



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civil Appli Nai 197 of 2004

SADRUDIN KURJI ..... 1<sup>ST</sup> APPLICANT

AKBAR KURJI .....2<sup>ND</sup> APPLICANT

AND

SHALIMAR LIMITED .....1<sup>ST</sup> RESPONDENT

SAZ CATERERS LIMITED .....2<sup>ND</sup> RESPONDENT

ZULFIKAR RAHEMTULLA .....3<sup>RD</sup> RESPONDENT

*(Application for leave to appeal from the ruling of the High Court of Kenya at*

*Nairobi (Emukule, J.) dated 31<sup>st</sup> March, 2004*

in

H.C.C.C. NO. 1457 OF 1998)

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RULING OF THE COURT

This is an application by way of Notice of Motion brought under **Rule 39** of the Court of Appeal Rules in which the applicants are seeking leave to appeal from the decision delivered by the superior court on the 31<sup>st</sup> March, 2004. The applicants also seek the costs of and incidental to this application to be awarded to them. The application which is supported by the affidavit of the 1<sup>st</sup> applicant, **Sadrudin Kurji**, is brought on the following grounds:-

“(a) ***THAT*** the applicants wish to appeal from the ruling delivered by the superior court on the 31<sup>st</sup> day of March, 2004 and require leave to do so.

(b) ***THAT*** the applicants applied to the superior court for leave to appeal from the said decision which application was dismissed on the 29<sup>th</sup> day of July, 2004.

(c) ***THAT*** the intended appeal will raise serious issues of law to be determined by this Honourable

***Court and the interest of justice requires that leave to appeal be granted.”***

When this matter came up for hearing before us, we heard submissions from Mr. Ougo, the learned counsel for the applicants, and Mr. Nagpal, (appearing with Mr. Rayani), the learned counsel for the respondents. The background to this application may be briefly stated. The dispute between the parties herein was referred to the arbitration of Mr. Azim Virjee who published his award on 22<sup>nd</sup> January, 1997. Nothing appears to have happened until 22<sup>nd</sup> January, 2003 when the respondents filed the award in the superior court and on 23<sup>rd</sup> January, 2003 they moved the superior court to enter judgment in terms of the award. That application to enter judgment in terms of the award was not served and thus the same was heard ex parte, so that by a ruling delivered on 13<sup>th</sup> March, 2003 the superior court entered judgment against the applicants herein. A month later the applicants moved the superior court seeking a stay which application was dismissed. The applicants did not give up but instead filed an application to set aside the judgment or to have it reviewed.

The respondents filed a preliminary objection which was upheld and so the applicants' efforts of setting aside the judgment or having it reviewed were rendered futile. The applicants would not give up and so they applied for leave to appeal against the striking out of their application and by the ruling of the superior court (Emukule J) dated and delivered on 29<sup>th</sup> July, 2004, leave to appeal to the Court was refused.

It is from the foregoing that the applicants filed this application for leave to appeal. It was Mr. Ougo's submission that if a party demonstrated that there was a serious view which merits judicial consideration then leave to appeal ought to be granted. He was of the view that in this application, it has been demonstrated that there are serious issues calling for judicial consideration. His main contention was that the respondents herein should have served the application which sought making the award a judgment of the Court.

Mr. Nagpal, on his part, submitted that this application lacked merit as, in his view, there were no points of law deserving any consideration by this Court. He emphasized the fact that the **Arbitration Act of 1995** follows modern law which is designed to keep the courts out of arbitration process as much as possible. It was Mr. Nagpal's submission that serving the other side with application to enter judgment did not arise. He therefore asked us to dismiss the application.

We agree with Mr. Nagpal's submission to the effect that the process of settling disputes by way of arbitration is designed to keep the courts out of settlement of disputes. We may as well add that arbitration process as provided by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This, however, does not mean that the Courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to step in and correct obvious errors.

In the present application, we have endeavoured to set out the background to the dispute and how it was referred to arbitration. The applicants appear to argue that the procedure was not strictly adhered to in that they were denied the right to be heard after the award had been published and before it was made a judgment of the Court. They are therefore seeking leave to be allowed to ventilate their grievances in this Court. According to the Draft Memorandum of Appeal attached to this application for leave to appeal, the applicants intend to raise the following grounds of appeal:-

***“1. THAT, the learned judge erred in law in failing to appreciate sufficiently or at all that the respondents should have served their application which sought an order that the arbitration award be made a judgment of the superior court, upon the appellants.***

***2. THAT, the learned judge erred in law in failing to take into account the fact that the appellants were not given an opportunity to be heard before the arbitration award was made a judgment of the superior court contrary to the rules of natural justice and the Arbitration Rules, 1997.***

3. ***THAT, the learned judge made a fundamental error in law in holding that the provisions of Order IXB Rule 8 of the Civil Procedure Rules were not applicable to the appellants' application seeking to set aside the ex-parte judgment which had been entered against them.***

4. ***THAT, the learned judge erred in law in failing to take into account the fact that the respondents were under an obligation in law to seek and obtain leave of the superior court to enforce the arbitration award as a decree of the court.***

5. ***THAT, the learned judge erred in law by failing to hear the appellants' application seeking to set aside the ex-parte judgment on its merits and by determining it on a preliminary objection when the issue raised by the respondents was not a true preliminary objection".***

Taking into account **section 35** of the Arbitration Act and the Rules made thereunder, especially **rules 4, 6 and 11** and bearing in mind the foregoing grounds of appeal, we are satisfied that (*without making any firm findings on any matter*) the application before us cannot be considered as unmeritorious. We are satisfied that the submissions before us have raised serious issues which call for judicial consideration.

In view of the foregoing, we are satisfied that this is a proper case in which to grant leave to appeal. Consequently, the application dated 10<sup>th</sup> August, 2004 is hereby allowed. Costs shall be to the respondents in any event.

***Dated and delivered at Nairobi this 17<sup>th</sup> day of February, 2006.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**