



**REPUBLIC OF KENYA**

**Court of Appeal at Nairobi**

**Civil Application 222 of 2012**

SADRUDIN KURJI ..... 1<sup>ST</sup> APPLICANT

AKBAR KURJI ..... 2<sup>ND</sup> APPLICANT

**AND**

SHALIMAR LIMITED ..... 1<sup>ST</sup> RESPONDENT

SAZ CATERERS LIMITED ..... 2<sup>ND</sup> RESPONDENT

ZULFIKAR RAHEMTULLA ..... 3<sup>RD</sup> RESPONDENT

**(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi in Milimani (Mutava, J.) dated 19<sup>th</sup> July 2012 in Nairobi Misc. Cause No. 59 of 2003)**

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**RULING OF THE COURT**

1. The applicants’ application dated 24<sup>th</sup> August, 2012 was brought under **Rule 5 (2) (b)** of the **Court of Appeal Rules** and seeks the following

prayers:

**(a) The execution of the decree in HCCC Misc. Cause No. 59 of 2003 at Milimani Nairobi pursuant to the ruling dated 19<sup>th</sup> July, 2012 be stayed until the applicants’ intended appeal is heard and determined.**

**(b) That the costs of this application be provided for.”**

2. In the impugned ruling, Mutava, J. dismissed the applicants’ application dated 2<sup>nd</sup> October, 2003 which was seeking orders for review or setting aside of a ruling delivered on 13<sup>th</sup> March, 2003 vide which the court had entered judgment in terms of an arbitral award in favour of the respondents.

3. In the High Court the applicants had argued, *inter alia*, that they were not given an opportunity to be heard in the application for the enforcement of the arbitral award contrary to mandatory provisions of the law and rules of natural justice. They also contended that there was an error on the face of the record as judgment was entered in terms of the award when the claimants had not obtained leave of the court to

enforce the award as a decree.

4. Having considered the averments in the affidavits that had been filed by all the parties as well as submissions by counsel, Mutava, J. was satisfied that the respondents had complied with the relevant provisions of **Sections 35 and 36 of the Arbitration Act** in making the application for enforcement of the arbitral award and dismissed the application for review of the said ruling. The applicants were dissatisfied with that finding and preferred an appeal to this Court.

5. As at July 2010 the respondents were demanding a sum of **Kshs.80,365,548/15** being the fruits of the judgment flowing from the arbitrator's award.

6. When the applicants' application came up for hearing before this Court, **Mr. Chacha Odera**, learned counsel for the applicants, submitted that his clients have an arguable appeal and that the judgment sum is so substantial that paying it over would cause severe hardship to the applicants yet there was no hope of recovering the same in the event that the appeal succeeded. He added that unless the order of stay of execution is granted the intended appeal, if successful, would be rendered nugatory.

7. Mr. Odera highlighted some of the issues that will be raised in the appeal to demonstrate that the same is arguable. He stated, *inter alia*, that the learned trial judge erred in law in failing to appreciate that a party filing an arbitral award is required under **Rule 5 of the Arbitration Act** to give notice to all parties of the filing of the award, giving the date thereof and the cause number and the registry in which it has been filed and to thereafter file an affidavit of service.

8. He further submitted that the learned trial judge misinterpreted the provisions of **Sections 35 and 36 of the Arbitration Act**.

9. Regarding the decretal sum payable, Mr. Odera told the Court that the current amount was in excess of Kshs.140 million and the respondents had not demonstrated to this Court that they would be able to pay it back if the appeal succeeded. In his view, the respondents bore the burden of proof regarding their ability to refund the decretal sum if the same were to be paid out and the appeal eventually succeeds. He cited the provisions of **Section 112 of the Evidence Act**.

10. Mr. Odera finally contended that the Court, in determining this application, ought to secure the interests of both parties and to that end he told us that the applicants are prepared to provide a bank guarantee in the sum of Kshs.15 million as a condition for grant of the orders sought.

11. Responding to the application, **Mr. Kiragu Kimani**, learned counsel for the respondents, conceded that the intended appeal was arguable, pointing out that it is important that this Court pronounces itself on the appropriate procedure for enforcement of arbitral awards.

12. Mr. Kimani however disagreed with the applicants' contention that the appeal would be rendered nugatory if stay of execution of the High Court ruling is not granted as prayed. In his view, what is sought to be executed is a monetary decree and the appeal cannot be rendered nugatory by payment of the decretal sum.

