



**Ellat-Agua Limited v Duncan (Miscellaneous Application E072 of 2021)
[2025] KEHC 7803 (KLR) (Commercial and Tax) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E072 OF 2021

FG MUGAMBI, J

MAY 30, 2025

BETWEEN

ELLAT-AGUA LIMITED APPLICANT

AND

ARMSTRONG & DUNCAN RESPONDENT

RULING

Background and Introduction

1. Before the Court is an application dated 14th November 2024 brought under Order 51 Rule 1, Order 42 Rule 6, and Sections 1A, 3, 3A and 63(e) of the Civil Procedure Act, as well as the Civil Procedure Rules, 2010. The application seeks orders for a stay of proceedings and a stay of execution pending hearing and determination of an intended appeal.
2. The application is supported by an affidavit sworn by Mwangi Murage as well as the written submissions dated 20th December 2024. The applicant states that it has filed a Notice of Appeal against the ruling delivered by this Honourable Court in Misc Appln. No. E071 of 2021 on 8th December 2023 and intends to pursue the appeal before the Court of Appeal.
3. The applicant argues that the intended appeal raises arguable legal issues concerning arbitration and the scope of the High Court's jurisdiction. It asserts that the appeal has good prospects of success and that, absent a stay, the appeal would be rendered nugatory and purely academic. The applicant expresses readiness to provide security in the form of a bank guarantee or any other security deemed appropriate by the Court.
4. The applicant further submits that the application was filed without unreasonable delay, and was prompted by the respondent's recent service of warrants of attachment. It is averred that the



respondent has already taxed its Bill of Costs, and received a ruling delivered on 25th June 2024, and subsequently obtained and served warrants of attachment via WhatsApp. Although the warrants expired on 4th October 2024, the applicant expresses concern that the respondent may seek fresh warrants, which would disrupt its business operations and impede the intended appeal.

5. The applicant submits that it risks suffering irreparable harm if this application is dismissed, including loss of property through the warrants, which cannot be adequately compensated by damages.
6. The respondent has opposed the application through a replying affidavit sworn by Wesley Kipkore on 15th January 2025 and filed written submissions dated 4th February 2025. It is the respondents' case that the application does not meet the legal threshold for grant of stay orders. It is deposed that there is no automatic right of appeal from a decision of the High Court made under Section 35 of the Arbitration Act and that such an appeal may only lie as of right under Section 39, where the parties have expressly agreed in the arbitration agreement to reserve such a right.
7. The respondent further asserts that even where leave is permissible, the applicant must demonstrate that the decision of the High Court falls outside the scope of Section 35 of the Arbitration Act, and that it is so grave or manifestly wrong as to amount to a miscarriage of justice. As a result, the intended appeal is said to be incompetent, premature, and without legal foundation, particularly in light of the fact that no leave has been sought or obtained from the High Court.
8. The respondent contends that granting the orders sought would amount to this Court effectively sitting on appeal over its own decision, a position that is impermissible in law. It is also argued that the application suffers from undue delay, having been brought over ten months after the delivery of the ruling on 8th December 2023, without any explanation for the lapse of time. According to the respondent, the application is an afterthought designed to delay execution and prevent the respondent from enjoying the fruits of a valid judgment.
9. The respondent takes issue with the applicant for failing to demonstrate the nature or extent of substantial loss it would suffer if the application is not granted. It adds that mere apprehension of execution is insufficient.
10. The respondent disputes the applicant's claim that the intended appeal is arguable or likely to succeed, pointing out that no draft Memorandum of Appeal has been annexed, nor has any clear or substantial grounds of appeal been presented. It is emphasized that any challenge to the arbitral award, if properly framed, ought to have been directed at the jurisdictional ruling of the High Court rather than the substance of the award itself.
11. In the alternative, and without prejudice to the above, the respondent prays that if the Court is inclined to grant a stay of execution, the same should be conditional upon the applicant depositing the entire decretal sum of Kshs. 31,997,142.57 in Court within fourteen (14) days, failing which the orders of stay should automatically lapse.

Analysis and Determination

12. I have carefully considered the application, response to it, the affidavits, the submissions of the parties, and the authorities cited. Before delving into the merits of the application, I deem it appropriate to address the issue of jurisdiction, which has been raised by the respondents.
13. It is well settled that the Court lacks jurisdiction under the Arbitration Act to entertain enforcement-related applications prior to the recognition and adoption of an arbitral award as a judgment of the



Court. This position was well enunciated by the Court of Appeal in the seminal decision of Anne Mumbi Hinga V Victoria Njoki Gathara, [2009] eKLR. The Court stated as follows:

“A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: “Except as provided in this Act no court shall intervene in matters governed by this Act.

The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act.”

14. My interpretation of the decision is that the position changes once such recognition of an award has been granted. At that point, the award assumes the status of a decree of the Court, and the Civil Procedure Act and Rules become applicable by operation of law, as appropriate. This is because the Arbitration Act while providing a comprehensive framework for arbitral proceedings, is silent on the procedural mechanisms for enforcement of awards post-recognition. It does not contain an independent execution regime.
15. Accordingly, once an arbitral award is adopted as a judgment under Section 36 of the Arbitration Act, the enforcement and execution of that judgment ought to proceed in accordance with the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules, 2010.
16. I now turn to determine whether the applicant has met the conditions set out in Order 42 Rule 6 on stay of execution and proceedings pending appeal. The established principles are that for an applicant to succeed in an application for stay of execution they must demonstrate that the application was submitted without undue delay, that they would suffer substantial loss if the application is not granted, and that they are prepared to comply with the court's requirements for providing security for the performance of the decree.
17. The respondent points out that the application was filed over ten months after the delivery of the ruling on 8th December 2023, without any explanation for the delay. The applicant attributes this delay to the time taken to prepare the necessary documents for the appeal. I have considered the record and find that the delay of ten months is indeed excessive and that the explanation advanced is neither credible nor sufficient.
18. That said, delay is not to be considered in isolation. The applicant further contends that if execution is allowed to proceed, it stands to suffer substantial loss, including the possible sale of its key assets. It argues that such action would significantly disrupt its business operations and impair its capacity to satisfy the judgment debt in an orderly manner. The applicant also points to a prior attachment of its assets by the respondent, expressing concern that further execution is likely, and that it would cause irreparable harm.
19. The respondent, on its part, disputes these assertions, characterizing the application as an afterthought and maintaining that the applicant has failed to demonstrate any real or imminent risk of substantial loss warranting the grant of stay.



20. The Court of Appeal in the case of *Kenya Shell V Benjamin Karuga Kibiru & Another*, [1986] eKLR, stated that:

“If there is no evidence of substantial loss to an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

21. I have carefully considered the reasons advanced by the applicant in support of its claim that it stands to suffer substantial loss if execution is allowed to proceed. The applicant has raised credible concerns regarding the potential sale of its assets and the likely disruption of its ongoing business operations. In my assessment, these concerns are neither speculative nor unfounded. There exists a real and appreciable risk of prejudice to the applicant should execution proceed prior to the hearing and determination of the intended appeal. It is therefore necessary, in the interest of justice, to preserve the status quo pending the appellate process.
22. The applicant has expressed willingness to provide security, whether in the form of a bank guarantee or such other form as the Court may consider appropriate. Conversely, the respondent urges the Court to impose a condition requiring the applicant to deposit the entire decretal sum of Kshs. 31,997,142.57 as a prerequisite for the grant of stay. The competing interests of the parties must accordingly be balanced in a manner that safeguards the respondent’s right to the fruits of judgment while ensuring that the appeal, if successful, is not rendered nugatory.
23. Having considered the respective positions of both parties, and in view of the interests of justice, I am satisfied that this is a suitable case in which to grant a stay of execution pending the hearing and determination of the intended appeal.
24. With respect to the prayer for stay of proceedings, I find that the same is not tenable. The parties neither canvassed nor made any substantive submissions on this limb of the application. In the absence of a properly articulated basis or supporting argument, the Court is unable to grant the relief sought. Accordingly, no orders shall issue in that regard.

Disposition

25. Accordingly, the application for stay of execution is allowed on the following terms:
- i. A stay of execution of the ruling delivered on 8th December 2023 in Misc. Application No. E071 of 2021 is hereby granted pending the hearing and determination of the intended appeal;
 - ii. As a condition for the stay, the applicant shall, within thirty (30) days from the date of this ruling, deposit the sum of Kshs. 20,000,000/= in a joint interest-earning account in the names of both parties’ advocates;
 - iii. Failure to comply with the above condition shall render the stay automatically vacated without further reference to the court;
 - iv. Costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE

