



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E84 OF 2021

**IN THE MATTER OF ARTICLES 22(1), 23(1) AND (3), 47,
48, AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLES 2, 19, 20, 22, 23, 24, 31, 35, 40,
50 (4) AND 165 (3) (d) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF OR THREAT TO RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 31, 35 AND 50 (4) OF THE CONSTITUTION OF KENYA**

BETWEEN

GULF ENERGY LIMITED.....PETITIONER

AND

RUBIS ENERGY KENYA PLC.....RESPONDENT

RULING

Application

1. The Respondent / Applicant through an application dated 16th June 2021 seeks the following orders:-

- a. That the Honourable Court be pleased to set aside orders 2 and 3 to the application dated 22nd June 2021 and granted on 6th July 2021.
- b. That the Honourable Court be pleased to place the file before Hon. Justice W. Korir for hearing and determination of the Applicant's preliminary objection on the application dated 22nd June 2021.
- c. The costs of this application be awarded to the Applicant.

2. The application is premised on several grounds on the face of the application and further supported by supporting affidavit of John Githiomi sworn on 16th June 2021.

3. It is Applicant's contention that the orders issued are in contravention of section 10 of the Arbitration Act and in breach of the Agreement to refer disputes to arbitration. Further by ruling delivered on 31.5.2021, Hon. Justice W. Korir struck out the petition on the basis the Court

had no jurisdiction to determine the dispute between the parties.

4. It is further stated the petitioner filed an application seeking to stay arbitral proceedings which had already commenced between the parties to which the Respondent / Applicant filed a Notice of Preliminary Objection in opposition to stay application.

5. The Respondent / Application in addition thereto urges that on 6th July 2021, when the application came up for further direction, the Court erroneously noted that the Applicant had not opposed the stay application and proceeded to grant orders sought and issued further directions. It is urged the Petitioner's Advocate confirmed the Applicant's Advocates had indeed served a copy of the response to the stay application and urged also that the Court filing receipts confirmed that the preliminary objection and List of Authorities were both filed on the Courts e-filing platform on 28th June 2021.

6. It is further Applicant's contention that the granting of orders on basis that Applicant had not responded to the application was an error by the Court and that the Applicant will greatly be prejudiced as the substantive arbitration, which had already commenced, will be further delayed.

7. The Applicant therefore prays that in the interest of justice the orders granted be set aside and that the stay application be determined on merits.

Petitioner's Response

8. The Petitioner / Respondent filed grounds of opposition dated 23rd July opposing the Respondent's / Applicant's application dated 16th July 2021.

9. The Petitioner contended that the application dated 22nd June 2021 seeks to protect the constitutional rights of the Petitioner and do prevent the use of documents and information improperly obtained by the Respondent and as such the application is not brought under the Arbitration Act nor does it seek to restrain arbitral proceedings. It is urged that the Petitioner's constitutional rights exist independent of the Arbitration clause or proceedings.

10. On issue of jurisdiction, the Petitioner averred that at paragraph 25 of the ruling of 31st May 2021, the Court held that in light of the provision of **Article 22 and 165 of the Constitution**, it had jurisdiction to hear and determine the issues raised in this Petition but further held that the matter should be left to the arbitration to determine the admission of evidence (See pages 31 and 42 of the ruling).

11. In addition and in opposing the application the Petitioner urged that no basis has been demonstrated for the settings aside of the orders granted on 6th July 2021. It is averred that there is no error apparent on the face of the record or at all, nor has sufficient reasons been put forward for setting aside of the orders granted on 6th July 2021. Further it is urged the orders were granted in the interest of justice but not granted on the basis that the application had not been opposed.

12. It is further contended that the orders sought amount to an appeal of this Court's orders of 6th July 2021 and it is further stated the proper recourse is for the Respondent to pursue the Appeal for which leave was granted.

Analysis and determination

13. I have carefully considered the applications, grounds of opposition, counsel oral submissions and authorities relied upon, and from the aforesaid the following issues arise for consideration:-

a. Whether the Applicant / Respondent has met the threshold to warrant setting aside orders 2 and 3 of the application dated 22nd June 2021 granted on 6th June 2021.

b. Whether the application dated 22nd June 2021 should be placed before Hon. Justice W. Korir for hearing and determination.

A. WHETHER THE APPLICANT / RESPONDENT HAS MET THE THRESHOLD TO WARRANT SETTING ASIDE ORDERS 2 AND 3 OF THE APPLICATION DATED 22ND JUNE 2021 GRANTED ON 6TH JUNE 2021.

14. Rule 16 (1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and procedure Rule 2013 (otherwise referred to as the "Mutunga Rules") provides:-

"If the Respondent does not respond within a time stipulate in Rule 15 the Court may hear and determine the petition in the Respondents absence."

15. Rule 16 (2) of the Mutunga Rules states that "the Court may set aside an order made under sub-rule 1 on its own motion or upon an application of the Respondent or a party affected by the order."

16. In addition to the above, Rule 25 of the Mutunga Rules, states that "an order issued under Rule 22 may be discharged, varied, or set aside by the Court either on its own motion or on an application by a party dissatisfied with the order."

17. The instant application by the Respondent / Applicant is brought up by the Respondent / Applicant under **Rule 16 and 25 of the Mutunga Rules 2013**.

18. On 6th July 2021, the Court in issuing the impugned orders Nos. 2 and 3 in presence of counsel for Petitioner and the Respondent noted that the application dated 22nd June 2021 had been served as directed and that Respondent was said to have filed a preliminary objection which the Court noted was not in the Court file and whose nature the Court was not aware of. The Court also noted the Respondent was opposed to granting any interim orders. The Applicant was not opposed to Arbitration but only sought certain measures of protection relating to certain confidential information as stated in prayers Nos. 2 and 3 of its application.

19. The Court proceeded to grant prayers Nos. 2 and 3 in the Petitioners application on the interim basis pending interparties hearing in the interest of justice and gave further directions regarding disposal of the Petitioner's application dated 22nd June 2021.

20. The Respondent / Applicant basic ground for seeking setting aside orders Nos. 2 and 3 issued by the Court is that the Applicant was not heard when orders were issued. It is not in dispute the Respondent / Applicant was represented on the material date and though the counsel was present, his preliminary objection was not in the court file. The orders were on the material date granted in exercise of the Court's inherent jurisdiction in the interest of justice. Indeed the Respondent / Applicant was not heard on his preliminary objection for reasons already stated herein above.

21. It is further urged that present application was filed when there was no petition on record as both the application and petition were struck out in the Court's ruling in this matter. On issue of jurisdiction the Petitioner contested that **Mutunga Rules 2013** cannot limit Court's jurisdiction. It was further urged the Court found it had jurisdiction. However as that issue was dealt with in the ruling of this Court I decline to be dragged into it in an application for setting aside orders I issued. I also notice that the law allows Trial Courts to issue interim orders of stay pending appeal, when satisfactory ground are laid down.

22. In view of the ruling I made on 6.7.2021 it is clear that the Respondent / Applicant's preliminary objection was not in the Court file when orders were issued and the Respondent / Applicant counsel though present at the material time he was not heard on the Preliminary Objection nor was the order granted because it was not opposed but in the interest of justice.

23. The Respondent / Applicant urge there is an error to justify granting of the application and that an error was made as they had filed and served response which Court noted but proceed to issue orders in the interest of justice.

24. It is urged that the interest of justice required both sides to be heard however at the material time the Respondent / Applicant could not be heard as its pleadings were unavailable hence interim orders were issued pending interparties hearing.

25. I find that in the interest of justice and the Respondent / Applicant's preliminary objection now being on record, the Respondent / Applicant has the right to be heard by Court on its preliminary objection.

26. I find that the Respondent / Applicant has met the threshold by establishing sufficient grounds but not errors to have the orders issued set aside in the interest of justice and application dated 22nd June 2021 be heard and determined on merits.

B. WHETHER THE APPLICATION DATED 22ND JUNE 2021 SHOULD BE PLACED BEFORE HON. JUSTICE W. KORIR FOR HEARING AND DETERMINATION.

27. The application dated 22nd June 2021 arise out of a decision by Honourable Justice W. Korir dated 31st May 2021 in which the Respondent / Applicant's preliminary objection dated 19th March 2021 was upheld and both the petition and notice of motion dated 16th March 2021 struck out.

28. The Respondent / Applicant's pray that this file be place before Honourable Justice W. Korir for hearing and determination of the Applicant's preliminary objection on the application dated. 22nd June 2021.

29. Having considered the various issues dealt with in the ruling of Hon. Justice W. Korir and issues raised in the application dated 22nd June 2021 and preliminary objection thereto, I find that the orders that are appropriate to grant in this instant application are as follows:-

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.

c. Costs in cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JULY, 2021

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J. A. MAKAU

