



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**

**Civil Appli 219 of 2009 (UR 152/2009)**

**BLUE SHIELD INSURANCE CO. LIMITED ..... APPLICANT**

**AND**

**SAMUEL KAMAU MUHINDI ..... RESPONDENT**

**(Application for stay of execution from the Order of the High Court of Kenya at Milimani  
Commercial Courts, Nairobi (Kimaru, J.) dated 8<sup>th</sup> July, 2008**

**in**

**MISCE. APPLI. NO. 166 OF 2009)**

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**RULING OF THE COURT**

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for stay of execution of the order made by the superior court on 8<sup>th</sup> July, 2009 requiring the applicant to deposit security of Shs.44,504,854.36 in an interest earning bank account within 14 days pending hearing and determination of the intended appeal against the order.

The circumstances which gave rise to the application are briefly as follows.

Sometime in 2003, the applicant employed the respondent as a Managing Director and Principal Officer of the Company. Barely two years later, the applicant terminated the respondent's contract of employment sometime in March, 2005. The respondent subsequently claimed from the applicant a share certificate for 1,000,000 shares which he had allegedly bought from the applicant in the course of his employment under the Employee Share Purchase Scheme and which were allegedly allotted to him by the applicant under an Agreement dated 31<sup>st</sup> March, 1994. The respondent in addition claimed accrued dividends from the year 2005. The applicant refuted the claims and the dispute was in due course referred to arbitration by a sole arbitrator under clause 9 of the Agreement dated 31<sup>st</sup> March, 2004.

The arbitrator ultimately made a final Award dated 6<sup>th</sup> February, 2009 finding, inter alia, that the respondent had indeed purchased 1,000,000 shares of the applicant company; that although the name of the respondent had not been entered in the share register, he was nevertheless a shareholder and had been allotted 1,000,000 shares; that the respondent was entitled to dividends for the years 2004, 2005, 2006 and dividends to be declared in subsequent years plus interest and that the respondent was specifically

entitled to Shs.11,514,793.75 being the balance due to him in respect of the dividends for 2006 and interest.

On 16<sup>th</sup> March, 2009, the applicant filed *High Court Miscellaneous Application No. 166 of 2009* (suit) under **Section 36** of the *Arbitration Act, 1995*, (Act) for leave to enforce the Final Award. The applicant on his part filed an application dated 18<sup>th</sup> March, 2009 in the same suit under **Section 35** of the Act for setting aside the award.

While the two applications were pending for hearing, the respondent filed an interlocutory application dated 14<sup>th</sup> May, 2009 seeking several orders the main one requiring the applicant to deposit in court the sum of Shs.44,238,548.30 awarded in the Final Award on the ground that the applicant was in an extremely precarious financial position and on the verge of collapse. That application was filed “*under Section 3A of the Civil Procedure Act and rule 4 (2) of the Arbitration Rules, 1997 and the other enabling provisions of the Law*”.

The application was supported by the affidavit of the applicant which showed, among other things, that the claim of Shs.44,238,548.30 comprised of Shs.11,514,793.75 less withholding tax – that is net Shs.10,939,054; Shs.4,297,699.60 being interest thereon at the rate of 20% p.a.; Shs.9,855,3000 being net dividends for year 2007; 1,895,457.70 being the interest thereon; Shs.16,770,000 being the net dividend for the year 2008 and, lastly Shs.481,039 as costs of the Final Award.

The managing director of the applicant – Patrick Kulova Wanjala filed a replying affidavit deposing, among other matters, that the computation of the respondent’s claim at Shs.44,238,548.30 was erroneous as the dividend was calculated on the basis of shares of the company worth Shs.150,000,000 while the shares of the company had even before the arbitral proceedings been increased to over 250,000,000 and further that the respondent had failed to disclose that the applicant had made a claim against the respondent of Shs.229,000,000 in another suit to wit *H.C.C.C. No. 594 of 2005*.

The respondent filed the said suit i.e. *H.C.C.C. No. 594 of 2005* sometime in June 2005 against the applicant claiming Shs.44,504,854.56 being damages for breach of contract of employment and general damages for defamation.

By its defence and counter-claim in that suit, the applicant counter-claimed against the respondent a sum of Shs.229,665,459.03 comprising losses allegedly incurred by the applicant in the years 2003 – 2005 due to the respondent’s fraudulent and negligent practices and fraudulent claims.

The interlocutory application for provision of security was heard and allowed by Kimaru, J. in a ruling dated 8<sup>th</sup> July, 2009. The applicant being aggrieved by the ruling filed a notice of appeal and subsequently filed the present application.

The principles applicable to applications for stay of execution, stay of proceedings or injunctions under **Rule 5 (2) (b)** of the Court of Appeal Rules require no repetition. The applicant in this case is required to satisfy us, that, the intended appeal is not frivolous and further that unless the order of stay of execution is granted, the appeal, if ultimately successful would be rendered nugatory.

According to the applicant, the intended appeal is substantial and will be based on serious triable issues particularly whether the application was merited in the unique circumstances of the proceedings in the superior court and whether the court could secure amounts in excess of what is awarded. But according to the respondent, the intended appeal is not arguable for reasons, *inter alia*, that it is in the public domain that the applicant is in a critical financial position and on the verge of collapse, a fact verified by its admission of its inability to raise the security ordered by the superior court.

Although the copy of the proceedings in the superior court which would contain the submissions of the respective counsel has not been filed, it is clear from paragraph 11 of the affidavit of Patrick Kulova Wanjala in support of this application that the applicant opposed the application in the superior court

mainly on the grounds that; it was incompetent; that the claim of Shs.4,428,548.30 was inaccurate; that the applicant had claimed over Shs.229 million against the respondent in the pending suit, and, lastly, that the respondent was not legally entitled to the order for provision of security.

On the question of the competence of the application in the superior court, it is clear from the ruling of the superior court that the application for deposit of the money in court was understood by both parties and considered by the superior court as an application for provision of security pending the hearing of both the applications for enforcement and setting aside of the arbitral award. It is manifest from the ruling of the superior court that Mr. Nowrojee’s submission was in essence that the application was incompetent as the court had no jurisdiction to order provision of the security under the provisions of law relied on and that the applicant should have brought the application under **Section 37 (2)** of the Act.

**Section 37 (1)** of the Arbitration Act 1995, provides:

**“37. (1) The recognition or enforcement of an arbitral award irrespective of the state in which it was made may be refused only –**

**(a)**

**(i)**

**(ii)**

**(iii)**

**(iv)**

**(v)**

**(vi) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which or under the law of which, that arbitral award was made or** (Emphasis ours).

**(b) (ii)**

**(iii)**

And Section 37 (2) of the Act provides:

**“If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper adjourn its decision and may also, on the application of a party claiming recognition or enforcement of the arbitral award order the other party to provide appropriate security”.** (Empbasis ours).

The superior court considered the provisions of **Section 37 (2)** of the Act and stated the law, thus:

**“Under the above section, this Court has discretion to require any party to arbitral proceedings whose award is pending enforcement to provide appropriate security.**

.....

.....

**In the case of limited liability companies, under section 401 of the Companies Act, the court has discretion, where good grounds are established, to order that security be provided pending the hearing and disposal of an issue that may have arisen prior to the enforcement of arbitrators award**

as the judgment of the court.

**Although the claimant did not specifically state the applicable section of the Arbitration Act 1995 in his application, I hold that this court has jurisdiction to hear and determine the application whether the respondent should provide security pending the hearing and determination of the outstanding applications”.**

Is the statement of the law by the superior court that the High Court has discretion both under **Section 37 (2)** of the Act and **Section 401** of the Companies Act to order any party including a company to provide appropriate security pending the enforcement of an arbitral award made under the Arbitration Act 1995, correct?

It seems that both Mr. Nowrojee and Mr. Regeru, learned counsel for the applicant and the respondent respectively understand **Section 37 (2)** of the Act as giving jurisdiction to the High Court to order provision of security pending enforcement of an arbitral award in domestic arbitration. Indeed, it seems that the applicant claimed that the application in the superior court was incompetent solely for the reason that the application was based on the inherent jurisdiction of the court rather than **Section 37 (2)** of the Act. We appreciate that it would be inappropriate and indeed irregular for us to embark on a conclusive construction of **Section 37 (2)** of the Act or **Section 401** of the Companies Act in an application for stay of execution. Our duty in this application is merely to find out whether the issue of jurisdiction to order provision for security is a well-founded ground of the intended appeal. However, the language of **Section 37 (2)** of the Act *ex facie* indicates that the provision for security referred to therein arises in cases falling under **Section 37 (1) (a) (vi)** of the Act only, (which the superior court did not refer to), that is to say, where an application has been made in the High Court under **Section 37 (1)** for the enforcement of an arbitral award made in a foreign country and, where, in addition, an application made in a court in that foreign country for setting aside or suspension of the arbitral award is pending for hearing or determination in that court. The English case of **Soleh Bonel International Ltd. vs. Government of the Republic of Uganda** [1993] 2 L.Lyod’s Rep. 208 dealing with the provision of security under identical provisions of the *English Arbitration Act 1975* illustrates the probable construction of the relevant law.

**Section 401** of the Companies Act relied on by the superior court, provides:

**“where a limited liability company is a plaintiff in any suit or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given”.**

Again, *ex facie* that section deals with security for costs and not security for the decretal amount or amount of an arbitral award.

We have in mind, that the applicant’s counsel submitted in the superior court that the court had jurisdiction under **Section 37 (2)** to order provision for security in the circumstances of this case. That concession would not however confer jurisdiction on the Court if the arbitration law does not in fact confer such jurisdiction.

From the above observations, we are of the view, that it is an arguable legal issue of great public importance whether **Section 37 (2)** of the Act and **Section 401** of the Companies Act confer jurisdiction on the High Court to order provision for security for the amount of the arbitral award made in a domestic arbitration pending the determination of the application for the enforcement or setting aside of the arbitral award.

The applicant also raised the issue of the accuracy of the respondent’s claim. The arbitrator computed only two claims – that Shs.11,514,793.75 being balance in respect of 2006 dividend and 962,074 being the costs of the Award. By the Award, the applicant is liable to pay respondent dividend every year after 2006 and interest thereon. The respondent has included in his claim the dividends payable for 2007 and

interest thereon and dividend for 2008, a total of about Shs.28,000,000 which he has computed unilaterally. The respondent claimed in the superior court that the computation of dividend for 2007 and 2008 was erroneous as it was based on the wrong shareholding of the applicant. The applicant contends in the supporting affidavit that any sum above the Shs.11,524,793.75 in the arbitral Award would have to be proved. We are satisfied that it is arguable whether the security could be ordered for sums in excess of amount of the arbitral Award and which has not been ascertained either by the court or by consensus.

Lastly, the applicant denied that it is on the verge of collapse although it admitted that it had cash flow problems due to economic downturn and although it admitted that it is unable to raise the over Shs.44,000,000 required as security within the time ordered by court. It is arguable whether the applicant is on the verge of collapse in the absence of any allegation by the respondent that, the Commissioner of Insurance who regulates insurance industry has caused the inspection of the applicant or its books of account under **Section 67 A (1)** of the Insurance Act or appointed a statutory manager under **Section 67 C (2)** of the same Act.

The managing director of the applicant deposes, among other things, in paragraphs 17, 18, 19 and 20 of the supporting affidavit, thus:

**“17. THAT on account of the said financial difficulties which were well known to the respondent, the applicant is unable to raise 44 million within 14 days and is poised to be caught in default of the court order.**

**18. THAT the applicant is apprehensive that once it is unable to meet the order for security given by the superior court, it will be cited for contempt and or be denied audience in the said court or in any other way clogged from prosecuting its application to set aside the arbitral award.**

**19. THAT the hardship to the applicant caused by the said court order is disproportionate and would bring its operations to a standstill.**

**20. THAT unless a stay is granted, the applicant’s application in the superior court may be compromised without an opportunity to be heard and the appeal against the order to furnish be rendered nugatory”.**

The respondent in his replying affidavit asserts that the applicant is in a financial position to deposit the sum ordered in view of the fact that the Annual reports and financial statements of the applicant continue to reflect a huge profit; that the applicant paid huge dividend of over Shs.500,000,000 for the year 2004 – 2008 to shareholders; that published accounts for 2007 contains a contingency reserve for the applicant’s dues, and, also show that applicant stands on an asset base of over Kshs. 3.1 billion.

In **Reliance Bank Ltd. vs. Norlake Investments Ltd.** [2002] 1 EA 218, the applicant – a bank in liquidation applied for stay of execution of the orders of the superior court under **Rule 5 (2 (b))** of the Court of Appeal Rules which, *inter alia*, required it to deposit a sum of money in Court within 15 days pending appeal on the ground that it would face unbearable hardship if it deposited the money amounting to Shs. 15 million and which it was not able to raise in full. It was conceded that its appeal was arguable. On the question whether or not the appeal would be rendered nugatory if stay of execution was not granted, this Court said in part at page 233 paragraphe:

**“We think that in the circumstances of this case, it would be too onerous to require the liquidator of the Applicant to deposit the money in Court or to comply with any of the orders made by the learned Judge. As we said earlier in this ruling, it was conceded that the applicant has an arguable appeal. To refuse to grant an order of stay to the applicant would cause it such hardship as could be out of proportion to any suffering the respondent might undergo while awaiting for the Applicant’s appeal to be heard and determined”.**

Like in **Reliance Bank** case, the applicant claims that it is not capable of raising the sum required at least within the time stipulated. Its inability to raise the money is disputed. We are not only unable to

decide the disputed issue in this application for lack of sufficient material, but also, in our view, it is inappropriate to do so. We observe, however, that the applicant has been required to deposit a very large sum of money indeed. It is probable, as the applicant states, that, if it fails to raise the money, the superior court may grant sanctions including denying the applicant an opportunity to prosecute the application to set aside the award, thereby resulting in an automatic enforcement of the arbitral award. That will cause great financial loss to the applicant.

Even if the applicant is able to raise the money withdrawing such a large sum of money from the business and depositing it as required, will not only render the intended appeal unnecessary but also adversely affect the business which is admittedly experiencing cash flow problems which event might ultimately cause great financial loss to the applicant.

If, as the respondent claims, the applicant has a strong asset base (over 3.1 billion), then, it is probable that the respondent will be able to recover the amount awarded if his application for enforcement of the Award ultimately succeeds.

In the result, we are satisfied that if the application is not allowed, the intended appeal will not only be rendered nugatory but also that the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer.

In final analysis, we allow the application and grant a stay of execution in terms of prayer 2 of the application. The costs of this application shall be costs in the intended appeal.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of October, 2009.**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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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