Oriole Investments Limited v Bandari Savings & Credit Corporative Society Limited & another (Civil Suit 55 of 2020) [2023] KEHC 24752 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 24752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 55 OF 2020

MN MWANGI, J

SEPTEMBER 29, 2023

BETWEEN

ORIOLE INVESTMENTS LIMITED ..... PLAINTIFF

AND

BANDARI SAVINGS & CREDIT CORPORATIVE SOCIETY LIMITED ..... 1ST DEFENDANT

QUEENO INVESTMENT LIMITED ..... 2ND DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 28th July, 2021 brought under the provisions of Order 45 Rules 1(1) & 2(2) of the Civil Procedure Rules, 2010, Section 80 of the *Civil Procedure Act* and Section 6 of the *Arbitration Act*. The 1st defendant/applicant seeks the following orders-

    a. Spent;

    b. That there be a stay of proceedings of arbitration proceedings (sic) between Oriole Investments Limited (Claimant) and Bandari Sacco Limited (respondent) pending before QS Ali Mandhry pending the hearing and determination of prayer C below;

    c. That the ruling dated 4th September, 2020 be reviewed and set aside and the defendant be allowed to file a statement of defence; and

    d. That costs of the application be provided for.

2. The application is premised on the grounds on the face it and is supported by an affidavit sworn on 28th July, 2021, by Ken Tobias Odero Sungu, the Chairman of the 1st defendant's Board of Directors. In opposition thereto, the plaintiff/respondent filed a replying affidavit sworn on 31st August, 2021, by Obed Njiru, the Managing Director of the plaintiff company herein.

3. The application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Munyithya, Mutugi, Umara & Muzna Company Advocates on 5th November, 2021, whereas the respondent's submissions were filed by the law firm of Mkan & Company Advocates on 1st November, 2021.

4. Mr. Munyithya, learned Counsel for the applicant cited Section 6(1)(a) of the *Arbitration Act*, No. 4 of 1995 and the Court of Appeal case of *Niazsons (K) Limited v China Road & Bridge Corporation Kenya* [2001] eKLR and submitted the applicant herein was served with the respondent's statement of claim way after the Court had delivered a ruling referring the dispute herein to arbitration pursuant to Clause 17 of the contract. He contended that this Court has to determine whether there exists a valid arbitration between the parties in dispute, since an invalid arbitration agreement cannot be the basis for referring disputes to arbitration.

5. It was stated by Counsel that upon perusal of the respondent's statement of claim, it became clear that the plaintiff relied fully on the provisions of the contract which differed with the contract set out in the tender document since it omitted the agreement and terms of payment. Counsel referred to Section 153 of the *Public Procurement and Asset Disposal Act* and Clause 18 of the tender document which provides for circumstances under which the contract could be terminated and the applicable procedure in termination. He stated that the contract between the parties herein did not comply with the said provisions.

6. Mr. Munyithya also cited Section 135(2) & (6) of the *Public Procurement and Asset Disposal Act* and stated that the applicant is placed in a precarious position if it were to proceed with the pending arbitration on the face of the glaring legal breaches committed by its previous Board, since failure to comply with provisions under the said Sections is a criminal offence punishable by law. He referred to the case of the *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR and the case of Lee v The Showmen's Guild of Great Britain (1952) 2 QB 329 (C.A) quoted in Niazsons (K) Ltd v China Road & Bridge Corporation Kenya (supra) and contended that the intention of the legislature is that if an agreement is null and void, then the Court has the requisite jurisdiction to hear and determine the matter.

7. It was submitted by Counsel that the contract sampled in the tender document clearly spelt out the mode of payment of the contractual amount but the respondent was taking advantage of the contract dated 4th August, 2016 to employ the use of FIDIC principles for the calculation of damages, a mode which was not disclosed or contemplated within the tender document, thus compromising the doctrine of transparency and accountability contemplated by Article 227 of *the Constitution* of Kenya, 2010. He contended that the contract formed was, and is in total breach of *the Constitution* and statute and is illegal, unlawful, null and void. To support his argument, Counsel relied on the case of *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR.

8. Mr. Munyithya relied on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and submitted that the applicant seeks to review Court orders issued on 4th September, 2020 on the ground that the suit is founded on a contract which is illegal, unlawful, null and void. He further submitted that at the time the applicant filed the application dated 13th August, 2020, it had not seen the respondent's statement of claim that fully relied on the void contract. Counsel cited the case of Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR and stated that the new evidence could not with diligence be found at the time the application dated 13th August, 2020 was filed. Counsel asserted that having demonstrated that the contract herein cannot form a basis of a lawful cause of action, the applicant intends to raise a defence on the doctrine of ex turpi causa non oritur action (no court will lend its aid to a man who founds his cause of action upon an immoral or an

illegal act) thus the ruling of the Honourable Court ought to be set aside so as to allow the applicant to file a defence.

9. Mr. Mkan, learned Counsel for the respondent relied on the case of *Kenya Alliance Insurance Co. Ltd v Annabel Muthoki Muteti* [2020] eKLR and submitted that the applicant subjected itself to arbitration proceedings willfully and even made an application to the Court seeking to enforce an arbitration clause in the contract giving rise to this suit, thereby waiving its right to this matter proceeding in an ordinary cause of litigation. He further submitted that even if there was any illegality in the parent contract giving rise to the suit herein, it was to be left to the Arbitrator to make such a finding.

10. Counsel contended that for a party to be entitled to orders of review, the said party must certify all the requirements outlined under Order 45 Rules 1 & 2 of the *Civil Procedure Rules*, 2010. He asserted that the applicant cannot say that there was discovery of new evidence or matters which were not within its knowledge since all the documents which were produced in the respondent's statement of claim for purposes of arbitration were all authored by the applicant and its Advocates on record.

11. Mr. Mkan submitted that the contract, tender documents and bill of quantities were all within the applicant's knowledge and that the applicant cannot allege that the information therein is new and was discovered after the respondent filed its statement of claim before the Arbitrator.

12. Counsel referred to the case of *Alpha Fine Foods Limited v Horeca Kinya & 4 others* [2021] eKLR and stated that the applicant has not established a sufficient reason or any patent error of law which requires to be reviewed. Mr. Mkan submitted that the application herein is an attempt by the applicant to delay the finalization and determination of this matter.

Analysis And Determination.

13. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the respondent as well as the written submissions by Counsel for the parties. In my considered view, the issue of whether the arbitration proceedings herein should be stayed pending the hearing and determination of prayer (c) has been overtaken by events since the effect of this ruling is to determine whether the application herein is indeed merited. Consequently, the only issue that arises for determination is whether this Court should review and set aside the ruling dated 4th September, 2020 and allow the defendant to file its statement of defence.

14. In the affidavit filed by the applicant, it deposed that when this matter was filed, it also filed an application dated 13th August, 2020, seeking stay of proceedings and for this matter to be referred to an Arbitrator pursuant to Clause No. 17 of the contract dated 4th August, 2016. Subsequently, the application was heard and a ruling was delivered in the applicant's favour on 4th September, 2020. The applicant averred that by the time the said ruling was delivered, the respondent had not prepared its statement of claim before the Arbitrator, thus certain things were not canvassed before the Court prior to the delivery of the said ruling.

15. The applicant further averred that on perusal of the respondent's statement of claim, it is evident that it fully relies on the provisions of the contract dated 4th August, 2016, which contract was supposed to be a product of a tender process. It stated that the documents consisting the contract set out in Clause 2 of the tender document are a product of the *Public Procurement and Asset Disposal Act*.

16. The applicant stated that the contract signed on 4th August, 2016, materially differs with the contract set out in the tender document. In addition, that the said contract omitted the tender document as completed by the respondent, the agreement and terms of payment. The applicant deposed that it

wishes to file a statement of defence and that this Court should find that the suit herein is founded on an illegal, unlawful, null and void contract and is for striking out.

17. The respondent in its replying affidavit deposed that the contract dated 4th August, 2016, was a product of a process and the entire procedure of public procurement was duly followed and a legitimate contract, legally binding on the parties thereto, was entered into. The respondent further deposed that the site was handed over to it and it constructed a two feet high wall and was paid, demonstrating the existence of a legally binding contract. It averred that the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, provides the framework in respect to contracts, and what is determinant is the contents and the intention of the parties entering into such agreements with intention to bind themselves, and not the form the contract is drawn in. The respondent contended that the fact that the agreement dated 4th August, 2016 differs in form with the templates provided as a guide does not rob any contract entered into by willing parties of its legality and legitimacy.

18. The respondent contended that it complied with all the tendering process, and the Legal Advisor for the parties herein during the entire process was Mr. Munyithya. It averred that the applicant was duly served with summons to enter appearance and the plaint in the month of August 2020 but it opted not to file a defence citing no reasons whatsoever.

19. It was stated by the respondent that the allegation that there has been discovery of new evidence to warrant review of the ruling and Court Order issued on 4th September, 2020, is an act of dishonesty on the part of the applicant and its Advocate Mr. Munyithya, as the entire process of tendering, drafting of the contract and payment of the initial deposit was done by the applicant on the advice of the said Advocate. Additionally, that at one point, the applicant sued the respondent in a bid to compel it to hasten the performance of the subject contract.

20. The respondent contended that there is no evidence and/or material facts which were not known to the applicant as at the time it was making the application for the matter to be referred to arbitration to warrant this Court to review its ruling. It deposed that Mr. Munyithya is a compellable witness to produce documents in support of the respondent's suit having represented both parties in respect to the drafting and execution of documents central to the contract herein hence he is not competent to continue representing the defendants.

21. The respondent averred that it cannot be punished for errors, omissions and deviations done by the defendants, and that the defendants have never at any time terminated the contract to date. The respondent asserted that the contract still subsists and all duties and obligations thereof are still accruing.

Whether This Court Should Review And Set Aside The Ruling Dated 4Th September, 2020 And Allow The Defendant To File A Statement Of Defence.

22. It is trite that this Court is clothed with the requisite jurisdiction to review its own decisions. However, this jurisdiction does not operate in a vacuum as it has to be exercised within the parameters of Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 which provide as hereunder-

> " 80. Any person who considers himself aggrieved-
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

(1) Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

23. The Court in the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR when dismissing an application similar to this one held as follows-

"...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b. On account of some mistake or error apparent on the face of the record, or

c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay."

24. The Supreme Court of India discussed the scope of review in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at p. 608. The Court held that-

"the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may

be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

25. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, Mativo. J (as he then was), when dealing with an application similar to the present one considered several decisions and outlined the following principles to be considered in an application for review-

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

26. In the present application, it is evident that the applicant seeks to review the ruling of this Court dated 4th September, 2020, on grounds that there is an error on a point of law apparent on the face of the ruling and/or that there has been a discovery of new and important matter after the framing of the statement of claim before the Arbitrator. It is important to note that in order for this Court to exercise its discretion in favour of the applicant, the latter must satisfactorily establish that it discovered new and important evidence which after the exercise of due diligence was not within its knowledge, or could not be produced at the time the application dated 13th August, 2020 was being heard and determined.

27. An applicant alleging discovery of new and important evidence must demonstrate that the discovery was made after the passing of the order sought to be reviewed, in this case, after 4th September, 2020. The applicant herein averred that it was after the respondent filed its statement of claim before the Arbitrator that it realized the respondent had relied fully on the contract dated 4th August, 2016, which contract is illegal, unlawful, null and void for want of compliance with Sections 135(2) & (6) and 153 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, and in contravention of Article 227(1) & (2) of *the Constitution* of Kenya, 2010. The applicant contends that this information only became apparent to it after the respondent filed its statement of claim before the Arbitrator.

28. It is not in dispute that the applicant was in possession of the contract dated 4th August, 2016, the tender document, and all other documents in relation to the transaction between the parties herein at the time it filed the application dated 13th August, 2020, in which it prayed for this Court to refer the dispute herein to arbitration pursuant to Clause 17 of the contract dated 4th August, 2016. As such, nothing prevented it from availing the information that the said contract is illegal, unlawful, null and void to the Court by way of a sworn affidavit before the said application was heard and determined.

29. As explained hereinabove, the applicant has to demonstrate that it was prevented by circumstances beyond its control from tendering the said evidence to Court before 4th September, 2020, when the ruling sought to be reviewed was delivered. To satisfy this test, the applicant must demonstrate discovery of new evidence which it could not procure at the time the application was heard despite exercise of due care and diligence. I am of the view that had the applicant exercised due care and diligence, it would certainly have brought this information to the Court's attention as it was within its reach prior to the delivery of the ruling dated 4th September, 2020.

30. Consequently, this Court finds that the so called "new important evidence and/or information" that the applicant intends to rely on, is not new at all, since the applicant had all the requisite documents in its possession to enable it arrive at the conclusion that the contract dated 4th August, 2016 is illegal, unlawful, null and void. It is apparent that there is no issue of discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the applicant's knowledge but what comes out from the depositions made by the applicant is that there was oversight on its part in the manner in which it packaged its case, as it left out certain allegations, which it now attempts to bring in. In Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006 cited in the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers* [2016] eKLR the Court of Appeal held as follows on review applications-

> "An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh."

31. Having failed to satisfactorily establish the three conditions precedent to granting of an order for review as provided for under Order 45 Rule 1 of the *Civil Procedure Rules*, 2010, it is my finding that the application herein is without merit.

32. Consequently, the application dated 28th July, 2021 is dismissed with costs to the plaintiff/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mrs. Kioko h/b for Mr. Joseph Munyithya for the 1st defendant/applicant

No appearance for the plaintiff/respondent