13. He added that the respondents are capable of refunding the decretal sum in the event that the appeal is successful. He added that the onus is on the applicants to show that the decretal sum, if paid, would not be recoverable from the respondents. He cited this Court's decision in **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION LIMITED vs. DABER ENTERPRISES LIMITED, Civil Application No. NAI 223 of 1999 (Unreported)**.

14. Regarding the aspect of balancing the interests of both parties as proposed by Mr. Odera, Mr. Kimani submitted that it would be reasonable for this Court to direct that the applicants do deposit one third of the decretal sum in an interest earning account in the joint names of the advocates for the parties. In support of that submission he cited this Court's decision in **NAIROBI CITY COUNCIL vs. QUARDOBA ENTERPRISES LIMITED, Civil Application No. NAI 95 of 2001 (UR.56/2001)**. In

that case, the High Court had awarded damages in favour of the respondent amounting to Kshs.30,096,100/=. In an application for stay of execution pending hearing and determination of the applicant's intended appeal, this Court granted stay of execution on condition that the applicant deposits a sum of Kshs.10 Million within 30 days of its ruling in an interest bearing account in the joint names of the advocates for the parties.

15. We have considered the submissions made by the respective advocates for the parties in this matter. It is now settled law that for an application for stay of execution pending an intended appeal to succeed, the applicant must not only show that he has an arguable appeal but also that unless stay is granted the appeal or intended appeal, if successful, will be rendered nugatory.

16. In this application we need not consider whether the applicants have satisfied the first condition in view of Mr. Kimani's welcome concession that the appeal is arguable. We will therefore proceed to consider the second condition, that is, whether the intended appeal, if successful, will be rendered nugatory if stay is not granted.

17. In the affidavit sworn by the 1<sup>st</sup> applicant in support of this application, at paragraph 16.1 he deponed that:

**“As at July 2010, the respondents’ counsel were demanding arising from the arbitrator’s award a sum of Kshs.80,365,548/15....The said sum is substantial and paying it over will cause severe hardship to the 2<sup>nd</sup> applicant and I without any hope of recovering the same should our appeal succeed.”**

18. There is no evidence whatsoever that the respondents are incapable of repaying the aforesaid sum if the intended appeal is ultimately successful. We note that according to a statement of account prepared by the respondents and annexed to their replying affidavit that the sum alleged to be due and payable by the applicants as at 31<sup>st</sup> August, 2012 amounted to **Kshs.140,329,399.50**.

19. We would agree with Mr. Odera that in determining the applicants’ application the Court must balance between the interests of both parties. The applicants’ contention is that the respondents will not be able to refund the judgment sum or a reasonable portion thereof if the intended appeal is successful but they did not adduce any evidence in support of that contention. Mr. Odera submitted that the onus of proving that they are indeed capable of making such a refund lies on the respondents whereas Mr. Kimani submitted that the burden of proof is upon the applicants.

20. **Section 112** of the **Evidence Act** states as follows:

**“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

We understood the applicants’ counsel to be saying that since it is only the respondents who know their true financial position, their financial ability to repay the judgment sum is a fact which is within their knowledge and therefore they ought to prove to the court that they can indeed refund the judgment sum if the appeal were to succeed.

21. On the other hand, the respondents have contended that since it is the applicants who are alleging that they (the respondents) are incapable of refunding the judgment sum, they bear the burden of proof.

22. The applicants in this matter did not allege that the respondents have no known assets. The applicants merely stated that there would be no hope of recovering any money that they may be required to pay to the respondents should the appeal succeed. On their part, the respondents stated in their replying affidavit that they own substantial assets and will be able to reimburse the judgment sum if the appeal were to succeed. They further stated that during the pendency of the matter in court the applicants have transferred their assets, including shares in companies and immovable property, to avoid satisfying any decree that may be passed against them.

23. However, we do appreciate that a sum of Kshs.140,329,399.50 which is being demanded by the respondents is a colossal sum and if the applicants are ordered to pay the same they may experience severe hardship in raising it.

24. In our view therefore, the order that we think truly balances the interests of both parties in this matter is to order, which we hereby do, stay of execution of the decree in HCCC Misc. No. 59 of 2003 pending hearing of the intended appeal on condition that the applicants do deposit, within a period of thirty (30) days from date of this ruling, a sum of **Kshs.40 million** in an interest earning account in the joint names of the advocates for the parties. The applicants will also bear the costs of this application.

**DATED and DELIVERED AT Nairobi this 21<sup>st</sup> day of February, 2013**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

.....  
**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**