



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLICATION 159 OF 2009

ADOPT-A-LIGHT LIMITED APPLICANT

AND

MAGNATE VENTURES LIMITED 1ST RESPONDENT

STANLEY KINYANJUI AND IGNATIUS OBONYO

Suing on behalf of OUTDOOR ADVERTISING

ASSOCIATION OF KENYA 2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

NORMAN MURURU 4TH RESPONDENT

(Application for stay pending the determination of an intended appeal against an order of the

High Court of Kenya at Milimani Commercial Courts, Nairobi (Khaminwa, J)

dated the 10th day of March 2009

In

H.C.C.C. No. 708 of 2008)

RULING OF THE COURT

Adopt-A-Light Ltd, the applicant herein, is and has been engaged in what appears to us to be a never ending dispute with Magnate Ventures Ltd., the 1st respondent, Stanley Kinyanjui and Ignatius Obonyo suing on behalf of Outdoor Advertising Association of Kenya, the 2nd respondents, City Council of Nairobi, the 3rd respondent and Norman Mururu, the 4th respondent. In this motion, which is brought by the applicant under **Rule 5 (2) (b)** of the Court’s Rules, the applicant is asking the Court for two basic

orders, namely:-

“1. The injunction order of the High Court made on 10th day of March, 2009 be stayed pending the determination of the intended appeal against the said order to the Court of Appeal.

2. The parties hereto be directed to proceed with the Arbitration before the fourth respondent arbitrator.”

The matter arises in this way:

By a summons in chambers dated 1st December, 2008 and stated to have been brought under **section 7** of the Arbitration Act, No. 4 of 1995, **Rules 3 (1) and 11** of the Arbitration Rules, 1997, **section 63 (c) & (e)** of the Civil Procedure Act **Cap 21** of Laws of Kenya and **Order XXXIX Rules 2, 3 and 5** of the Civil Procedure Rules, the 1st and 2nd respondents herein had asked the superior court for various orders and for our purposes in the motion before us, we need to set out two of those prayers:-

“2 Pending the hearing and determination of this Application inter-partes, or until further orders, the 1st, 2nd and 3rd Defendants [i.e. City Council of Nairobi, Adopt-A-Light Ltd and Norman Mururu] whether by themselves, agents, servants or otherwise howsoever be restrained from proceeding with the hearing of the arbitration in respect of the contract dated 28th March, 2002 between the 1st and 2nd Defendants [i.e. between the City Council of Nairobi and Adopt-A-Light Ltd.].

3. Pending the hearing and determination of this Application inter-partes, or until further orders, the 1st, 2nd and 3rd Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from proceeding with the hearing of the arbitration in respect of the contract dated 28th March, 2002 between the 1st and 2nd Defendants without the participation of the Plaintiffs [i.e. Magnate Ventures Ltd. and Stanley Kinyanjui and Ignatius Obonyo on behalf of Outdoor Advertising Association of Kenya] and the prior determination of legal questions of jurisdiction and legality of the contract dated 28th March, 2002 between the 1st and 2nd Defendants.”

The summons was heard before Khaminwa, J and by her ruling dated 10th March, 2009, the learned Judge stated, and we quote from her said ruling:-

“I am satisfied that the provisions of section 7 of the Arbitration Act is complied with and I allow Application and grant orders as prayed under prayer 3 of the chamber summons dated 01.12.08. The Applicants [i.e. the 1st and 2nd respondents in the motion before us] shall have the costs of the application.”

So the learned Judge granted only prayer 3 in the summons. Prayer 2 had sought a general ban of the whole arbitration process. The Judge did not give that order and we are satisfied she rejected it. The learned Judge granted only prayer 3, the effect of which was that the arbitration would proceed but only with the participation of the 1st and 2nd respondents in the motion before us and that before the arbitral process could so proceed a determination of the legal questions of jurisdiction and illegality or otherwise of the contract dated 28th March, 2002 would have to be made. The chamber summons itself did not specify who was to do the determination. The learned Judge also did not specify in her ruling who was to determine the legal issues of jurisdiction and the validity of the contract; she merely granted prayer 3; indeed the extracted order approved by all the parties and issued on 24th March, 2009 confirms that position.

The learned Judge was satisfied that **section 7** of the Arbitration Act had been:-

“--- complied with”

and thus the order allowed the arbitration to proceed with the participation of the 1st and 2nd

respondents. **Section 7** merely deals with interim measures which the High Court is authorized to issue during the process of arbitration. In this instance the learned Judge ordered that the process of arbitration would only proceed if the 1st and the 2nd respondents were allowed to participate in the process. That was one of the orders which the 1st and 2nd respondents themselves had sought from the court. It would appear to us that the respective advocates for the respondents in the motion before us were contending that the arbitral process could only proceed after the superior court itself had determined the legal issues of jurisdiction and the validity of the contract, the subject of the arbitration.

As we have seen from the prayers made before the superior court, nobody had asked that court that it must itself determine those issues. The learned Judge herself did not say anywhere in her ruling that the High Court itself had to determine the issues before the arbitrator could proceed. In view of the elaborate provisions set out in **section 17** of the Arbitration Act, we doubt whether the learned Judge could have made any such order. Under that section:-

“The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose –

(a) an arbitration clause which forms part of the contract shall be treated as an independent agreement of the other terms of the contract: and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.” – see section 17 (1).

It is clear under this section that an arbitrator has power to rule on the issue of his own jurisdiction and on the validity or otherwise of the agreement, the subject of the arbitration and may even rule that the contract is null and void.

Under **section 17 (6)**:-

“Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter”

and under **section 17 (7)**:-

“The decision of the High Court shall be final and shall not be subject to appeal.”

Why do we point out these matters at this stage? We do so because Mr. Kiragu Kimani, learned counsel for the applicant, told us that when they asked the respondents that the arbitral process should proceed, the advocates for the respondents thought the process could not proceed before the High Court itself determined the legal issues of jurisdiction and the validity of the contract between the applicant and the 3rd respondent and that the applicant was even threatened with contempt of court proceedings if the process of arbitration was started. In view of the plain meaning of the learned Judge’s order and the provisions of the Arbitration Act, we doubt whether any party who is given proper legal advice would really want to lodge contempt proceedings. We would say nothing more than that.

But it is the applicant who wishes to appeal against the learned Judge’s order on the ground that the 1st and 2nd respondents, not being parties to the contract between the applicant and the 3rd respondent have no legal basis to warrant their participation in the arbitral process. In fact the applicant is asking us to make an order staying the operation of the injunction granted by the learned Judge to the effect that the process of arbitration shall not proceed without the participation of the 1st and 2nd respondents. The question then arose as to whether the Court has power under **Rule 5 (2) (b)** of its rules to stay the operation of an injunction already granted. Mr. Kiragu Kimani concentrated most of his submissions before us on that point and cited numerous authorities showing that the Court has in many previous decisions of its own ruled that it has jurisdiction to stay the operation of an injunction granted by the

superior court. Mr. Havi, for the 1st and 2nd respondents and Mr. Mubea for the 3rd respondent also showed us decisions of the Court to the effect that the Court has no jurisdiction to stay the operation of an injunction already granted.

There is no denying that there are conflicting decisions of the Court on this point, but despite Mr. Kiragu Kimani's spirited submissions that we fall on the side that we have jurisdiction to grant the stay sought, we are afraid, we must disappoint Mr. Kiragu. If we were to accept Mr. Kiragu's arguments, we would merely be adding to the confusion already existing on the issue. As a bench of three Judges, it does not seem right to us that we should over-rule one line of authorities as being invalid and accept another line as being valid. There is no legal basis upon which a bench composed of three members of the Court can over-rule another bench composed of three other members. That is why we say we shall only be adding to the confusion already existing if we were to rule on the issue of jurisdiction one way or the other. That is why a practice has been developed by this Court that where it is felt that a particular decision or a line of decisions by the Court is not in accordance with the law and, therefore, ought to be over-ruled as not being good law, a bench of at least five Judges is constituted to do so. It is our hope that a situation similar to the one under discussion will soon arise and that a bench of at least five Judges will be constituted to finally pronounce on the matter.

Nevertheless, we have to decide the motion before us. It was conceded by counsel for the respondents that the applicant's intended appeal is an arguable one, i.e. the intended appeal can in no way be described as frivolous. But even so, the applicant has still to show us that if we do not grant to it an order of stay, its intended appeal, were it to eventually succeed, would have been rendered nugatory by our refusal to grant the stay sought. On this point, the applicant did not satisfy us that its intended appeal would be rendered nugatory. First, we note that the applicant itself was prepared to go on with the arbitration as ordered by the superior court and we have already referred to Mr. Kimani's assertion that he was threatened with contempt of court proceedings if the process of arbitration were to take off. If the applicant thought that proceeding with arbitration as ordered by the superior court would render its intended appeal nugatory, it is unlikely that the applicant would have been ready to proceed.

Secondly, even if the process of arbitration were to proceed as ordered by the superior court and the intended appeal were to succeed, that success would not have been rendered nugatory; the process of arbitration itself would be nullified and though time would have been wasted, the wasted time would be compensated in costs – see for example, SILVERSTEIN VS. CHESONI [2002] 1 EA 296 and KENYA COMMERCIAL BANK LTD. VS. BENJOH AMALGAMATED LTD & ANOTHER [2000] LLR 3125.

The applicant has not satisfied us that if we refuse to grant to it the order of stay it seeks, its intended appeal will be rendered nugatory and that being the position we take on the matter, we order that the applicant's notice of motion dated 8th June, 2009 and lodged in the Court on 9th June, 2009 fails and is hereby dismissed. The costs of the dismissed motion shall await the outcome of the intended appeal or further orders of the Court.

Those shall be our orders.

Dated and delivered at Nairobi this 31st day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.