**IN THE COURT OF APPEAL**
**AT MOMBASA**

**(CORAM: OMOLO, O'KUBASU & WAKI, JJ.A.)**

**CIVIL APPLICATION NO. NAI. 175 OF 2010 (UR. 126/2010)**

**BETWEEN**

**AL. SAI (K) LTD. ……..……. APPELLANT**

**AND**

**SEGWAYS BEACH HOTEL LTD. ……...…… RESPONDENT**

***(Application for an order of stay of execution pending hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Mohamed Ibrahim, J.) dated 10th June, 2010***

***in***

***H.C.C.C. NO. 254 OF 2009)***
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**RULING OF THE COURT**

We have a rather interesting application before us. It is a Notice of Motion expressed as having been brought:-

***"Under Section 3, 3A, 3B and Rule 5(2)(b) of the Appellate Jurisdiction Act."***

In this application the applicant, ***ALSAI (K) LIMITED*** seeks the following orders:-
***"(a) This application be certified urgent and be heard ex parte in the first instance.***
***(b) Pending the hearing and determination of the intended appeal the orders given by the superior court on 10th June, 2010 be stayed:-***

*(i) to the extent that they require the dispute to be referred to the arbitrators.*

*(ii) to the extent that the prohibitory injunction relates to the use of the Chinese kitchen, Chinese restaurant, any television set, any air conditioner, furniture, fittings and kitchen equipment.*

*(iii) to the extent that they require the arbitrators to compete deliberations and submit their award within 90 days from 10th June, 2010.*

The application which is supported by the affidavit of ***SALIM SULTAN MOLOO*** who describes himself as the Applicant's director is brought on the following grounds:-

***"(i) The applicant filed and served a Notice of Appeal under the Rules of the Court.***

***(ii) The applicant has prepared the Record of the Appeal and the Appeal will be filed herewith.***

***(iii) The superior court made conclusive and final findings at an interlocutory stage; that the applicant had taken the law into its own hands; that the termination of the contract was premature, unlawful and wrongful and by so doing severely prejudiced the intended arbitration.***

***(iv) The Judge having wrongfully made conclusive and final findings usurped the powers of the arbitrators and placed the arbitrators and the applicant into an embarrassment as the arbitrators cannot make findings inconsistent with the judge's findings.***

***(v) Though the applicant is willing to participate fully in the intended arbitration justice can only be done by the arbitrators if the premature findings relating to the applicant's conduct are set aside.***

***(vi) The intended arbitrators are unlikely to reach a different finding and are unlikely to straight away make an award against the applicant based on the Honourable Judge's findings.***

***(vii) The Honourable Judge ordered the arbitrators to submit their award within 90 days. Though the appeal will be filed simultaneously with this application the appeal is unlikely to be heard and determined before the 90 days are over.***

***(viii) The Applicant is in real danger of participating in arbitral proceedings that the Honourable Judge has already pre-determined against it. In the event the applicant will have spent time and resources in a process that is flawed before its commencement.***

***(ix) The orders of injunction are wide reaching. Their effect is to restrain the applicant from using a kitchen and restaurant within a beach hotel and at the same time binding the applicant not to remove furniture, fittings and the said kitchen and technically granting to the respondent mandatory injunction that had been denied.***

***(x) The orders given on 10th June, 2010 are oppressive. Though the judge noted that he had the power to go into the hotel and conduct a stock taking to separate forks, spoons, cutlery, bed sheets, blankets, cups, beds e.t.c., the judge failed to carry out the exercise meaning that any bed in the hotel cannot be used while any bed sheet of the respondent remains thereon, any television set or air conditioner that may have been purchased by the respondent cannot be used, removed, repaired or replaced. It is not reasonable for the applicant to install 2 television sets or 2 air conditioners in any particular room.***

***(xi) Though the applicant is anxious to comply with the orders of injunction such compliance is impracticable and failure to comply may expose the Applicant to contempt of court proceedings.***

***(xii) The orders relating to the hotel kitchen and restaurant can only be complied with by the closure of the kitchen and the restaurant. A beach hotel cannot run without these two.***

***(xiii) The intended appeal has overwhelming chances of success.***

***(xiv) The orders sought will not in any manner prejudice the Respondent who had accepted the termination and sought a refund of the deposit and the release of the property the subject of the injunction.***

***(xv) The orders given on 10th June, 2010 relate to a beach hotel. Interruption of the hotel's operations would lead to severe loss not only to the hotel's business but to the hotel's name thereby affecting the hotel's future guests or repeat guests.***

***(xvi) Unless this application is granted the applicant will suffer severe loss and damage that cannot be remedied by any award in damages.***

***(xviii) this application has been filed timeously."***

The background facts to this application are that the parties herein entered into a Management Agreement on *31st May, 2008 in* respect of the running of a hotel located at Bamburi Mainland North Mombasa known as Sai Rock Hotel. The Agreement contained an Arbitration clause in case of any dispute arising between the parties. By a letter dated *30th June, 2009,* the applicant through its advocates terminated the Management Agreement on the following grounds:-

***"i That your three cheques in the aggregate sum of Kshs.2,650,000 in payment of the Management Fee for June 2009 were returned unpaid for reasons that you did not have sufficient funds. This is the third or fourth time that your cheques have bounced.***

***ii You have failed to renew insurance in terms of the agreement dated 31st May, 2008 running the hotel with the insurance.***

***iii You have not paid electricity charges.***

***iv You have not paid for water consumed in the hotel.***

***You cannot expect to operate the hotel without payment of the management fees or insurance. Each of the defaults specified above constitution** (sic) **fundamental breach of the contract dated 31st May, 2008. By a letter dated 29th May, 2009 addressed to your advocates you were duly notified that the insurance policy for the hotel was lapsing on 31st May, 2009. You failed to heed that notice we would refer to our client's letter dated 26th June, 2009 regarding insurance for the hotel. TAKE NOTICE therefore that you are not allowed and will not be allowed into the hotel with effect from 1st July, 2009. You must therefore quit and vacate the hotel premises forthwith. This matter (sic) is issued without prejudice to such options as our client may have against you for antecedent breaches of the said agreement."***

The applicant effected the said one day notice and took over the possession and running of the hotel from the respondent. The respondent was, naturally, aggrieved by the applicant's action and after amicable settlement failed, the respondent filed suit in the superior court. At the same time of filing suit the respondent filed an application under the provisions of the Arbitration Act and ***Order 39 rules 1*** and ***2*** of the Civil Procedure Rules seeking, inter alia, the following orders:-

***"1. ……***

***2. An interim measure of protection by way of or a:-***

*(a) A prohibitory injunction restraining the defendant by itself, its servants and/or agents from using, destroying, disposing, levying, storage or any other charges, or in any other way interfering with the plaintiffs hotel, kitchen equipments, stocks, furniture, fittings, installations in the coffee shop, Chinese Restaurant and/or any other plaintiff's goods pending the hearing and determination of this application, prayer No. 3 herein and/or the suit.*

*(b) A mandatory injunction compelling the defendant by itself, its servants and/or agents to reinstate the plaintiff's back into the suit premises until expiry of the contractual 60 months term or lawful determination pending the hearing and determination of the application, prayer No. 3 herein and the suit.*

*3. That this Honourable Court be pleased to refer this matter to arbitrate to an arbitrator appointed by the Chairman of the Law Society of Kenya.*

*4. Costs. "*

That application was placed before Ibrahim, J. for determination. The learned judge considered the rival submissions presented before him and in a ruling dated and delivered at Mombasa on *10th June, 2010* stated, inter alia:-

***"As a result, since it is the defendant which created the present unfortunate situation through its unlawful and wrongful action, then it cannot be allowed to enjoy any perceived advantages or benefits.***

I therefore do grant the following orders:-

***1. I do declare a dispute has arisen between the parties herein and order that it be referred to arbitration under the Arbitration Act by the joint Arbitrators nominated in the Agreement, namely Mr. Kamal Bhatt and Mr. Vincent Omollo.***

***2. I do hereby grant a prohibitory injunction in terms of prayer A of the Applications pending the determination of the Arbitration proceedings.***

***3. I was inclined to grant the mandatory injunction unconditionally sought by the plaintiff. However, in view of the circumstances and that the premises is a hotel and the agreement clearly shows that the legal possession would remain with the defendant and in view of the potential impact in the long term on the business of the Hotel its image, reputation etc in the delicate, sensitive and competitive hotel industry, it would not be in the interest of either of the parties for such an order. This court apprehends a total closing down or closure of the hotel premises. This would be of no benefit for either of the parties.***

***The court also recognizes that the Agreement herein remains a Management Agreement which was for making of profits. It is not a dispute of ownership or title. Despite the defendant's reprehensive conduct, court orders ought not be destructive. It must be manageable, beneficial and judicious. I have also considered the many employees and staff of the hotel, said to be over 86. I have also considered that upon arbitration the contract has possibility of continuance mutually or through the Arbitration.***

***I decline to grant that order. I therefore do direct that the Arbitrators act with haste and complete their deliberations and submit their award to the parties within a period of 90 days from today.***

***4. The defendants shall pay the costs of the application to the plaintiff."***

The applicant was dissatisfied by the foregoing and, through its advocates, filed a Notice of Appeal intimating that it intended to appeal against the whole of the Ruling of Ibrahim, J. But before that appeal is finally heard and determined, the applicant comes to this Court seeking the orders set out at the commencement of this ruling. That is the application that came up for hearing before us on *20th January, 2011* when Mr. F. Kinyua Kamundi appeared for the applicant, and Mr. Ndegwa appeared for the respondent.

From the submissions of Mr. Kamundi, it would appear that his client's main complaint is that the learned judge of the superior court used inflammatory language and also predetermined the issues in dispute. Mr. Kamundi did not address us on the issue of the intended appeal being arguable and not frivolous.

On his part, Mr. Ndegwa submitted that the intended appeal was not arguable and that even if this application were to be refused the intended appeal, even if successful, would not be rendered nugatory.

As we consider this matter it may be necessary to consider the orders/directions given by the learned judge in his ruling. The first order the learned judge made was to declare a dispute between the parties and went on to order that the dispute be referred to arbitration under the Arbitration Act as

provided in the Management Agreement.

The learned judge then granted a prohibitory injunction in terms of prayer A of the applicant's application in the superior court. The judge further ordered that the legal possession of the hotel would remain with the applicant. The learned judge specifically directed that the arbitration award be submitted within 90 days from *10th June, 2010*. Finally the applicant was penalized by being ordered to pay the costs of the application to the respondent herein.

Those were the orders/directions given by the learned judge. The applicant now comes to this Court seeking orders that the orders of the learned judge be stayed ***"to the extent that they require the dispute to be referred to the arbitrators."***

We have looked at the Management Agreement dated *31st May, 2008* and clause 29 of that Agreement provides:-

***"All disputes arising in connection with this Agreement shall be referred to Arbitration Act of Kenya by one or more arbitrators appointed in accordance with said rules. Mr. Kamal Bhatt and Mr. Vincent Omollo or in their absence or inability to act as arbitrators to a single arbitrator to be appointed by the chairman of the Law Society of Kenya."***

That is what the learned judge ordered and directed that the award be submitted within 90 days from *10th June, 2010*. Instead of going for arbitration the applicant chose to come to this Court vide this application which was filed on *14th July, 2010*. The other relief sought in this application relates to Chinese kitchen, Chinese Restaurant, television set, air conditioner, furniture, fittings and kitchen equipment. We fail to understand how this Court would grant a stay of prohibitory injunction in respect of all these specified items.

Lastly, the applicant seeks an order of stay:-

***"To the extent that they require the arbitrators to complete deliberations and submit their award within 90 days from 10th June, 2010."***

It would appear that the applicant is seeking extension of time in which the award is to be submitted. If such an extension of time is needed, then the Court which referred the matter to arbitration ought to be asked to grant such extension of time in which the award should be submitted.

Having carefully considered the background facts to this application and what has been urged before us, we are of the firm view that this application is devoid of any merit. It is clearly an abuse of the Court process and we have no hesitation in rejecting it. Accordingly, the application is dismissed but with no orders for costs.

***Dated and delivered at Mombasa this 4th day of March, 2011.***

***R.S.C. OMOLO***
**……**
***JUDGE OF APPEAL***

***E.O. O'KUBASU***
**…….**
***JUDGE OF APPEAL***

***P.N. WAKI***
**……..**
***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***