



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. E 029 OF 2020 (O.S.)**

**IN THE MATTER OF THE ARBITRATION ACT, 1995 AND IN THE MATTER OF AN ARBITRATION OVER THE CONSTRUCTION AND COMPLETION OF LR. NO. 2327/330 KAREN**

**RUPRA CONSTRUCTION LIMITED..... APPLICANT**

**VERSUS**

**ADM CONSULTING LIMITED ..... RESPONDENT**

**RULING**

1. There is a consensus that this Originating Summons should be marked as settled. What is not agreed is the order of costs to follow.
2. Commenced under the provisions of Section 7 of the Arbitration Act, the Chamber Summons of 12<sup>th</sup> February 2020 sought two substantive prayers:-
  3. *That pending resolution of the dispute herein by Arbitration and a proposed site visit, an order restraining the Respondent from taking over the construction site known as LR. NO. 2327/330 KAREN do issue.*
  4. *That pending arbitration, this Honourable Court issues preservative orders for preservation of the construction site and a site inspection by the Arbitration Tribunal.*
3. At the urging of the Court, parties, through counsel entered the following consent on 17<sup>th</sup> February 2020:-

“By consent Paul Sagi Q.S to carry out inspection and assessment of works done on 20<sup>th</sup> February 2020. Interim orders extended on 24<sup>th</sup> February 2020.”
4. It is common ground that the site has now been handed to the employer. As well is that the Quantity Surveyor( Q.S) has prepared an Assessment Report pursuant to the consent order of 17<sup>th</sup> February 2020. The parties conduct in respect to the inspection visit by the Q.S will turn out to have a bearing on the order of costs this Court will make.
5. The Applicant asserts that it deserves costs on the matter because it has succeeded in the cause. The Respondent takes a contrary view and seeks costs.
6. Costs follow the event but is also at the discretion of the Court, a discretion to be exercised judiciously.
7. Although the Applicant makes the argument that it has succeeded in its cause, it is clear that it did not in respect to prayer 3. That was a prayer to restrain the Respondent from taking over the construction site pending resolution of the dispute by Arbitration. To the extent that the possession of the site was handed over before the matter was resolved, the outcome is not as anticipated by the Applicant.
8. As regards the second prayer, a joint inspection was agreed by the parties and one would argue that to that extent, the Applicant had succeeded on this limb. Yet the behaviour of the Applicant at the site inspection does not endear it to this Court’s favour. There is an affidavit by Ashvinder Mann sworn on 21<sup>st</sup> February 2020 in which he states that the Q.S was denied access to the site on 20<sup>th</sup> February 2020 by the Applicant. That would be in defiance of the consent order. This deposition has not been controverted by the Applicant and the

Court accepts it to be true. Indeed, in the Assessor's report, the Q.S reports that he was denied access to the site by the contractor.

9. Having sought the Court's intervention for site inspection and an agreement having been reached by way of a consent of Court on the inspection, it was incumbent of the Applicant, just as the Respondent, to cooperate on the site inspection. The behaviour of the Applicant is to be frowned upon by this Court. One way to do so is to deny it an order of costs on this limb.

10. Coupled with the fact that the Applicant did not succeed in prayer 3 of the Summons, the Court orders that this matter be marked as compromised but with costs to the Respondent to be paid by the Applicant.

**Dated, Signed and Delivered in Court at Nairobi this 3<sup>rd</sup> Day of August 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Koskei holding brief for Miss Nderu for the Respondent.

No appearance for the Applicant