REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 217 of 2011

JARIBU CREDIT TRADERS LIMITED.....1ST APPLICANT

SURESH NANALAL KANTARIA.....2ND APPLICANT

KEVAL NANALAL KANTARIA.....3RD APPLICANT

AND

BLUE LIMITED.....RESPONDENT

(An application for stay pending the determination of an intended appeal against the ruling and

decree of the High Court ofKenya at Nairobi (Koome & Kihara Kariuki, JJ.) dated 24th November, 2010

in

H.C.C Misc. Appl. No. 122 of 2010 & H.C.C.C. No. 151 of 2010 (Consolidated)

(Formerly H.C.C.C. No. 790 of 2009)

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RULING OF THE COURT

By a motion dated 8th September, 2011 and filed on 9th September, 2011, the applicants applied under ***Rule 5(2) (b)*** of the Rules of the Court for an order of stay of execution of the decree of the High Court dated 3rd December, 2010 pending the hearing and determination of an intended appeal against the decree. The applicants also prayed for an order that the costs of and incidental to the application do abide with the result of the intended appeal.

The grounds upon which the motion was based were that the applicants had valid grounds of appeal with prospects of success and that unless stay of execution of the decree was ordered, the applicants stood to suffer substantial loss and irreparable damage.

The motion was supported by an affidavit sworn on 8th September by Keval Nanalal Kantaria, the 3rd applicant who is also the Managing Director of the 3rd applicant. The respondent resisted the motion through an affidavit sworn on 5th October, 2011 by ***Philip Muturi Mwangi***, a director and deputy chief executive officer of the respondent.

Conscious that at this stage we are not dealing with the merits of the intended appeal, we nevertheless feel that it is necessary to set out the full history of this litigation, if for no other reason, to illustrate the dire consequences visited upon investment and potentially good business projects by unbridled litigation. As disclosed in the affidavits of the applicants and the respondent, this litigation has a sad and tortuous history that begins within a Sale of Business Agreement (h*ereafter SBA*) dated 27th August, 2007 between the applicants and the respondent. By that agreement, the 1st applicant sold its hire purchase business including the deduction codes, debtors' books and goodwill to the respondent for US$ 1,600,000. Clause 14.2.1 of the agreement was on dispute resolution and provided that any dispute arising out of or in connection with agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules (LCIA). The LCIA Rules were deemed to be incorporated by reference into clause 14.2.1 and the number of arbitrators was set at three.

Disputes soon arose between the parties and henceforth it has been one suit after another, one application after another. The respondent was the first off the blocks. On 20th March 2008 the respondent invoked the arbitration clause in the SBA and submitted a request for Arbitration to the London Court of International Arbitration, thus launching ***London Court of International Arbitration Case No. 81039, Blue Limited vs. Jaribu Credit Trader Limited & 2 Others***. The respondent followed this up on 27th March, 2008, with **N*airobi High Court Civil Suit No. 157 of 2008*** in which it sought an injunction to restrain the 1st applicant from dealing with or disposing of the debtors' book files without its consent, and interfering with the respondent's business in Kenya. An order was also sought to compel the 1st applicant to deliver to the respondent the debtors' book files or in the alternative an order to secure such files pending the hearing and determination of the arbitration proceedings. On 22nd October, 2008, the High Court substantially granted the orders sought.

The 1st applicant responded by filing a notice of appeal against the said orders and followed it up immediately with an application in this Court for stay of execution of the orders of the High Court pending the hearing and determination of the intended appeal. On 13th May, 2009 the application was adjourned to await the outcome of the arbitration. That application is still pending before this Court and certainly counts among the "*backlog*" clogging the Court.

On 8th April, 2008 the 1st applicant commenced judicial review proceedings in the High Court ***(Judicial Review Application No. 165 of 2008***), seeking an order of prohibition against the Permanent Secretary, Ministry of State for Public Service to stop the transfer of deduction code 0008 to the respondent. As is evident from Schedule 2 of the SBA, this was one of the deduction codes, the subject of the SBA. This application was withdrawn on 21st October, 2008.

On 22nd May, 2008 in accordance with the arbitration clause in the SBA, LCIA appointed three members of an arbitration tribunal to hear and determine the dispute. The arbitration tribunal published its award on 12th October, 2009 with the following holding:

A. *The SBA and the arbitration agreement contained therein are valid and binding.*

B. *The first applicant must immediately transfer all codes listed in Schedule 2 to the SBA, dated 27 August, 2007 to the respondent.*

C. *The first applicant must also immediately transfer the debtors' book of the hire purchase business, the sale of which is the subject of the SBA, together with all the information regarding the debtors' book that the respondent will require to collect on the said debtors' book which information is to consist of the full names, identification numbers, outstanding balances and debtors' employment details.*

D. *The first applicant must immediately stop collecting any payments under the codes listed in Schedule 2 to the SBA, forthwith.*

E. *The first applicant must immediately stop collecting any book debts listed in the debtors' book of the hire purchase business, the sale of which is the subject of the SBA, forthwith.*

F. *The first applicant must render to the respondent within 30 days of the date of the award a true and proper statement of account of all amounts collected under the codes listed in Schedule 2 of the SBA from 1st October, 2007 to date, along with all substantiating documents that will allow a debatement of such accounts.*

G. *The first applicant must debate the said accounts with the respondent within 30 days of rendering the same in terms of Paragraph F above.*

H. *On conclusion of the debatement of the account, all payments collected by the first applicant under any of the codes after 1st October 2007, are to be set-off against the outstanding purchase price of $500,000-00 owed by the respondent to the first applicant. Whichever party is found to owe money to the other after such set-off is to make payment of that money to the other party within 30 days of the conclusion of the debatement of the account.*

I. *The applicants must, jointly and severally, pay to the respondent £73,451.99 at the costs of the arbitration and $45,400.29 as legal costs.*

J. *All other claims made by any of the parties are rejected.*

On 4th December, 2009, barely two months after the award, the 1st applicant filed in the ***High Court at Milimani Civil Suit No. 882 of 2009***. The 1st applicant pleaded the arbitral award and on the basis of the award, sought among other things a declaration that the respondent was not entitled to deductions held by employers that were ***NOT*** listed in Schedule 2 of the SBA. In effect, the 1st applicant was saying, just like in the arbitral award, that the respondent was entitled only to deductions held by employers listed in Schedule 2 of the SBA. The 1st applicant filed in the suit an application under certificate of urgency seeking an injunction to stop the respondent from collecting the debts listed in the debtors' book of the hire purchase business. Why this suit was necessary in view of the terms of the arbitral award is not clear. Suffice it to say that neither the ***Civil Suit No. 882 of 2009***nor the application for injunction has been prosecuted and to date they are still pending before the High Court.

The next matter in this saga was **High Court Miscellaneous Civil Application No. 790 of 2009** filed by the respondent on 15th December 2009 at the Central Registry in Nairobi. The application was taken out under ***Section 36(1)*** of the Arbitration Act, 1995 and prayed for adoption of the arbitral award by the High Court and leave to enforce the same as a decree of the court. The applicants responded by filling a separate application, **H*igh Court Civil Application No. 122 of 2010*** at Milimani Court on 8th February, 2010 to set aside the arbitral award. This application was being filed almost five months after publication of the arbitral award and nine days before the hearing of the application to enforce the award. The grounds relied upon to set aside the arbitral award were that the arbitration panel had misconducted itself by applying South African law rather than Kenyan law as provided in the SBA; the award was contrary to public policy in Kenya and that the award was incapable of enforcement as a decree of the court because of its ambiguity, unclarity, uncertainty, impossibility of enforcement and further that the award required enormous expenses to comply with, affected third parties not involved in the arbitration and its enforcement required strict supervision by the court.

The respondent's application to enforce the award came up for hearing on 17th February, 2010, and the High Court ordered the application transferred to Milimani Commercial Court for hearing and determination. At Milimani Court that matter became ***Miscellaneous Civil Application No. 151 of 2010.*** Subsequently the applicants' ***Application No. 122 of 2010*** for setting aside the award and the respondent's ***Application No. 151 of 2010*** to enforce the award were consolidated.

The two consolidated applications were heard by *Koome J* (*as she then was*) on 20th July 2010 and on 3rd December 2010, the ruling was delivered on behalf of *Koome J* by *P K Kariuki* (*as he then was*) who also

duly countersigned it.

The court dismissed the applicants' application to set aside the arbitral award with costs and allowed that respondent's application for adoption and enforcement of the arbitral award as a decree of the court. In arriving at that order the court found that whereas the SBA provided that the agreement shall be governed by and construed in accordance with the Laws of the Republic of Kenya, the applicants had willingly submitted themselves to and participated in the arbitration without raising any objection regarding the applicable law. The court also found that the applicants had not demonstrated which particular holding in the arbitral award was contrary to the laws of Kenya.

On the issues of the award being contrary to public policy, or the award being incapable of enforcement as a decree of the court because of its ambiguity, unclarity, uncertainty, impossibility of enforcement and all that, the court held that this had not been demonstrated and that the applicants "merely threw the issue to the court." The court also found that the application was filed outside the period of three (3) months provided for under ***section 35(3)*** of the Arbitration Act. Lastly the court held that the applicant had in any event acknowledged the arbitral award in ***High Court Civil Case No. 882 of 2009***.

Upon dismissal of their application, the applicants applied for and obtained leave to appeal to this Court.

On 8th December, 2010, the applicants filed a Notice of Appeal against the said ruling of the High Court. This was followed by a Notice of Motion filed in the High Court on 11th January, 2011 whose main prayers were for stay of execution of the decree and stay of proceedings including debatement of accounts pending the hearing and determination of the intended appeal.

That Motion was heard by *Njagi J* who on 5th July, 2011 dismissed the same as far as it related to stay of execution and stay of proceedings.

So it is that the current application was filed in this Court on 9th September, 2011.

At the hearing of this application ***Ms Onyinkwa*** for the respondents contended that no appeal lies against the decision of the High Court because the arbitral award was final and binding on all the parties. For that proposition, she relied on ***Section 32A*** of the Arbitration Act, the Memorandum of Objects and Reasons in the Arbitration (Amendment) Bill, 2009 which introduced ***Section 32A*** and the case of ***Anne Mumbi Hinga vs. Victoria Njoki Gathara Court of Appeal at Nairobi, Civil Appeal No. 8 of 2009.***

Ms Onyinkwa's objection must fail for two reasons. First, ***Section 32A*** of the Arbitration Act provides that "Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act." (*emphasis added*). ***Section 35*** of the Act provides instances when recourse may be had to the High Court to set aside an arbitral award. These instances include where the High Court finds that the award is in conflict with the public policy of Kenya. The applicants' application dated 8th February 2010 seeking to set aside the arbitral award contended that the arbitral award was contrary to the public policy of Kenya. That brought the applicant within the provisions of ***Section 35***. As noted earlier, upon dismissal of the application, the applicant sought and obtained the leave of the High Court to appeal to the Court of Appeal. The applicants are seeking to challenge the decision of the High Court which was properly before the High Court under ***Section 35*** (*except in relation to the separate question whether the application was brought within the prescribed time*).

Second, the decision of this Court in ***Anne Mumbi Hinga vs. Victoria Njoki Gathara***does not assist the Respondent because in that case the Court of Appeal was considering an intended appeal from a decision of the High Court declining to set aside an arbitral award for alleged lack of service. The Court of Appeal held that under ***Section 35*** of the Arbitration Act, "*failing to serve any process after an award has been made, is not one of the grounds for setting aside an award or any subsequent judgement or decree*" and that the High Court should not have entertained the application in the first place. In short, in ***Anne Mumbi Hinga vs. Victoria Njoki Gathara*** the applicant had not brought herself under ***Section 35*** of the

Arbitration Act, while the present applicant's were properly before the High Court (*again, save for the question whether the application was brought within the prescribed time*).

In determining this application, we are required to satisfy ourselves that the applicants have an arguable appeal or an appeal that is not frivolous and whether refusal of an order of stay would render that appeal nugatory if it is eventually successful.

The applicants do not present a draft memorandum of appeal setting up the intended grounds of appeal. However, ***Mr. Murugara*** for the applicants relied on the affidavit sworn by ***Keval Nanalal Kantaria***, the 3rd applicant on 8th September, 2011 to demonstrate that the appeal is arguable. Paragraph 23 of the affidavit lists the grounds as:

(a) *The learned judge erred in law and in fact in disallowing the applicant's application.*

(b) *The learned Judge erred in finding that the applicants' application had been filed out of time while this was not the case.*

(c) *The learned Judge erred in law and in fact in finding that the arbitral award was capable of being enforced in Kenya, which is not the case.*

One of the issues in the intended appeal is whether the application to set aside the arbitral award was filed out of time. The arbitral award is dated 12th October, 2009 and not 9th November, 2009 as alleged by the first applicant. There is no dispute that the first applicant was represented in the arbitral proceedings in Johannesburg, South Africa, by two Advocates. The affidavit of the third applicant merely states that he was informed by one of the Advocates who represented the first applicant at the arbitral proceedings that the advocate got the arbitral award by email on 9th November 2009 and by post on or about 10th November, 2009. This being a central issue of controversy, it would have been expected that an affidavit by the advocate would have been filed. As it is, what is presented to show an arguable appeal is only the bare assertion of the third applicant which was hotly contested by the respondent.

The other issue in the intended appeal is whether the arbitral award is contrary to public policy in Kenya and is capable of being enforced. Before this Court the applicants have not done any better than they did before the High Court where they are said to have merely thrown the issue at the court. The pleadings of the first applicant in ***High Court Civil Case No. 882 of 2009*** acknowledged and recognize the arbitral award save for the codes not listed in Schedule 2 of the SBA.

In ***Kenya Shell Ltd vs. Kobil Petroleum Ltd (2006) eKLR*** this Court considered the circumstances under which an arbitral award may be set aside for being contrary to public policy in Kenya. In our considered view the arbitral award was not contrary to public policy, but that is an issue to be canvassed at the hearing of the appeal.

Taking all these matters into account, we are not satisfied that the applicants have presented an arguable appeal or an appeal that is not frivolous.

Accordingly the Notice of Motion dated 8th September, 2011 is hereby dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 1st day of March 2013

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR