



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civ Appli 236 of 2006

SHASHI C. PATEL APPLICANT

AND

DAMAYANTI NAVIN SHAH

NAVIN R. SHAH RESPONDENTS

(An application for stay of proceedings in the superior court pending the lodging, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Lady Justice Ang’awa) dated 12th June, 2006

in

H.C.C.C. NO. 1951 OF 1999)

RULING OF THE COURT

In a plaint dated 6th October 1999 and filed into the court on the same day, the respondents in this Notice of Motion **Damayanti Navin Shah** and **Navin R. Shah** prayed for judgment against the applicant **Shashi C. Patel** for special damages as particularized in the same plaint; general damages for negligence; general damages for breach of contract; general damages for breach of warranty, costs of the suit and interest on all the damages sought at court rates. The same judgment was sought on grounds that on or about 21st April 1998, the applicant negligently performed surgery upon the first respondent to remove two solid nodules in her pelvic region such that some masses which the applicant alleged he had removed during the operation were not removed and a second operation in India became necessary at an increased and an unexpected expenditure. All this, the respondents alleged, were despite undertaking by the applicant that he would meet the professional standards required of him and an assurance by him that he had done so. The applicant filed statement of defence dated 12th March 1999 in which he denied the allegations in the plaint and stated that if any masses accumulated after the surgery he had carried out, the same must have been because of the inherent nature of the disease and the first respondent’s delay to report to him for a follow-up treatment. He then prayed for the dismissal of the suit with costs.

After the close of pleadings, the affidavits filed by the parties and annexures show that the suit was set down for hearing on various occasions but for one reason or another, the hearing could not proceed. It was at last fixed for hearing on 17th and 18th May 2006, but before that date, the parties discussed the way forward, at least on telephone, and agreed that the matter would not proceed to hearing on those days but

would be referred to arbitration under **Order 45 Rule 1** of the Civil Procedure Rules. In a letter dated 12th May 2006, the advocates for the respondents wrote to the advocates for the applicant stating as follows:

“We refer to the telephone conversation with the undersigned and enclose herewith consent to refer this matter to arbitration.

We are preparing the application for filing shortly.

Yours faithfully

For Kilonzo & Company

Mutula Kilonzo Junior”.

Thereafter a letter of consent dated 12th May 2006 and signed by both parties Advocates was addressed to the Deputy Registrar and it read as follows:

“Kindly record the following consent.

By consent the above matter coming up for hearing on 17th and 18th May 2006 be and is hereby taken out of the hearing list referred to arbitration on the question of liability under the provisions of order XLV of the Civil Procedure Rules”.

However vide another letter dated 15th May 2006 addressed to the advocates for the applicant and received by the said advocates on 16th May 2006, the advocates for the respondents stated:

“We refer to the above matter.

The plaintiffs have now changed their minds and have decided that they will not go to arbitration. We will therefore be proceeding on 17th May 2006 before Justice Ang’awa”.

On the 16th May 2006, the applicant filed Chamber Summons seeking that the issue of the applicant’s liability to the respondents be referred to arbitration; that the arbitrator(s) be appointed in such manner as may be agreed upon by the parties, that all necessary and consequential orders and directions be given and that costs of the application be in the cause. That application was based in the main that the parties had agreed to refer the issue of liability to arbitration. That application was heard by the superior court (Ang’awa J) and in a considered ruling delivered on 12th June 2006, the application was dismissed with costs to the respondents. The applicant felt aggrieved by that decision and intends to appeal against it. He filed Notice of Appeal on 14th June 2006. In the meanwhile, he has come before us with this application in which he is seeking the following two orders, namely:

“1. That the hearing and determination of the issue of liability by the superior court in High Court Civil Case No. 1951 of 1999 be stayed pending the lodging, hearing and determination of the intended appeal herein.

2. That the costs of this application be in the intended appeal”.

Several grounds are pleaded in support of the application but they all boil down to two main grounds and these are that the intended appeal is arguable and that the expected success of the appeal will be rendered nugatory should this application be refused. The other grounds are in fact subordinate to that main ground that the intended appeal is arguable.

We have considered the record before us, the rival submissions by the learned counsel, and the law. It

is now settled law that an applicant seeking orders under **rule 5 (2) (b)** of this Courts Rules must satisfy the Court that the appeal or intended appeal is arguable and that if the application for stay is refused, the results of the appeal or intended appeal, if successful will be rendered nugatory. See the case of **J. K. Industries Ltd vs. KCB** (1982 – 88) 1 KAR 1088. In this application it is clear to us that the issue as to whether the consent that was signed by both parties to refer the matter to arbitration but had not been acted upon by the court could be treated as binding consent under **Order XLV** of the *Civil Procedure Rules*. And also, whether the superior court, in hearing the application brought to it under **Order XLV Rules 1, 2, 3 and 19** of the *Civil Procedure Rules*, was bound to refer the matter to arbitration and whether the consent letter signed by both counsel needed to be endorsed as an order of the court by Deputy Registrar so as to bind the parties to the suit. In our view, these are all matters that are arguable. We do not say they will succeed on full hearing as that is not for us to state at this juncture, but, that they need to be ventilated is in our view certain. That clears the first hurdle.

On the second principle, i.e. whether or not the results of the appeal if it succeeds would be rendered nugatory if this application is refused, it cannot be gainsaid that if this application is refused, the suit would be heard in the superior court and the parties would be deprived of the benefits that might accrue from the arbitration process. It might be difficult if not impossible to get the matter to arbitration once it is heard by the superior court, as there will remain nothing to go to arbitration by then. Common sense commands that as the question of whether to refer the matter to arbitration or not is still to be the subject of an appeal or intended appeal in this Court, the hearing in the superior court must be stayed to abide the outcome of this Court’s decision on the intended appeal. That being our view of the matter, the application succeeds. The hearing and determination of the issue of liability by the superior court in the *High Court Civil Case No. 1951 of 1999* is hereby stayed pending the lodging, hearing and determination of the intended appeal. Costs of this application to be in the intended appeal. Those are our orders.

Dated and delivered at Nairobi this 10th day of November, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR