



**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: OMOLO, O'KUBASU & NYAMU, J.J.A.)**

**CIVIL APPLICATION NO. NAI 229 OF 2010**

**BETWEEN**

**TANZANIA NATIONAL ROADS AGENCY ..... APPLICANT**

**AND**

**KUNDAN SINGH CONSTRUCTION LIMITED ..... 1<sup>ST</sup> RESPONDENT  
KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

***(Being an application for injunctive orders pending the filing, hearing and determination of intended appeal against the ruling of the High Court of Kenya at Mombasa (Azangalala, J.) dated 29<sup>th</sup> July 2010***

***in***

**H.C.C.C.NO.8 OF 2010**

**\*\*\*\*\***

**RULING OF THE COURT**

This is an application for injunctive orders pending the filing, hearing and determination of intended appeal against the ruling of superior court at Mombasa (***Azangalala, J.***) delivered on 29<sup>th</sup> July 2010.

It is a bulky application which consists of five volumes almost the size of a mini fridge! However for the purpose of this application we have only focused on the central issues which we consider relevant to a determination under ***rule 5(2) (b)***, upon which this application is grounded.

The genesis of the dispute is that on the 1<sup>st</sup> August 2007 the applicant, Tanzania National Roads Agency, a Tanzanian legal entity and the 1<sup>st</sup> respondent ***Kundan Singh Construction Ltd*** a Kenyan Contracting Company, entered into a contract in the FIDIC form of contract for carrying out of the upgrading of ***Mbeya – Chunga Makongolosi Road section 1 Mbeya – Lwanjiyo*** (36km) to a bituminous standard. Pursuant to the said contract the 1<sup>st</sup> respondent company caused the second respondent Kenya Commercial Bank to execute three Guarantees in favour of the applicant as follows:-

**1) On 1<sup>st</sup> August 2007 Bank Performance Guarantee No GOKE860460 77250C for Tshsh, 2,746,387,50000 (APG).**

**2) On 6<sup>th</sup> September 2007 Advance Payment Guarantee No. GOK E 8604077397C for USD**

3,478145 (APG2).

3) On 6<sup>th</sup> September 2007 Advance Payment Guarantee No.GOKE86046077398C for Tshs.1,098555999(APG).

It is not in dispute that after the execution of the FIDIC contract certain disputes and differences did arise concerning the contract entered into by the parties and that those differences were in accordance with the provisions of the contract referred to arbitration of the Stockholm Chamber of Commerce in or about April 2009 and that pursuant to the said referral an arbitral award is expected to be given by May 2011.

On 12<sup>th</sup> March 2009, the 1<sup>st</sup> respondent filed Milimani Commercial Court Civil Case No. 164/09 Kundan Singh Construction Ltd v Chief Executive Tanzania National Roads Agency and Kenya Commercial Bank Limited (the Milimani case). On 23<sup>rd</sup> March 2010 the applicant filed Mombasa Commercial Court Case No. 8 of 2010 under the title – Tanzania National Roads Agency v Kundan Singh Construction Ltd and Kenya Commercial Bank Ltd (the Mombasa Case). In the Milimani case the learned Judge (Apondi, J.) restrained the applicant herein from making any demands on the guarantees executed in favour of the applicant by the bank or repossessing any of the 1<sup>st</sup> respondent's assets and machinery the subject matter of a debenture in favour of the 2<sup>nd</sup> respondent. In the Mombasa case, the applicant herein had sought, inter-alia, to enforce the guarantees executed by the 2<sup>nd</sup> respondent in its favour and for damages in breach of contract. In the suit the 1<sup>st</sup> respondent was sued in its capacity as the principal debtor and the 2<sup>nd</sup> respondent bank was sued in its capacity as a guarantor. Following the filing of a chamber application by the 1<sup>st</sup> respondent the learned Judge (Azangalala, J.) stayed the Mombasa suit in these terms:-

***“I have however held that the parties herein are the same as the parties litigating in the Milimani case. The issues raised in both suits are the same or substantially the same and that the 1<sup>st</sup> respondent's additional claims could have been raised in the Milimani case. Having so found, the provision of Order XI Rule 1(a) and (b) of the Civil Procedure Rules and section 6 of the Civil Procedure Act are pertinent. The latter reads as follows:-***

***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit or proceeding is pending in the same or in any other court having jurisdiction in Kenya to grant the relief claimed.”***

It is also common ground that in the Milimani injunction order no reference was made by the learned Judge (Apondi, J.) to **section 6** of the Arbitration Act of Kenya 1995 and this is apparent from the contents of the order as extracted. As is well known section 6 of the Arbitration Act provides the basis for stay orders in arbitration matters. The superior court, (Apondi, J.) invoked the Civil Procedure Act and the rules when granting the order.

The application filed in respect of the Milimani suit sought injunction orders in these terms:-

***1. That pending the hearing and determination of the intended appeal the respondents by themselves, their servants, agents and or assigns be temporarily restrained from discharging the securities created over the following properties in favour of the 2<sup>nd</sup> respondent namely:-***

***a) LEGAL CHARGE OVER LR NO.336/108 I.N.O. KUNDAN SINGH CONSTRUCTION LIMITED for Kshs.250,000,000/-.***

***b) Legal charge over LR No.19885,19886, and 19887 I.N.O. Vista Windows Limited FOR***

*Kshs.231,500,000/-.*

- c) Legal charge over LR No.194/48, Nairobi, I.N.O. Kundan Singh Ubhi for Kshs.50,000,000/-.*
- d) DEBENTURE for Kshs.600,000,000/- over the entire assets of Kundan Singh Construction Limited.*
- e) Guarantee and indemnity by Highland Cannery for Kshs.2.45 billion supported by a board resolution.*
- f) Directors guarantees and indemnity for Kshs.2,452,285,786/-.*
- g) Motor vehicles and Log Books registered in joint names of Kundan Singh Construction Limited and Kenya Commercial Bank Limited and the respective transfer forms signed in blank.*
- h) Comprehensive Insurance Cover over the entire assets including the assets being purchased with Kenya Commercial Bank Limited noted as the loss payee.*

It is apparent that no reference was made to the existence of any arbitration agreement between the parties to the FIDIC contract. It is not in dispute that the three guarantees were issued by the Bank in favour of the applicant on the strength of the securities set out in (a) to (h) above, and the central theme of the above prayer is that the securities should not be discharged until the suit is heard and determined by the superior court. The order was directed to the applicant and the bank.

The applicant came to this Court aggrieved by the stay order obtained against it in the Mombasa case, where the applicant is restrained from enforcing the Guarantees, the debentures and the charges which had been given as securities in support of the performance of the FIDIC contract.

At the hearing of this application the applicant was represented by Mr Joseph Munyithia, advocate and the 1<sup>st</sup> respondent was represented by Mr O.P. Nagpal assisted by Mr R. Nagpal advocate while the 2<sup>nd</sup> respondent was represented by Mr Nyachoti advocate.

Mr Munyithia in his submissions relied on the affidavit in support of the application sworn by Engineer Simon Ngani on 30<sup>th</sup> August 2010. The principal submissions were that the Mombasa suit is different from the Milimani suit in that in the Mombasa suit the applicant seeks the enforcement of the two guarantees as well as damages for breach of contract and the same has been filed against the two respondents herein as principal debtor and guarantor respectively who have in turn filed defences to the suit; that the Milimani court had no jurisdiction in the suit as the applicable law is the Tanzanian law; that the applicant had been barred vide the stay order from prosecuting the injunction application dated 23<sup>rd</sup> March 2010 in the Mombasa case although the two suits raise different issues; that without an injunction order from this Court in place the applicant stands the risk of the securities the subject matter of that application being discharged by the respondents which act would adversely affect the applicant and finally that the overriding objective of this Court is to do substantive justice and the objective could only be attained by granting the orders sought.

On his part Mr Nagpal relied wholly on the replying affidavit sworn by Opkar Singh Ubhi on 24<sup>th</sup> January 2011. The principal submissions were that the stay order obtained in the Mombasa case was justified on the basis of the provisions of **section 6** of the Civil Procedure Act because it was filed after the Milimani case and the parties involved were the same and the issues raised were the same; that it was necessary for the stay order to be imposed until the arbitral proceedings are finalized in May 2011 when an award is expected pursuant to **Clause 67.1** of the FIDIC contract between the parties and in any event the Dispute Resolution Board appointed pursuant to the contract prior to the reference to arbitration had on some disputes found in favour of the 1<sup>st</sup> respondent as against the applicant herein; that the issue of breach of contract is a matter which is presently the subject matter of the Arbitration; that the two guarantees intended to be enforced had expired on 11<sup>th</sup> January 2010; that should the applicant be

allowed to enforce the guarantees the 1<sup>st</sup> respondent's apprehension concerning the supporting securities charged to the 2<sup>nd</sup> respondent bank being realized would become real, although the charges have nothing to do with the guarantees as the charges were contracts between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent bank and they were intended to secure the 1<sup>st</sup> respondent's global funding; that the Mombasa suit constituted an abuse of the Court process in that it was filed after the injunction order in the Milimani suit had been obtained and was filed without making full disclosure of vital matters relating to the Milimani suit including the existence of arbitration proceedings; and that finally in respect of the global funding the 1<sup>st</sup> respondent pays substantial fees to the 2<sup>nd</sup> respondent and therefore the 1<sup>st</sup> respondent is likely to continue to pay the same service fees for securities it could no longer use to secure the global funding facility.

Mr Nyachoti in his brief submission supported the position taken by the 1<sup>st</sup> respondent's counsel and added that since the value of the subject matter was in the region of Kshs.500 million the bank was in a position to repay to the applicant should its appeal finally succeed and therefore the success of its appeal would not be rendered nugatory and consequently the injunction order sought should be declined.

We have considered the affidavits filed on behalf of the parties together with the submissions by the learned counsel.

At the outset we must point out that we did attach a lot of importance to the answer given by the two respondents counsel to the Court's query on whether it was their clients' intention to discharge the securities. Counsel for the respondents gave indications to the Court that their clients had no such intention. We consider this to be a vital concession in that it is a confirmation that the parties did not have major objection to the maintenance of the status quo pending the resolution of the matter either by arbitration or until the appeal against the stay order is finally determined.

It is also our view that it is arguable whether it is legally competent for the applicant in the Milimani case and the 2<sup>nd</sup> respondent bank to obtain injunctive orders against themselves as regards the guarantees and the charges whereas the bank was not a party to the arbitration agreement contained in the FIDIC contract – the FIDIC contract being between the applicant and the 1<sup>st</sup> respondent. In this connection we note that in the final order in the Milimani Court, the injunction order granted was not pursuant to **section 6** of the Arbitration Act.

**Section 6** of the Arbitration states:-

**“6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.”**

**Section 10** of the Arbitration Agreement states:-

**10. Except as provided in this Act, no court shall intervene in matters governed by this Act.**

It is therefore quite evident that the issue as to whether the Milimani Court was entitled to invoke the Civil Procedure Act and rules in a matter where there was an enforceable arbitration agreement and also purport to bind a party namely the bank which was not a party to the arbitration agreement is an arguable point. It seems clear to us also that as regards the Mombasa suit which dealt with the enforcement of the guarantees, its linkage to the FIDIC contract the subject matter of arbitration might not be apparent. Finally, arising from the above analysis it might be arguable if the Mombasa suit and the Milimani suit raise the same issues or that the parties are the same.

Further if as admitted by the 1<sup>st</sup> respondent **sub-clause 67.1** is a valid arbitration clause and all disputes and differences were referable to the arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce, Sweden, the jurisdiction of the Milimani Commercial Court to give the restraining orders against the second respondent bank which was not a party to the FIDIC contract could

yet be another arguable point.

Again whether in the Mombasa suit the Court was entitled to give relief under **section 6** of the Civil Procedure Act in the face of the admission by the two respondents that all the differences and disputes were the subject matter of arbitration instead of proceeding under **section 6** of the Arbitration Act is obviously a moot point. Similarly, it is arguable whether the issue of the enforcement of the guarantees was an arbitrable matter in a situation where the 2<sup>nd</sup> respondent bank was not a party to the FIDIC contract which contained the arbitral clause.

In our view the points identified above cannot be said to be frivolous.

In view of the above, the Court in interpreting and exercising its power under **rules 5(2) (b)** is in our view entitled to cast its net outside the rule so as to do justice in what appears to us to constitute an intricate and complex matter both before us and also before two courts of coordinate jurisdiction in the superior court.

From the above analysis it can be gleaned that as regards the first requirement of arguability we are of the view that the applicant has satisfied the same.

Concerning the second requirement on whether the success of the appeal would be rendered nugatory if we were to decline granting the orders we are of the view that if the securities consisting of charges and a debenture were interfered with, this would in turn affect the 1<sup>st</sup> respondent's ability to discharge its liability under contract as principal debtor because it could in the meantime dispose of the properties before the conclusion of the case instituted in Mombasa for the purpose of enforcing the guarantees. As regards the ability of the 2<sup>nd</sup> respondent bank in its capacity as a guarantor to satisfy the guaranteed amounts we note that the amounts are colossal and although we do not doubt the ability of the bank to satisfy such a claim we are obviously concerned that because of the so called global funding of the 1<sup>st</sup> respondent by the bank the properties if discharged could be put out of reach of the applicant and this could expose the applicant to a greater hardship than any other party in the proceedings. It seems to us inescapable that the tacking of further advances or any fresh borrowings would involve the discharge of the securities and the registration of further charges or variations without the involvement of the applicants while the issue of the validity and enforceability of the guarantee is still pending. On the other hand for now, the bank and the respondent would not suffer any prejudice if an injunction would issue to preserve the securities since it is apparent that the two respondents would like to retain the securities so as to cater for the intended global lendings. In addition, taking a broad view of the complex matter before us we are in the circumstances inclined to think that there is more to this matter than just the success or failure of the intended appeal. On the ground the stay orders has had the practical effect of denying the applicant the right of access to Court or the chance of articulating any of his claims whether right or wrong concerning the guarantees. The right of access to court is in our view priceless and there cannot be a greater hardship to a party than this. As the advocates for the two parties have expressly informed the Court that the parties had no immediate plans to discharge the securities, the balance of convenience in our view does tilt in favour of maintaining the status quo until the determination of the intended appeal. In the result the injunction is granted in terms of prayer one (1) of the application. This is obviously a complex matter involving a non Kenyan entity and for this reason, once the appeal is filed, we direct that it be heard on a priority basis. We order that the costs of this application be in the appeal.

It is so ordered.

***DATED and delivered at Mombasa this 11<sup>th</sup> day of March, 2011.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J.G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**