



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL DIVISION

MISC APPLICATION NO E034 OF 2021

IN THE MATTER OS SECTIONS 7, 17(3), 19, 20 (1)(3), 32 (3), 35(1)(2)(A)(IV) AND (3) OF THE ARBITRATION ACT NO.4 OF 1995 AND IN THE MATTER OF RULE 7 OF THE ARBITRATION RULES,1997

AND

IN THE MATTER OF SECTION 45(1)(2) (2A) & (6) OF THE ADVOCATES ACT CAP. 16 LAWS OF KENYA AND IN THE MATTER OF ARTICLE 47(1) AND 50(1) & (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION TO SET ASIDE THE ARBITRAL AWARD PUBLISHED ON 21ST DECEMBER 2020 BY PETTERSON MUNENE KAMAARA, FCIARB, ARBITRATOR

BETWEEN

OSEKO & OUMA ADVOCATES, LLP.....APPLICANT

VERSUS

SAMUEL GACHIE KAMITI.....RESPONDENT

RULING

APPLICATION

The Applicant filed a Notice of Motion Application dated **19th January 2021** supported by the affidavit of **Christine Ouma Oseko** sworn on **19th January 2021** and sought orders before hearing and determination of the application interpartes among others as follows;

1. That the Court be pleased to stay enforcement of the Arbitral Award published on **21st December 2020** by **Mr. Patterson Munene Kamaara** pending hearing and determination of this application.
2. That an interim order be issued to order that the funds held by the Applicant in the separate client account at NCBA Bank Kenya be maintained in the said account pending the hearing a determination of the application.

REPLYING AFFIDAVIT

The Applicant's application is opposed by the Respondent through the Replying Affidavit sworn by **Samuel Gachie Kamiti** on **4th February 2021**.

He stated that the Applicant's application offends the mandatory provisions of the Arbitration Rules as the Application ought to have been filed in **Nairobi HCCC No. 64 of 2019 (O.S) Samuel Gachie Kamiti Vs Oseko & Ouma Advocates, LLP** which stayed the proceedings therein pending hearing and determination of the arbitration or further orders of the Court.

That the Applicants deliberate action to seek for similar orders which were dismissed by a Court of concurrent jurisdiction and appellate court amounts to gross abuse and misuse the court process, an act which the court must frown at.

That the Applicant after losing prayers for stay to have the funds moved to the joint interest earning account both in High Court and the Court of Appeal is now engaging in forum shopping by deliberately choosing not to challenge the Award.

That the present application is premature and speculative as the Arbitrator is yet to dispose of the request made by the Claimant in the Arbitration pursuant to **Section 34 (2) of the Arbitration Act**.

That the Arbitrator having found that the claimants request was justified gave directions **on 25th January 2021** that the Respondent (Applicant herein) do comment on the request dated **18th January 2021** within 14 days and the Arbitrator shall thereafter consider corrections sought by the Claimant within 30 days. The Arbitrator was therefore to make further orders and directions as part of the award.

That despite being given an opportunity to comment on the request, the Applicant failed and/or chose not to comment on the on the said request and instead lodged its notice of objection.

ORAL PROCEEDINGS

The parties through respective Counsel submitted orally as follows on 4th February 2021;

Mr Oduol for the Applicant referred to the instant application which was served to the Arbitrator and parties to Arbitral proceedings and pending its hearing and determination sought interim orders in prayers 2 & 7 of the Application to safeguard the subject matter of the application and stay of enforcement of the Arbitral Award.

Mr Odoyo for the Respondent referred to the Replying Affidavit filed and served to parties and opposed grant of Prayer 2 of the Application, as there are active proceedings ongoing before the Arbitrator under **Section 34 of the Arbitration Act**. The Arbitrator was served with a request and responded to the request. The Arbitrator asked the Respondent to respond and the Respondent/Applicant filed an objection to the Arbitrator. It would be premature to grant Prayer 2 as final orders are to be granted by the Arbitrator.

The Respondent's Counsel stated that with regard to Prayer 7 of the Applicant's application if granted would offend the mandatory provisions of the Arbitration Rules.

The Application ought to have been filed in **Nairobi HCCC No. 64 of 2019 (O.S) Samuel Gachie Kamiti Vs Oseko & Ouma Advocates, LLP** which stayed the proceedings therein pending hearing and determination of the arbitration or further orders of the Court.

On 21st January 2021, the Applicant informed the Court that they wished to challenge the Arbitral Award. The matter was stood over to 20th September 2021 to allow parties exercise their rights under **Section 35 of Arbitration Act**.

Prayer 7 cannot be granted as it would be contrary to the Ruling of 20th September 2019 in the above cited case. The Applicant was dissatisfied with the order(s) and filed an application for stay of execution which was dismissed on 6th July 2020.

Thereafter, the Applicant filed an appeal in **C.A No 1 of 2020** and also sought stay of execution. The application for stay of execution was dismissed on 18th December 2020. So that those orders by Hon. J.Tuiyott in **Nairobi HCCC No. 64 of 2019 (O.S)** ought to be complied with.

Mr Oduol on response confirmed that the Arbitrator rendered an award. The Applicant filed this application in January 2021 as in their view the Award had grave errors that cannot be corrected by the Arbitrator.

For example, the Arbitrator made orders in or to the Law firm of Oseko & Co Advocates and not the Applicant; Oseko & Ouma & Co Advocates.

The Arbitrator held that the Agreement was a Retainer Agreement but proceeded to assume jurisdiction to tax a Bill of Costs. These are not clerical mistakes but go to jurisdiction of the Arbitrator and it is a matter to be argued fully.

The Applicant's Counsel stated that the matter is at the moment scheduled for taxation by the Arbitrator and the Applicant will be prejudiced. The Applicant served the Arbitrator with objection notice that proceedings of taxation would be in excess of jurisdiction under **Section 17 of Arbitration Act**.

Therefore, grant of Prayer 2 of the Applicant's Application is to preserve the Applicant's case pending hearing and determination of the application.

Counsel for the Applicant stated that in **Nairobi HCCC No. 64 of 2019 (O.S)**, the Respondent filed an application to set aside the Arbitration Agreement. **HC MISC 64 of 2019** is spent because the Originating Summons by the Respondent was to set aside the Retainer Agreement which the Court stated is a matter for Arbitration. There is no matter for hearing and determination in the said case file. The Court declined jurisdiction and relied on the Arbitration Clause and referred the matter to arbitration. The Court also made an order that funds be retained in a joint account. Once a Court declines jurisdiction, can it proceed to make substantial orders to the affect parties' rights?

Once a Court declines jurisdiction it ought to down its tools. The Hon Arbitrator did not make any order one way or another. This order if allowed would be to preserve the subject matter.

One of the issues that complicates compliance with the said order are taxes due to be paid by the advocate to Kenya Revenue Authority

(KRA) as there is a Retainer Agreement. This dispute has not been determined by the Arbitrator.

The Court granted the orders as interim orders until determination of the Arbitral Tribunal. The life of these orders ended with the Arbitral Award.

The Applicant reiterated issuance of the sought orders pending hearing and determination before the Hon Arbitrator and the pending appeal.

DIRECTIONS/ORDERS

The instant application seeks the setting aside in part or whole of the Final Arbitral award of 21st December 2020 on grounds outlined in the Supporting Affidavit of the Applicant.

In the meantime, pending hearing and determination of the instant application, The Applicant sought stay of recognition and enforcement proceedings due to the following applications that are before the Arbitrator for determination;

- a) The Respondent filed before the Arbitrator an application under **Section 34 (2) of Arbitration Act** seeking clarification of certain parts/areas of the Arbitral Award.
- b) The Applicant filed a Notice of Objection before the Arbitrator under **Section 17 of Arbitration Act** challenging jurisdiction of Arbitrator to tax Bill of Costs.
- c) One of the orders by the Hon. Arbitrator in the Final Arbitral Award was /is the Respondent in the Arbitration to file with the Arbitrator and serve upon the Claimant an Advocates – Client Bill of Costs within 30 days from 21st December 2020 which is pending.

The Applicant filed an appeal in **Court of Appeal 121 of 2020** with regard to Court orders of 20th December 2019 in **HC MISC 64 of 2019**.

This Court's jurisdiction is derived from **Article 10 of Arbitration Act** to hear and determine matters in relation to Arbitration to the extent as prescribed by the Arbitration Act.

The Parties appeared in this Court in **HC MISC 64 of 2019**, where it was confirmed that by virtue of Clause 12 of Retainer Agreement, the Arbitration Clause/Agreement, the parties' choice of dispute resolution forum was/is Arbitration. The Court declined jurisdiction and referred the matter to arbitration as per Court orders of 20th December 2019.

It is on record that there are active ongoing proceedings before the Hon. Arbitrator as illustrated above. Since the Court lacks jurisdiction to hear and/or determine any of the pending matters before the Arbitrator, these proceedings ought and shall proceed through Arbitration.

In light of the uncontested fact that there are ongoing proceedings before the Arbitrator, the instant application ought to await final conclusion or orders from the Arbitrator so as to pave way for recognition and enforcement proceeding and/or setting aside proceedings. The Arbitral Tribunal ought to be given an opportunity to address the issues pending before it such as the Applicant's Notice of Objection to the Arbitrator's jurisdiction as well as the Respondent's request for clarification on the Arbitral Award.

The instant application is stayed pending conclusion of Arbitrator's proceedings. Since proceedings for recognition and enforcement of the Award have not commenced, naturally and logically there is stay of enforcement of the Arbitral Award pending hearing and determination of the matters pending before the Hon Arbitrator's proceedings.

With regard to the interim order sought that funds held by the Applicant in separate client Account at NCBA Bank of Kenya be maintained in the said Account pending hearing and determination of this application or such further orders of the Court, this Court shall state as follows;

- a) The High Court in **HC MISC 64 of 2019** on 20th December 2019 granted orders that funds held by the Applicant in separate client Account at NCBA Bank of Kenya be maintained in a joint interest earning account.
- b) This is a Court order by the Court which is of equal concurrent and competent jurisdiction as this Court. This Court has been referred to the Ruling by Hon. Tuiyott J of 6th July 2020 dismissing application for stay of execution of these orders. There is also the Court of Appeal Ruling on stay of execution of the said orders pending appeal of 18th December 2020 and the Court dismissed the stay of execution application. This Court, therefore, lacks supervisory or Appellate jurisdiction to allow it to attend to in any way the said Court orders.
- c) More so, the said orders are the subject of pending appeal in the Court of Appeal whose decision bind this Court.
- d) Until and unless the order is varied, amended, set aside or successfully appealed against, this Court lacks requisite jurisdiction to deal with the same.

DISPOSITION

1. Therefore, from the above outline and analysis, the Court stays the enforcement and/or setting aside of Arbitral Award proceedings (the instant application) pending determination of the proceedings before the Hon Arbitrator.

2. Consequently, enforcement of the Arbitral award of 21st December 2020 is also stayed due to ongoing proceedings before the Arbitrator until termination of Arbitration proceedings.

3. The status quo remains until further orders from Arbitrator and/or Court of Appeal.

DELIVERED SIGNED & DATED IN OPEN COURT ON 23RD FEBRUARY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR OCHIENG ODUOL FOR THE APPLICANT

MR. ODOGO FOR THE RESPONDENT

COURT ASSISTANT: TUPET

Mr. Ochieng Oduol: We ask to appeal against the Ruling of the court and it is in the exercise of caution.

Mr. Odogo: They are seeking to appeal against the direction.

Court: Leave to appeal granted. The parties to obtain certified copy of the Ruling and Proceedings upon payment of requisite fees.

M.W. MUIGAI

JUDGE