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Technoservice Limited v Nokia Corporation & another (Civil Application E610 of 2023) [2024] KECA 1429 (KLR) (11 October 2024) (Ruling)



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Citation	Technoservice Limited v Nokia Corporation & another [2024] KECA 1429 (KLR) <input type="button" value="Copy"/>
Media Neutral Citation	[2024] KECA 1429 (KLR) <input type="button" value="Copy"/>
Court	Court of Appeal
Court station	Court of Appeal at Nairobi
Outcome	Dismissed
Case number	Civil Application E610 of 2023
Judges	DK Musinga, S ole Kantai, M Ngugi
Judgment date	11 October 2024
Language	English
Type	Judgment
Original source file	Download DOCX (27.4 KB)
Date published	19 October 2024
Case action	Ruling
Filing county	

Nairobi

Order

The motion fails and is hereby dismissed with costs to the respondent.

Technoservice Limited v Nokia Corporation & another (Civil Application E610 of 2023) [2024] KECA 1429 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1429 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E610 OF 2023

DK MUSINGA, S OLE KANTAI & M NGUGI, JJA

OCTOBER 11, 2024

BETWEEN

TECHNOSERVICE LIMITED APPLICANT

AND

NOKIA CORPORATION 1ST RESPONDENT

**INTERNATIONAL CHAMBER OF 2ND RESPONDENT
COMMERCE/INTERNATIONAL COURT OF
ARBITRATION**

*(An application for stay of execution of Orders of the High Court of Kenya at Nairobi (Dr. Githiru Freda Mugambi, J.) dated 23rd October, 2023 in H.C. Comm. Case No. E103 of 2020.
Arbitration Cause E103 of 2020)*

RULING

1. By an agreement dated 5th August, 2009 between the applicant, Technoservice Limited and the 1st respondent, Nokia Corporation, it was agreed at Clause 22.2 “of the Frame Repair Service Agreement”:

" Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof shall be finally settled by arbitration by three arbitrators in accordance with the Rules of the International Chamber of Commerce. The language used in arbitration, including the language of the proceedings, the language of the decision, and the reasons supporting it shall be in English. The arbitration shall be conducted in Helsinki, Finland."

2. At Clause 22.3 on “of the Frame Repair Service Agreement.”

"The Parties agree to recognize the decision of the arbitrators as final, binding and executable. The arbitration shall be the sole and exclusive remedy of the Parties to the dispute regarding claims or counterclaims presented to the arbitrators."

3. Section 6 of the *Arbitration Act* provides that:

"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-

- a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

4. In a plaint filed at the Commercial & Admiralty Division of the High Court of Kenya at Nairobi, the applicant made various allegations against the respondent and the International Chamber of Commerce/International Court of Arbitration (sued as Interested Party) regarding performance of a contract subject of the agreement dated 5th August, 2019. It sought various prayers, declarations and other orders running from (i) to (xxii). The respondent entered appearance but did not file a defence. It instead made a formal application that the dispute be referred to arbitration in terms of the arbitration clause in the said agreement. F. Mugambi, J. in a ruling delivered on 23rd October 2023, found that the respondents' application had met all the requirements under section 6 of the *Arbitration Act*. Proceedings were therefore stayed pending reference of the dispute to arbitration.

5. The applicant has approached this Court by Motion on notice said to be brought under section 3A of the *Appellate Jurisdiction Act*, rules 1(2) and 5 (2)(b) of the Court of Appeal Rules, praying in the main that we be pleased to issue an order of stay of execution of the said ruling pending hearing of the application and of an intended appeal, and issue any further order as we may deem fit and just. In the grounds in support of the Motion and in a supporting affidavit of Bulent Gulbahar, a director of the applicant, it is said, amongst other things, that the applicant has appealed the said ruling, which it says is arguable; that the Judge erred because she did not give priority to an application for consolidation which was pending; that an application to further amend the plaint should have been given priority; that the application to refer the matter to arbitration was supported by a defective affidavit; that the Judge ignored evidence that that arbitration under the International Chamber of Commerce "ICC" is "... biased, corrupted, prohibitively expensive, slow and unconstitutional ..."; that the Judge should have found that ICC:

"... is conflicted as against the Respondent, Nokia, due to Nokia's membership and relationship with the ICC, including Nokia officials holding high ranking positions within the ICC and ICC International Court of Arbitration ..."

6. Further, that the Judge should have found that the Arbitration Agreement was null and void; that the respondent had committed tax fraud against Kenyan law; and that the intended appeal would be rendered nugatory, amongst other grounds.
7. There is a further affidavit where more or less similar grounds are repeated.
8. Aapo Saarikivi of Helsinki, Finland, and a partner in the law firm of Roschier, Attorneys Limited, in a replying affidavit says, inter alia, that the law firm represented the respondent in arbitration proceedings at the International Court of Arbitration of the ICC against the applicant; that the applicant had lodged a claim at ICC against the respondent, which claim was identical to the claims in the plaint at the High Court of Kenya at Nairobi; that the arbitration proceedings stalled because the applicant here did not pay its part of arbitration fees; that failure to pay arbitration fees led to the arbitration being deemed as withdrawn; that the dispute before the High Court of Kenya was subject to the arbitration clause in the agreement dated 5th August, 2009. The deponent sets out the background of the dispute, which we have already referred to and there is no need to repeat it here.
9. There are several documents filed which we have seen and considered, and we have also considered the written submissions filed by the respective parties.
10. The principles that apply in an application for stay of execution pending appeal are well known. For an applicant to succeed in such an application, it must, firstly, demonstrate that the appeal, or intended appeal, is arguable, which is to say that the appeal is not frivolous. Such an applicant must, in addition, show that the appeal, if successful, would be rendered nugatory absent stay. See a summary of the relevant principles set out in Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR.
11. What is the position here where the applicant prays that we grant stay of execution where the parties were referred to arbitration?
12. It is that a dispute arose in execution of the agreement dated 5th August, 2009 made between the applicant and the respondent. The applicant filed suit against the respondent making various claims. The respondent entered appearance to the suit and then formally applied for the dispute to be referred to arbitration by the ICC as set out in clauses 22.2 and 22.3 of the agreement.
13. As we have stated, section 6 of the Arbitration Act sets out an elaborate procedure on reference to arbitration for parties who are bound by an arbitration agreement. The respondent followed that procedure by entering appearance and then applying to the court to stay proceedings pending reference and determination by an agreed arbitral tribunal. The respondent complied with the requirements of the law to the letter.
14. The parties chose the forum and method of resolving disputes that may arise during execution of their agreement. They were bound by their agreement. In the circumstances, the complaints by the applicant were misplaced. We cannot therefore see any arguable point in the intended appeal. Being of that view, we need not go into a consideration of the second limb of the principles applicable in an application of this nature. The motion fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

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