REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 273 of 2008 (UR 178/2008)

KENYA TEA DEVELOPMENT AGENCY LTD.....APPLICANT

AND

J. M. MATHENGE T/A BUILECON ASSOCIATES.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Milimani Commercial Courts) (Khaminwa, J) dated 10th July, 2008

in

H.C.C.C. No. 482 of 2007(O.S.)

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RULING OF THE COURT

This notice of motion under ***rule 5(2)(b)*** of the Court of Appeal Rules was filed in this Court on 14th October 2008. It seeks a stay of execution of the ruling of the superior court (*Khaminwa, J*) in Nairobi *H.C.C.C. No. 482 of 2007(OS) (Milimani)* pronounced on 10th July 2008 pending the hearing and determination of the Appeal in ***Civil Appeal No. 173 of*** *2008*. The grounds on which the application is based are set out on the face thereof, namely, that the learned Judge exercised her discretion wrongly and erroneously and thus arrived at a wrong and erroneous decision. All the other grounds on the face of the application are apparently similar to the grounds appearing in the memorandum of appeal.

There is also a supporting affidavit to the application deponed to by ***Rabecca Mbithi*** an Advocate of the High Court of Kenya and the applicant's head of Legal and Regulatory Affairs which gives the back ground of the case the subject of the application asserting that the appeal has high chances of success. This affidavit also repeats the grounds set out on the face of the application and avers further that if the stay is not granted the appeal will be rendered nugatory because the sum awarded to the respondent in the arbitration award are by any means large and the appellant may be unable to recover it from the respondent if the appeal was successful and also that if the applicant pays over this sum to the respondent it will affect its operations and other constituent tea factories. The deponent avers that the applicant is not aware of any or any sufficient assets which the respondent has that will enable him to refund the decretal sum should the appeal succeed. She avers further that the applicant is a solid corporation which is itself sufficient security for the respondent regarding the award and subsequent decree issued in ***High Court Misc. Cause No. 1059 of 2007 (****Milimani****)*** which award and decree were contested in the applicant's

originating summons in ***Nairobi HCCC No. 482 of 2007(O.S.) (****Milimani****)*** the subject of the appeal filed by the applicant herein.

The respondent ***J. M. Mathenge*** swore and filed a replying affidavit in opposition to the application in which he states that the said application has no merit since ***Civil Appeal No. 173 of 2008*** has been filed without leave of the court and that it raises no arguable grounds and had no chances of success because of the reasons he spells out in paragraph 4 of the affidavit. According to the said affidavit the applicant has not demonstrated how the appeal would be rendered nugatory if the present application was not granted.

This dispute between the parties revolves around fees payable by the applicant to the respondent on account of certain construction and supervisory services rendered by the latter to the former. The parties agreed and appointed *Onesmas Mwangi Gichuiri* and *Adam S. Marjan* as co-arbitrators to resolve the dispute. The co-arbitrators deliberated over the matter and filed the arbitral award dated 17th June, 2007 in court as demonstrated by a notice dated 27th June 2007. Through an exparte chamber summons dated 25th June 2007 and filed in court on 26th June 2007 the respondent applied for a decree to be issued in terms of the aforesaid award; for leave to enforce the decree and for costs to be provided for. The reasons given for the application was that the applicant had failed to settle the award and it would appear all through this court process, the applicant had made no application to set aside the arbitral award.

The award was for the applicant to pay to the respondent a total sum of ***Kshs.14,690,573/08*** within 30 days of the date the same was to be taken up by either party. ***Mr. Mwaniki Mbaka***, learned counsel for the respondent, took up the matter to court on 25th June 2007 and gave notice thereof to ***Mr. Kipkorir Titoo***, learned counsel for the applicant, on 27th June 2007. The applicant did not pay up as stipulated in the award neither did he take any further action, say, to ask for the quashing or setting aside the award. However, later, by an originating summons dated and filed in court on 18th September, 2007 the applicant sought for a court order to quash and/or set aside the arbitrators; award, set aside the application for enforcement of the arbitrators' award and for any further orders as it may deem necessary to grant.

That application was based on the grounds set out on the face thereon namely; that the joint arbitrators exceeded their mandate and made an award that dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration and contained matters beyond the scope of the reference to arbitration; that the award exceeded the scope of the mandate of the arbitrators; that the joint arbitrators misapprehended both the contractual documents and the applicable contract law and failed to appreciate that the parties were bound by their contractual terms; that the award deviated from the respondents' claim; that the computation of the award was erroneous; that the award was against public policy and that, being contrary to the laws of contract and public policy the award was a nullity. The application was supported by an affidavit which outlined the appointment of the respondent by the applicant to provide post contract consultancy services on contract management and administration. The affidavit also chronicled other events leading to the filing of the originating summons.

The respondent then took out a chamber summons under ***Order VI rule 13(1)(b)(c)*** and ***(d)*** of the Civil Procedure rules seeking an order that the originating summons dated 18th September, 2007 be struck out. That matter was heard before the superior court and it is the subject matter of the pending appeal and the application before us. The basis for seeking that order was that the originating summons was filed in violation of ***rule 4(2)*** of the Arbitration Rules 1997 and that it was scandalous, frivolous, vexatious and an abuse of the court process.

In her reserved ruling after hearing counsel for the parties submit before her, the learned Judge of the superior court said:-

"***Firstly, the action is out of time and it would be necessary to seek leave to enlarge time and that can only be done in the original suit. The point raised that once directions are taken application of this nature cannot be brought is not tenable neither can the principal of estoppel be applied if an application is not properly before the court. I do not find that the procedure adopted by the respondent in*** *suit No. 1059 of 2007* ***erroneous or a nullity. The respondent used the rules of court made under the***

Act.

On the argumentative affidavit there is always provision under order 18 to call a deponent for cross-examination. This was not done. The other issues raised on challenge of the arbitral award and the court is not required to deal with the same. The merit of the application shall be dealt with when properly before the court.

I allow the application and strike out the originating summons filed on 18.9.2007 with costs to the applicant for the suit and this application."

This is the ruling which has given rise to ***Civil Appeal No. 173 of 2008*** followed by this application for stay of execution. The appeal is not before us but the principles to be considered before an application of this nature is granted are firstly whether there is an arguable appeal or put it another way that such an appeal is not frivolous, and secondly whether the appeal, if successful, will be rendered nugatory if the application for stay is not granted. See ***Reliance Bank Limited (****in liquidation****) v. Norlake Investment Limited - Civil Application No. Nai 93 of 2002.***

When counsel for the parties submitted before us on this application on 19th November 2006 ***Mr. Kipkorir*** for the applicant stated that there was an arguable appeal because the learned Judge had granted a stay pending hearing and what remained for a hearing date to be taken, but then she dismissed the originating summon and included ***Miscellaneous Application No. 1059 of 2007*** in her ruling. According to him under the Arbitration Act there was no procedure set out for applying to set aside an award; that it was improper for the respondent to go to court two days after publication of the award when an aggrieved party had up to 30 days to apply under ***section 34*** of the Arbitration Act. He submitted that the sum awarded to the respondent was huge and since the applicant did not know the assets the respondent had it may be difficult to recover this sum from him if the appeal succeeds; thus rendering the appeal nugatory.

Mr. Mwaniki for the respondent said there was no arguable appeal as the applicant never sought leave to file the appeal. That when the award was published the respondent filed it in the High Court on 26th June 2007 in accordance with ***section 36*** of the Arbitration Act and a day later, notice of filing was served upon the counsel for the appellant. According to him it is true the Arbitration Act does not prescribe the mode of filing of the award in Court – but when notice of filing award was served upon counsel for the appellant he took no steps to contest it; that if the order sought is not granted the appeal will not be rendered nugatory since the respondent is able to refund it and that the respondent should not be deprived of the fruits of the award.

In this case, subject to this appeal after the arbitral award was made on 18th June 2007 counsel for the respondent moved the court on 25th June 2007 for leave to enforce it and notified learned counsel for the applicant about this on 27th June 2007. Under ***section 35(1)*** of the Arbitration Act;

"***Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)."***

Grounds for setting aside the award are set out in subsection 2 of that section. Section 40 of the Act gives the Chief Justice power to make Rules of court for:-

"***(b) the filing of applications for setting aside arbitral awards."***

Though there may appear to be no specific form for the filing of an application to set aside an arbitral award, ***rule 4(2)*** of the Arbitration Rules 1997, provides that:-

"***All applications subsequent to the filing of an award shall be by summons in the cause in which the award has been filed and shall be served by all parties at least seven days before the hearing date."*** (*Underlining supplied*)

This rule seems to us to be clear that the application to set aside the award, being subsequent to (*following*) the filing of the award shall be by chamber summons and shall be filed in the cause in which the award was filed. In this case the cause in which the award was filed was filed. In this case the in which the award was in which the award was filed was ***High Court Misc. Civil Cause No. 1059 of 2007***. It seems therefore incorrect for both counsel to submit that no procedure has been set for applying to court to set the award aside. The applicant as is evident did not comply with the rule but instead instituted a fresh ***suit number 482 of 2007*** by originating summons. We highly doubt the justification put forward by the applicant in adopting such procedure but that is for the appellate court to determine. For our part we express serious doubts that the learned Judge was at fault in her findings. In our assessment the applicant does not surmount the first limb of the principles we have to consider before granting an application for stay.

In any event, the application before the superior court was by Chamber Summons to strike out the Originating Summons dated 18th September 2007 and the order made by the learned Judge did exactly that: namely, to:-

"***Allow the application and strike out the Originating Summons filed on 18.9.2007 with costs to the applicant for the suit and this application***."

In that case any execution as envisaged in the application can only be in respect of the costs; otherwise the learned Judge did not order any of the parties to do anything or to pay any money. There is therefore nothing arising out of the superior court ruling for this Court, in an application for stay, to enforce or restrain by the order which is being sought, a further reason why we feel the applicant has not surmounted the first limb of the principles we have to consider – see ***Western College of Arts and Applied Sciences v. Oranga & Others [1976] KLR 63*** at page 66.

Moreover, counsel for the applicant has not addressed us to justify his filing of a separate suit by originating summons rather than making the application as expounded herein before by chamber summons in the existing suit ***No. 1059 of 2007*** as envisaged in ***rule 4(2)*** of the Arbitration Rules or that such fresh suit was filed within prescribed time to reinforce the high chances of success for the pending appeal.

As to whether the appeal, if successful, will be rendered nugatory if this application is not granted, the submissions made before us have not demonstrated that the respondent will be unable to make a refund of the amount in dispute if the appeal is successful. The respondent has averred in paragraph 13 of the replying affidavit that he is capable of refunding the decretal sum in the unlikely event that the appeal succeeds. We are also alive to the fact this is a money decree and that not all the sum awarded in the arbitration award is in dispute. The sum total of our observations is that this application has no merit and that it should be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of March, 2009

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR