



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.E084 OF 2021

GULF ENERGY LIMITED.....PETITIONER/RESPONDENT

VERSUS

RUBIS ENERGY KENYA PLC.....RESPONDENT/APPLICANT

RULING

Introduction

1. The petitioner herein filed the petition dated 16th March 2021 together with a notice of motion of even date. The respondent filed a preliminary objection dated 19th March, 2021 opposing the petition. The same was heard and allowed. As a result, the petition and notice of motion were struck out on 31st May, 2021.

2. On 7th June, 2021 a Notice of Appeal to the Court of Appeal was lodged by the petitioner in respect of the ruling of 31st May, 2021. Further, a notice of motion dated 22nd June, 2021 was filed by the petitioner/applicant. It sought conservatory orders pending the hearing of the intended appeal.

3. The respondent filed two (2) preliminary objections to the said notice of motion. The same are dated 28th June, 2021 and 21st September, 2021 respectively. A ruling was delivered on 29th October, 2021 in respect of the said notice of motion dated 22nd June, 2021 plus the and preliminary objections. The court granted conservatory orders as sought by the petitioner.

4. Thereafter the respondent filed a notice of motion dated 11th November, 2021 seeking the following orders:

(i) & (ii) spent

(iii) In allowing the petitioner's application the court denied the respondent an opportunity to be heard on the application.

(iv) The court's orders have the effect of restricting unduly and prejudicially the respondent's ability to pursues its ongoing claim in arbitration.

(v) It is just and equitable that this application be heard as a matter of urgency.

5. The application is supported by the grounds on its face plus 3 affidavits by John Githiomi dated 11th November, 2021, 30th November, 2021 and 31st January, 2022. The deponent has averred that they were never given an opportunity to argue their preliminary objection dated 28th June, 2021.

6. Further that, the respondent was never directed to file submissions on the same. According to him, the court was to rule on the preliminary objection dated 21st September, 2021 before proceeding to hear the others.

7. In his supplementary affidavit the applicant deposes that the orders made by Mr. Justice J. A. Makau on 6th July, 2021 for hearing of the petitioner's application by way of written submissions was set aside and vacated by the Judge's orders on 30th July, 2021. Further, that the preliminary objection dated 21st September, 2021 was not given any directions. He therefore avers that there was no direction to the effect

that the Notice of motion and the preliminary objection were to be heard together.

8. In the 2nd supplementary affidavit the deponent refers to the petitioner's statement of rejoinder dated 17th December, 2021. He averred that for the first time the petitioner had conceded that the issue of the respondent's entitlement to rely on the alleged "**confidential information**" falls within the jurisdiction of the arbitral tribunal and not the courts.

9. In response to the notice of motion the petitioners filed grounds of opposition dated 19th November, 2021, and a replying affidavit by Paul Limoh sworn on the same date. A summary of both documents is to the effect that Justice Makau who handled the matter on 23rd June, 2021 and 6th July, 2021 gave directions on the filing of responses and submissions. These directions were not set aside but the interim orders were discharged. He depones that the record bears witness on what transpired in court.

10. It is his disposition that the court at paragraph 10 of its Ruling confirms that indeed parties adopted their submissions to the application dated 22nd June, 2021 and the preliminary objections.

On the grounds of opposition the petitioner argues that no basis has been demonstrated for the review of the Ruling of 29th October, 2021. That no error apparent on the face of the record has been identified nor the discovery of any new or important matter, cited.

11. The petitioner states that the application seeks to challenge the Ruling of 29th October, 2021 which should not be allowed. Further that the conservatory orders granted on 29th October, 2021 have not barred the respondent from proceeding with the arbitration, which it is doing.

The respondent/applicant's submissions

12. Kaplan and Stratton advocates for the respondent/applicant filed submissions dated 30th November, 2021. Counsel submits that when he appeared before the court on 22nd October, 2021 he only argued the further preliminary objection dated 21st September, 2021 with an expectation of arguing the rest once the further affidavit had been determined. He submits that there was an error on the record leading to a decision in violation of the rules of natural justice.

13. Counsel submits that this court has unfettered discretion to allow an application for review where there is an error on the record or for any sufficient reason. Reliance was placed on the cases of :

(i) **National Bank of Kenya Ltd. v Ndungu Njau (Civil Appeal No.211 of 1966).**

(ii) **Pancras T. Swai v Kenya Breweries Ltd [2014] eKLR.**

14. Referring to paragraph 10 of the impugned ruling counsel submits that it did not reflect what exactly happened in court on 22nd September, 2021. As a result the respondent was denied natural justice, which makes the decision to be null and void. He referred to the cases of:

(i) **Onyango v Attorney General [1986 – 1989] E. A.L R @ page 456.**

(ii) **Aisha Motor Dealers Ltd & another v Wanza Kisuli and Peter Nzangi (suing as a legal representative of Estate of the late Nthony Kisuli [2019] eKLR, in support of this argument.**

15. While highlighting his submissions Dr. Ojiambo argued that the respondent/applicant was never heard on the preliminary objection dated 28th June, 2021. The same had been filed and was before Justice Korir on 29th October, 2021. He adds that there was no consent on the preliminary objections being heard together. He asserts that the preliminary objections were dismissed without the respondent/applicant being granted an opportunity to argue them. That this denied it an opportunity to be heard which is against natural justice. He therefore seeks for a revision of the decision of 29.10.2021.

16. The petitioner/respondent's submissions are dated 6th December, 2021 and filed by Hamilton, Harrison and Mathews who appears for it. Counsel has given a summary of what transpired before Justice Makau before the matter was placed before Justice Korir for hearing. He has referred to the notes of the proceedings and submits that paragraph 10 of the impugned ruling reflects the correct position.

17. Counsel mentions that when the ruling was delivered Dr. Ojiambo for the respondent never objected or protested to anything, yet he was aware that Justice Korir had been transferred. At this point the said Judge cannot comment or respond to the criticisms being made. It is his submission that there has been no denial of natural justice to the respondent/applicant and there is no error on the face of the record.

Analysis and determination

18. Having considered the notice of motion, the affidavits, written and oral submissions, cited cases and the law, I find the issue falling for determination to be whether the respondent/applicant has made out a case for review of the orders by Justice Korir issued on 29th October, 2021. The respondent/applicant claims that it was denied a right to be heard.

19. The record shows that the petition and notice of motion dated 19th March, 2021 were struck out following a successful preliminary objection dated 19th March, 2021. The petitioner/respondent being aggrieved filed a notice of appeal to the Court of Appeal and an application dated 22nd June, 2021 before this court. In response to the said application, the respondent/applicant filed a preliminary objection

dated 28th June, 2021. A further preliminary objection dated 28th September, 2021 was filed by the respondent/applicant.

20. It is the respondent/applicant's claim that it was never heard on the application dated 22nd June, 2021 and the preliminary objection dated 28th June, 2021. From the record, the following are very clear:

- (i) The petitioner/respondent filed submissions and a digest of authorities both dated 13th July, 2021 which are in respect of the notice of motion dated 22nd June, 2021 and the preliminary objection dated 28th June, 2021.
- (ii) The respondent/applicant equally filed submissions and a digest of authorities both dated 21st July, 2021. They are in respect of the preliminary objection dated 28th June, 2021 and the notice of motion dated 22nd June, 2021.

21. The Ruling the subject of the notice of motion dated 22nd June, 2021 was a decision by Justice W. Korir. Upon the request by Dr. Ojiambo for the respondent Justice Makau set aside orders he had issued on 6th July, 2021 and forwarded the file to Justice Korir to proceed and hear it on 22nd September, 2021.

22. Counsel for both parties appeared before Justice Korir as the record shows on 22nd September, 2021. Mr. Fraser for the petitioner/respondent introduced the matter before the court. Dr. Ojiambo then said "We would want to proceed with our preliminary objection initially".

23. Mr. Fraser proceeded and addressed the court on the submissions filed and whatever else they had filed. He had in his initial address told the court that despite the further preliminary objection dated 21st September, 2021 having been filed, he proposed that the same be dealt with alongside what was coming for hearing on that day.

24. When Dr. Ojiambo addressed the court he was more detailed than Mr. Fraser. He referred to their submissions dated 21st July, 2021 and submitted more on the 2nd preliminary objection of 21st September, 2021. The two preliminary objections had been filed in opposition to the application by the petitioner/respondent dated 22nd June, 2021. Both counsel were given an opportunity to do a rejoinder before a date for Ruling was given by Justice Korir.

25. According to Dr. Ojiambo, the court only heard the parties on the 2nd preliminary objection dated 21st September, 2021 and not on the application dated 22nd June, 2021 and the preliminary objection dated 28th June, 2021. He even argues that no directions were given for the matter to be heard by way of written submissions.

26. From what transpired on 6th July, 2021 directions were given by Justice Makau in respect of filing responses and submissions for the application dated 22nd June, 2021. At page 57 of the handwritten proceedings the Hon. Judge stated:

"I further direct the application be determined by way of written submissions."

27. The Ruling dated 30th July, 2021 by Justice Makau granted the following orders:

(a) The orders issued on 6th July, 2021 being orders 2 and 3 to application dated 22nd June, 2021 be and are HEREBY set aside and vacated.

(b) I direct that this case be placed before Hon. Justice W. Korir for hearing and determination of both the application dated 22nd June, 2021 and Applicant's preliminary objection to the application dated 22nd June, 2021.

28. These were the exact orders that were sought in the respondent/applicant's application dated 16th June, 2021. There was no request for the directions on filing of responses and submissions issued by Justice Makau on 6th July, 2021 to be set aside. No such order was therefore issued.

29. As the record shows both parties faithfully filed written submissions, and digests of decided cases without any coercion. The respondent/applicant does not state how both of them agreed to file written submissions without directions being given. In fact in what appears to be the highlighting of submissions both parties refer to their written submissions in respect of the application dated 22nd June, 2021, and the Preliminary objection plus the cited authorities.

30. The above is what transpired in court on 22nd September, 2021 before the matter was set down for Ruling. The respondent/applicant now wants this court to set aside the ruling of 29th October, 2021 upon review of the same.

31. Review is provided for under Order 45 of the Civil Procedure Rules which states:

[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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

32. In the case of **National Bank of Kenya Ltd** (*supra*) cited by the respondent/applicant it was held:

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

33. The respondent/applicant’s argument rests on the claim that there is an error on the face of the record arising from failure by the court to accord it a hearing. The respondent/applicant does not deny having filed substantive submissions dated 21st July, 2021. The same well addressed the application dated 22nd June, 2021 and the preliminary objection dated 28th June, 2021

34. I have perused the Ruling by Justice Korir delivered on 29th October, 2021. It has fully addressed both preliminary objections before moving to the notice of motion dated 22nd June, 2021 which had given rise to the preliminary objections.

35. The Ruling was delivered in the presence of counsel for both parties. Dr. Ojiambo then sought leave to appeal which leave was granted. Having analysed the material on record plus the submissions, I find that there is no error apparent on the face of the record.

36. The parties filed written submissions which were considered by Hon. Justice Korir before arriving at his decision. The respondent/applicant was granted leave to appeal which it should utilize as it appears not satisfied with the decision, dated 29th October, 2021.

37. Otherwise I find no reason to make this court review the Ruling dated 29th October, 2021. The upshot is that the application lacks merit and is dismissed with costs. The interim orders of 11th November, 2021 are hereby vacated.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 24TH DAY OF MARCH, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong’udi

Judge of the High Court