



Kampala International University v Housing Finance Company Limited (Petition (Application) 34 (E035) of 2022) [2023] KESC 5 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KESC 5 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 34 (E035) OF 2022
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
JANUARY 27, 2023**

**BETWEEN
KAMPALA INTERNATIONAL UNIVERSITY PETITIONER
AND
HOUSING FINANCE COMPANY LIMITED RESPONDENT**

(Being an application for conservatory orders pending hearing and determination of the appeal)

An arguable appeal was not one which necessarily had to succeed but one which ought to be argued by the appellate court.

Imminent threat of loss of a considerably large amount of money could be termed as irreparable harm for the purposes of obtaining conservatory injunctive orders. The amount in question in the instant suit was USD. 12,767,508.33

Reported by John Wainaina

Civil Practice and Procedure – appeals – application for conservatory injunctive orders pending the determination of an appeal – conditions to qualify for conservatory injunctive orders pending the determination of an appeal – irreparable harm - what was the measure by which appellate courts could contend whether an appeal was arguable - whether the possibility of the loss of considerably large amounts of money could be termed as irreparable harm for the purposes of obtaining injunctive orders.

Civil Practice and Procedure – appeals – appeals to the Supreme Court - appeals as of right in any case involving the interpretation or application of the Constitution - public interest - whether a matter contesting dismissal of an appeal of an arbitral award at the High Court on grounds that the High Court did not afford the applicant an opportunity to highlight its submissions met the jurisdictional threshold for an appeal as of right to the Supreme Court – article 163(4)(a).

Brief facts

The applicant received an adverse arbitral award for the statutory sale of its properties valued at USD. 12,767,508.33 by the respondent. Aggrieved the applicant unsuccessfully contested the arbitral award at the High Court.



Further aggrieved the applicant filed an appeal before the Court of Appeal where It was contended that the High Court dismissed the contest without affording the applicant an opportunity to highlight its submissions. The appellate court dismissed the appeal which led to the instant application before the Supreme Court.

Further aggrieved at the Court of Appeal decision, the applicant filed the instant appeal/application in which it sought conservatory orders staying the arbitral award pending the hearing and determination of the instant appeal. The applicant contended that the Court of Appeal failed to consider the questions relating to the right to be heard, denying the applicant the right of access to justice; that the appellate court prematurely embarked on evaluation of material evidence. It also contended that should the arbitral award be executed, the loss of USD. 12, 767, 508.33 was irreparable.

The applicant hinged its appeal on the question of interpretation or application of the Constitution on grounds, inter alia, that its right to fair hearing as envisaged under the Constitution 2010 was hindered when at the High Court it was not given an opportunity to highlight its submissions, which right was not addressed by the Court of Appeal. There is also contention on whether the court has jurisdiction

The respondent filed a preliminary objection in which it contended that the Supreme Court lacked jurisdiction in the instant matter as the ruling of the Court of Appeal did not involve the interpretation or application of , neither was the appeal certified as a matter of general public importance. That the only issue that was for consideration by the Court of Appeal was whether the applicant had met the threshold for leave to appeal against the decision of the High Court on setting aside an arbitral award under Section 35 of the .

Issues

- i. What was the measure by which appellate courts could contend whether an appeal was arguable?
- ii. Whether the possibility of the loss of considerably large amounts of money could be termed as irreparable harm for the purposes of obtaining conservatory injunctive orders.
- iii. Whether a matter contesting dismissal of an appeal of an arbitral award at the High Court on grounds that the High Court did not afford the applicant an opportunity to highlight its submissions met the met the jurisdictional threshold for an appeal as of right to the Supreme Court.

Held

1. The question of the arguability of an appeal did not call for the interrogation of the merit of the appeal and the Supreme Court, at such stage, was not to make any definitive findings of either fact or law. An arguable appeal was not one which necessarily had to succeed but one which ought to be argued fully by the court.
2. The respondent sought to recover USD 12, 767, 508.33 through the statutory power of sale of the suit properties. The amount in contention was considerably large and there was imminent danger on the applicant being evicted from the said properties as a result of the impugned ruling by the Court of Appeal. That would occasion irreparable harm upon the applicant.
3. There was sufficient public interest element in the appeal as it touched the right to a fair trial as stipulated under article 25 of the Constitution, the applicability of the doctrine of *stare decisis* and the exercise of jurisdiction by the various institutions ranging from the arbitrator, the High Court and the Court of Appeal in the dispensation of justice.

Application allowed.

Orders

- i. *The Notice of Motion application dated November 16, 2022 and filed on November 22, 2022 was allowed to the extent that conservatory orders of injunction restraining the respondent whether by themselves, servants, agents, or any other person claiming under them from in any way alienating or selling the parcels of land known as Kajiado/Kaputiei North/1209, Kajiado/Kaputiei North/1210 and Kajiado/Kaputiei North/1211 in exercise of statutory power of sale and/or enforcement of the final arbitral award made and published by the arbitrator, Hon. Mr. Collins Namachanja on the September 27, 2019 pending the hearing and determination of the instant appeal.*



- ii. *Costs of the application would abide the outcome of the appeal.*

Citations

Cases

1. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (SC Application No 5 of 2014; [2014] eKLR) — Mentioned
2. Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019; [2020] KESC 1 (KLR)) — Mentioned
3. George Boniface Mbugua alias George Boniface Nyanja v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) (Miscellaneous Application 7 (E011) of 2021; [2021] KESC 41 (KLR)) — Mentioned
4. Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another (Petition 12 of 2016; [2019] KESC 11 (KLR)) — Mentioned
5. Synergy Industrial Credit Limited v Cape Holdings Limited (Petition 2 of 2017; [2019] KESC 12 (KLR)) — Mentioned
6. Tanad Transporters Limited & 2 others vs. Laiser Communications Limited & 2 others (SC Petition No 7 (E009) of 2022) — Mentioned

Statutes

1. Arbitration Act, 1995 (No 4 of 1995) — Section 35 — Cited
2. Constitution of Kenya, 2010 — Article 25, 50(1), 159, 163(4)(a) — Cited
3. Supreme Court Act, 2011 (No 7 of 2011) — Section 15, 15A, 15B, 21(2) — Cited
4. Supreme Court Rules (No 7 of 2011 Sub Leg) — Rule 3(5) — Cited

Advocates

None mentioned

RULING

1. Upon perusing the notice of motion dated November 16, 2022 and filed on November 22, 2022 by the applicant, Kampala International University, pursuant to article 163(4)(a) & 159 of the *Constitution of Kenya, 2010*, sections 15(2) & 21(2) of the *Supreme Court Act* and the *Supreme Court Rules, 2020* seeking conservatory orders of injunction restraining the respondent whether by themselves, servants, agents, or any other person claiming under them from in any way alienating or selling the parcels of land known as Kajiado/Kaputiei North/1209, Kajiado/Kaputiei North/1210 and Kajiado/Kaputiei North/1211 in exercise of statutory power of sale and/or enforcement of the final arbitral award made and published by the arbitrator, Mr Collins Namachanja, on the 27th of September, 2019 pending the hearing and determination of this appeal; and
2. Upon perusing the grounds on the face of the application; the supporting affidavit of its chairman of the board, Hassan Basajjabalaba, sworn on November 16, 2022, and submissions dated November 16, 2022 and filed on November 22, 2022 in support of the orders sought. The applicant contends that it has an arguable appeal and unless the orders sought are granted the appeal will be rendered nugatory as the respondent is likely to sell its property; that contrary to its directions on the disposal of the preliminary objection relating to the expungement of the further affidavit filed by the respondent's advocate, in which the parties advocates had extensively submitted on, the High Court delivered a ruling on the two applications filed by parties on setting aside of the arbitral award and enforcement of the award whereas; that by the court determining the two applications, it denied the applicant an opportunity to be heard and/ or highlight its written submissions contrary to the court's earlier directions; that the court failed to apply the principle of stare decisis, established principles of the



- Constitution and the law; that the arbitrator did not disclose a relationship with a party to arbitration which *ipso facto* resulted in bias; that failure to raise an objection to jurisdiction established by the arbitration agreement did not confer jurisdiction to the arbitrator;
3. Upon considering the applicant's further argument that the appellate court on appeal, failed to address the cogent questions relating to the right to be heard as envisaged under article 25 (c) and 50 (1) of the Constitution, denying the applicant the right of access to justice contrary to article 48 of the Constitution; that the appellate court prematurely embarked on evaluation of material evidence;
 4. Upon perusing the response contained in the respondent's notice of preliminary objection dated December 2, 2022 and filed on December 14, 2022 and its written submissions dated December 13, 2022 and filed on December 14, 2022 wherein the respondent alleges that this court has no jurisdiction to hear and determine the application and petition by dint of article 163(4)(a) and (b) of the Constitution, sections 15, 15A and 15B of the Supreme Court Act, No 7 of 2011 as well as by virtue of the decision in Geo Chem Middle East vs. Kenya Bureau of Standards; SC Petition No. 47 of 2019 [2020] eKLR; that the ruling of the Court of Appeal did not involve the interpretation or application of the Constitution neither is the appeal certified as a matter of general public importance; that the only issue that was for consideration by the Court of Appeal was whether the applicant had met the threshold set out in this court's decisions in Nyutu Agrovet Limited v Airtel Networks Kenya Limited & another [2019] eKLR and Synergy Industrial Credit v Cape Holdings Limited [2019] eKLR with respect to the requirement for leave to appeal against the decision of the High Court on setting aside an arbitral award under section 35 of the Arbitration Act; that the determination by the High Court was limited to grounds for setting aside an award under section 35 which it did by considering the extensive submissions filed by the applicant which needed no further input via oral highlights; and
 5. Upon perusing the applicant's submissions dated December 15, 2022 and filed on December 16, 2022 in opposition to the preliminary objection in which the applicant affirms that this court has jurisdiction in view of the cause of action before the superior courts that revolved around the application of the right to fair trial as envisaged under article 50 of the Constitution, 2010; that matters on the constitutional application are alive in this appeal, as a result, it falls under the jurisdiction of this Court as stipulated in article 163 (4) of the Constitution, 2010;
 6. Noting the directions issued by the Hon. Deputy Registrar of this court on December 14, 2022 the court is at this juncture limited to the consideration of the application before us and the preliminary objection in so far as it relates to the application and not the substantive appeal; and
 7. Cognizant of the provisions of section 21(2) of the Supreme Court Act 2011 and rule 3(5) of the Supreme Court Rules 2020 which grants the court inherent power to make any ancillary or interlocutory orders as may be necessary for the ends of justice or prevent abuse of the process of the court; and the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others SC Application No 5 of 2014 [2014] eKLR which set out the criteria for grant of interlocutory relief – an applicant must demonstrate that the appeal is arguable and not frivolous; that if stay is not granted the appeal will be rendered nugatory; and that it is in the public interest that the order of stay is granted.
 8. We now opine as follows:
 - a) on arguability of the appeal, we enunciated in Tanad Transporters Limited & 2 others v Laiser Communications Limited & 2 others, SC Petition No 7 (E009) of 2022 and George Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) SC Misc. Application No. 7 (E011) of 2021 [2021] eKLR that this question does not call for the interrogation of the merit of the appeal and the court, at this stage, must not make any definitive findings of either fact or law. An arguable appeal is not



one which necessarily must succeed but one which ought to be argued fully by the court. The applicant hinges his appeal on the question of interpretation or application of the Constitution on grounds, *inter alia*, that its right to fair hearing as envisaged under the Constitution 2010 was hindered when at the High Court it was not given an opportunity to highlight its submissions, which right was not addressed by the Court of Appeal. There is also contention on whether the court has jurisdiction in light of its previous decisions in Nyutu Agrovet Limited v Airtel Networks Kenya (*supra*), Synergy Industrial Credit v Cape Holdings Limited (*supra*) and Geo Chem Middle East v Kenya Bureau of Standards (*supra*), it is our view that the appeal is arguable.

- b) On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible. The respondent seeks to recover USD 12,767,508.33 through the statutory power of sale of properties known as Kajiado/Kaputiei North/1209, Kajiado/Kaputiei North/1210 and Kajiado/Kaputiei North/1211. The amount in contention is considerably large and there is imminent danger on the applicant being evicted from the said properties as a result of the impugned ruling by the Court of Appeal. Bearing that in mind, we are of the view that this would occasion irreparable harm upon the applicant.
- c) Lastly, on public interest, we believe that there is sufficient public interest element in the appeal as it touches on an inalienable right, that is the right to a fair trial as stipulated under article 25 of the Constitution, the applicability of the doctrine of *stare decisis* and the exercise of jurisdiction by the various institutions ranging from the arbitrator, the High Court and the Court of Appeal in the dispensation of justice.

9. Consequently, for reasons aforesaid, we make the following orders:

- (i) The notice of motion application dated November 16, 2022 and filed on November 22, 2022 be and is hereby allowed to the extent that conservatory orders of injunction restraining the respondent whether by themselves, servants, agents, or any other person claiming under them from in any way alienating or selling the parcels of land known as Kajiado/Kaputiei North/1209, Kajiado/Kaputiei North/1210 and Kajiado/Kaputiei North/1211 in exercise of statutory power of sale and/or enforcement of the final arbitral award made and published by the arbitrator, Hon Mr Collins Namachanja on the September 27, 2019 pending the hearing and determination of this appeal;
- (ii) Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2023.

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P. M. MWILU

**DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE SUPREME COURT**

.....
M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT
.....



S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

