REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLICATION 276 OF 2009

AREVA T & D INDIA LIMITED.....APPLICANT

AND

PRIORITY ELECTRICAL ENGINEERS LIMITED
EMPOWER INSTALLATION CONTRACTORS LTD...RESPONDENTS

(Application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Kimaru, J.) dated 2nd September, 2009

in

H.C.C.C. NO. 535 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 ("the Rules")** for stay of the order of the superior court (Kimaru, J.) made on 2nd September, 2009 pending the hearing and determination of an intended appeal.

The facts giving rise to this dispute are briefly as follows:

The applicant is a company incorporated in India, having its registered office in Kolkata, and its principal place of business in Noida, India. The applicant was awarded a contract by **Kenya Power and Lighting Company Ltd., (KPLC**) a Kenyan parastatal, substantially owned by the Government of Kenya to reinforce and upgrade the electricity distribution network of **KPLC**. The scope of the work involved was extensive, and the terms of the contract permitted the applicant to enter into sub-contract agreements with other parties, subject to the approval of **KPLC**. Accordingly, on 20th July, 2007 the applicant entered into a sub-contract agreement with **Priority Electrical Engineers Ltd. ("PEE"**), the 1st respondent, which is a company incorporated in Kenya, having its registered offices and principal place of business in Nairobi, Kenya.

The sub-contract agreement required PEE to undertake works which were valued at Kshs.222,837,354/=. At some point, after PEE commenced the sub-contract works, a dispute arose between it, and the applicant. On 29th July, 2009, PEE commenced litigation in the superior court by filing a plaint, and contemporaneously with the plaint, it filed an application by way of Notice of Motion seeking orders for interlocutory and mandatory injunction against the applicant. Essentially, PEE's complaint was that the applicant had unilaterally and without notice terminated its sub-contract agreement with it. It sought orders to prevent the applicant from awarding the same sub-contract to

Empower Installation Contractors Ltd. ("EIC") or any other party.

When the plaint and the Notice of Motion aforesaid was served upon the applicant, it immediately filed **an application,** by way of Chamber Summons dated 30th July, 2009 and filed in court on 31st July, 2009, seeking stay of the suit pending the hearing and determination of the arbitral proceedings. The application for stay was filed pursuant to Section 6 (1) of the *Arbitration Act* and Rule 2 of the *Arbitration Rules 1997* and was based on the following grounds stated on the body of the application:

> **"1. The sub contract agreement made between the Plaintiff and the 1st Defendant dated 20th July 2007 provides for disputes to be resolved by arbitration.**
>
> **2. The sub-contract agreement further confers exclusive jurisdiction upon the courts in Delhi.**
>
> **3. In the circumstances this Honourable court lacks jurisdiction to hear and determine the dispute and applications that may arise.**
>
> **4. It is in the interest of justice that the application be granted to avoid multiplicity of suits".**

It was not in dispute that the sub-contract agreement provided clearly for the resolution of any disputes by way of arbitration. Article 25 of the sub-contract agreement specified the manner in which any dispute arising during the subsistence of the sub-contract would be resolved. It provides as follows:

> **"Any dispute arising out of or in connection with this agreement shall be finally settled by way of arbitration in accordance with the Indian Arbitration Act, 1996 as modified from time to time. The arbitral award shall be final and binding and shall not be a subject to any appeal or revision. The venue of the arbitration shall be at New Delhi India".**

Article 26 of the agreement stated that courts of Delhi (India) shall have exclusive jurisdiction to deal with any issue that may arise out of the sub-contract agreement.

In a ruling dated 2nd September, 2009, Kimaru, J. noted that PEE had not altogether rejected arbitration, but simply wanted the said arbitration proceedings conducted in Kenya, albeit under the Arbitration Act of India, as per the sub-contract agreement. The learned Judge accordingly ordered that the dispute between the parties be referred to arbitration in accordance with the sub-contract agreement, but that the venue of the arbitration shall be Nairobi, Kenya, and not New Delhi as the sub-contract agreement had provided. This is how the learned Judge expressed himself, in material part:

> "In e**xercising its discretion in determining the venue of arbitration, where the arbitration clause provides for the arbitration proceedings outside Kenya, the court must take into account the following factors: in what country the evidence on the facts in issue is situate or more readily available and the effect of that on the convenience and expense of trial as between the courts of the two countries, whether and how differently the law of the foreign court applies, with what country either party is connected and how closely, whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantage and finally, whether the plaintiff would be prejudiced by having to sue in a foreign court.**
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> **Applying the above principles to the present case, it is evident that whereas the parties agreed that the dispute would be resolved by arbitration at the agreed venue of New Delhi India, it is clear that the plaintiff has a case when it argues that the arbitration proceedings ought to be conducted in Kenya under the supervision of the Kenyan Courts. The subject matter of the contract is to be performed in Kenya. The entity that is paying for the performance of the contract is a company substantially owned by the Government of Kenya. The entire evidence that will be adduced during the hearing of the dispute will be procured from Kenya. The majority of witnesses, if not all, are in Kenya. I think this court would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification. In the present case, it is clear that by invoking the arbitration clause, and by insisting that the venue of the arbitration be at New Delhi India, the 1st defendant is in actual fact seeking to take advantage of a procedural technicality to frustrate the hearing and determination of the pending dispute between itself and the plaintiff. If this court were to uphold the argument advanced by the 1st defendant, the practical consequences of such decision would mean that the dispute between the plaintiff and the defendants would not be resolved expeditiously as the anticipation (sic) in any arbitration proceedings".**

It is against that ruling that an appeal is intended, and for now the applicant seeks a stay of the aforesaid order, and more specifically

stay of the order to commence the arbitral proceedings in Nairobi, Kenya.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

In his submissions before us, Mr. P. M. Gachuhi, learned counsel for the applicant, argued that the main issue in the intended appeal revolved around jurisdiction; that the superior court had no jurisdiction to vary the contract between the parties, when such variation was not even pleaded in the plaint before the court; and that the parties had voluntarily agreed to refer their dispute to arbitration under the *Indian Arbitration Act, 1996* and had chosen New Delhi, India as the locus of such arbitration. He relied on the cases of **National Bank of Kenya Ltd. vs. Pipeplastic Samkolit (K) Ltd. & Another [2001] KLR 112 and Raytheon Aircraft Credit Corporation and Another vs. Air Al – Faraj Limited [2005] KRL.**

Mr. Gachuhi submitted that unless the orders sought are granted, the intended appeal would be rendered nugatory because the applicant will be compelled to submit itself to arbitration in a locus, and before an arbitrator chosen by the Institute of Engineers of Kenya, whose qualifications and competence could be questionable. He relied on the cases of **Shashi C. Patel vs. Damayanti Narin Shah and Another – *Civil Application No. Nai. 236 of 2006 (UR. 131/2006)* (unreported) and The Owners of the Motor Vessel "Lillians" vs. Caltex Oil (Kenya) Ltd. [1998] KRL 1.**

Mr. A. Ombwayo, learned counsel for the 1st respondent, submitted that the 1st respondent having agreed to refer the dispute to arbitration, jurisdiction was no longer an issue. The only issue was the venue of the arbitral proceedings, and the superior court was correct in ordering that the same be held in Nairobi for the reasons outlined in the ruling of the superior court.

He argued that the intended appeal will not be rendered nugatory, if the orders sought are not made, as the applicant has every opportunity to challenge the appointment or the competence of the arbitrator, if it so wishes.

There is no dispute between the parties that the terms of the sub-contract agreement provided in clear terms that any dispute between them would be referred to arbitration in accordance with the agreement. That in itself raises the question of the superior court's jurisdiction in entertaining a suit which the applicant says should never have been filed in the first place. The issue of jurisdiction, in our view, is an arguable point, as is the fact that the superior court gave orders on an issue that was not pleaded, or prayed in the plaint – the issue relating to the locus of the arbitral proceedings. We agree with the applicant that whether the superior court had the jurisdiction to vary a contract freely entered into by the parties, is an arguable point in the intended appeal. We are, therefore, satisfied that the intended appeal is arguable. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.

On the second point of whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that indeed, it will be rendered nugatory. Clearly, without those orders, the applicant will be compelled to enter into an arbitration in a manner, and at a place, not contemplated in its agreement with PEE, and in alleged violation of the aforesaid agreement. Presently, we do not know why the parties chose Indian Courts and not Kenyan Courts to deal with any disputes between them.

Accordingly, we grant the orders of stay sought in the application dated 14th September, 2009. Costs shall be in the appeal.

Dated and delivered at Nairobi this 11th day of December, 2009.

S. E. O. BOSIRE
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JUDGE OF APPEAL

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

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR