



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 780 OF 2017

IN THE MATTER OF THE ARBITRATION ACT

AND

IN THE MATTER OF A DISPUTE

BETWEEN

CASTLE INVESTMENTS COMPANY LIMITED.....APPLICANT

VERSUS

BOARD OF GOVERNORS

OUR LADY OF MERCY GIRLS SECONDARY SCHOOL.....RESPONDENT

RULING

1. The applicant brought the Notice of Motion dated 8th October, 2019 in which it sought for the following orders:

- (i) *Spent.*
- (ii) *THAT Kshs.635,796/ be factored in as the total costs of the reference to be shouldered by the respondent.*
- (iii) *THAT Kshs.519,000/ be factored in as the sum paid by the applicant that should attract 15% interest.*
- (iv) *THAT cost of the application be provided by the respondent.*

2. In support of the Motion are the grounds set out on its face and the facts deponed in the affidavit of *David Kamau Gitau*, a director of the applicant.

3. The deponent stated that on 24th August, 2014 an arbitral award was made in favour of the applicant in the following manner:

- 1) *The respondent shall pay to the claimant the total sum of Kshs.459,958.60 in full and final settlement of the dispute submitted to the arbitrator.*
- 2) *The sums in a) above shall attract simple interest at the rate of 15% p.a. from 31st July, 2011 until payment in full.*
- 3) *Parties shall meet their own costs but the respondent should shoulder the cost of the reference. Any sum paid by the claimant to attract simple interest at 15% p.a. from the date of delivery of the award until payment in full.*

4. The deponent stated that the above award was subsequently adopted as an order of the court on 30th April, 2019 and that thereafter, the applicant's advocate sought for the aforementioned sums from the respondent to no avail.

5. It was also the deponent's assertion that the applicant has since been unable to extract warrants of attachment due to the fact that cost of the reference was not particularized in the award and the arbitrator deemed himself functus officio over the matter under the provisions of the Arbitration Act.

6. The deponent stated that for the foregoing reasons, the applicant is now seeking to have the sum of Kshs.635,796/ to be factored in as the total costs of the reference to be shouldered by the respondent and is further seeking the sum of Kshs.519,796/ out of the said amount which the applicant paid to the Arbitrator and the same to be paid to it with simple interest at 15% p.a.
7. The respondent put in a replying affidavit sworn by its Board Member, *Ben Otinga* to resist the Motion. The deponent averred that given the finality of the arbitral award, the applicant cannot purport to re-open it through the court as this is solely the mandate of the arbitrator.
8. The deponent contended that from the wording and interpretation of the arbitral award, each party was to cater for its own costs and the respondent was to meet cost of the filing fee; further contending that in any event, the entire arbitral award has since been appealed against by the respondent.
9. When the Motion came up for interparties hearing on 12th February, 2020 the parties' advocates made oral submissions. To start off, *Miss Wangui* counsel for the applicant reaffirmed the averments made in the application and relied on the annexures to the supporting affidavit.
10. The counsel further submitted that since it is the respondent who prompted the arbitration proceedings, it ought to bear the responsibility of meeting the cost of the reference.
11. *Mr. Pala* advocate for the respondent also opted to rely on the facts deponed in the replying affidavit save to present the argument that the applicable law relating to costs is the Arbitration Rules 1997, more specifically rules 5 to 11.
12. It was the advocate's additional submission that the court can only re-open an arbitral award where the decision to challenge it has been brought under the provisions of Section 35 of the Arbitration Act, which provision also permits the registrar to tax costs.
13. In return, *Miss Wangui* maintained that the applicant is not attempting to re-open the arbitral award; rather, it is simply seeking an interpretation of the relevant orders made therein.
14. I have carefully considered the grounds set out on the face of the Motion; the facts deponed in the supporting and replying affidavits respectively; and the oral arguments made by the respective counsel.
15. Before addressing my mind to the merits of the Motion, I would prefer to first consider two (2) preliminary issues which were raised by the respondent.
16. On the one part, the respondent indicated to this court that there is a pending appeal against the arbitral award. Suffice it to say that, I took note that the respondent made no efforts to avail any additional information or adduce any evidence in that regard, neither did it make mention of an existing order for a stay either of the execution or the proceedings for that matter.
17. In the premises, I find that this court is vested with the power to entertain the application because an appeal does not operate as a stay unless there is an order staying the execution and/or proceedings. .
18. On the other part, it was the respondent's view that to entertain the application would be equal to re-opening the award whereas the appropriate action would be to refer the application to the arbitrator for further dealing.
19. Upon my study of the record, I established that true to the averments made by the applicant, the arbitrator rendered himself functus officio over the matter vide the letter dated 5th September, 2019 annexed to the supporting affidavit and marked as "DG 6."
20. In consideration of the above circumstances, I am of the view that the only forum available to the parties is this court and in any event, it is clear that the essence of the application is to seek a determination on the issue of quantum of cost of the reference; this to my mind cannot be said to amount to a re-opening of the award as was the argument brought forth by the respondent. That said, I reaffirm my earlier finding that the application is properly before me and I therefore see no reason not to consider its merits.
21. It is clear from the foregoing that the crux of the matter has to do with the quantum on cost of the reference. Turning to the arbitral award made on 24th August, 2014 and annexed to the supporting affidavit as annexure "DG 1", order 3) of the same expresses that it is the responsibility of the respondent to bear cost of the reference and it goes on to express that where such cost is borne by the applicant who was the claimant in the arbitral proceedings, then such sum would incur interest at 15% p.a. from the date of delivery of the award until payment in full.
22. From the record, it is clear that following the award, the applicant sought for its enforcement and adoption before the court while the respondent simultaneously filed an application seeking to set aside the award. Both applications were heard together, with the court dismissing the respondent's application while allowing the applicant's application vide its ruling delivered on 30th April, 2019.
23. I have looked at a copy of the letter dated 25th August, 2014 previously issued to the parties by the arbitrator and annexed to the supporting affidavit as "DG 7." The contents of the said letter are that the arbitrator was notifying the parties on the availability of the arbitral award subject to payment of the cost of the reference, which I understood to constitute his fees.
24. Furthermore, the arbitrator provided a detailed breakdown of his fees, totaling the sum of Kshs.706,440/. I noted the assertions made in paragraph 8 of the affidavit of David Kamau Gitau in support of the Motion that a discount of 10% was offered on the aforementioned fees, bringing cost of the reference to the sum of Kshs.635,796/ which is the amount being sought under prayer (ii) of the Motion.

25. On the issue of the sums paid by the applicant in that regard, I had the opportunity of looking at copies of the two (2) receipts for the respective amounts of Kshs.403,796/ and Kshs.116,000/ annexed to the supporting affidavit as evidence of payments made by the applicant towards the arbitrator's fees in a bid to obtain the arbitral award.

26. Having noted the payments made by the applicant coupled with the appropriate orders stipulated in the arbitral award, I am of the view that there is nothing precluding this court from granting the prayers sought.

27. The upshot is that the Motion is found to be meritorious and it is allowed as prayed.

Dated, Signed and Delivered at Nairobi this 27th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent