007.

"I think it is now trite that where parties have agreed to resolve a dispute arising out of a commercial agreement by arbitration, the courts are required to give effect to the wishes of such parties by enabling the parties to conclude with finality the determination of the dispute by arbitration."

28.This Court in **Kenya Shell Ltd v. Kobil Petroleum Ltd**

[2006] 2KLR 251 had this to say:

"***Arbitration is one of several dispute resolution methods that parties may choose to adopt outside courts in the country. The parties may either opt for it in the course of litigation ….. or provide for it in contractual obligations in which event the Arbitration Act no. 4 of 1995 (the Act) would apply and the courts take a back seat. In the matter before us, the parties had an arbitration clause and therefore the Act applies. The Act which came into operation on***

2nd January 1996 and the rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act; the finality of disputes and a severe limitation of access to the courts."29.In this case the High Court did no more than give effect to the wishes of the parties as expressed in clause 23 of the shareholders' agreement by referring the parties to their chosen forum for adjudication of disputes under the shareholders'

agreement.

30.For those reasons, I would dismiss the application. However as the majority Hon. Mr. Justice P. O. Kiage and the Hon. Lady Justice J. Mohammed are of a contrary view, the orders shall be as proposed by the majority.

Dated and delivered at Nairobi this 6th day of June, 2014.

S. GATEMBU KAIRU

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JUDGE OF APPEAL

RULING OF J. MOHAMMED, JA

I have had the opportunity to read in draft the Ruling of *Kiage, JA* and I do agree with it entirely in its entirety. The orders of the court shall therefore be as proposed by *Kiage, JA*.

Dated and delivered at Nairobi this 6th day of June, 2014

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR