



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 23 OF 2019

OSANO ASSOCIATES LIMITED.....APPELLANT

VERSUS

ICT AUTHORITY.....RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated **10th October 2019** by which **OSANO & ASSOCIATES LIMITED** (hereinafter the Applicant) sought the following Orders:-

“(a) SPENT

(b) The Honourable Court be pleased to stay the execution of the Final Award of Hon Justice Ringera on 24th April 2019 pending the hearing of this application and the Appeal.

(c) Costs.”

2. The application was premised upon **Order 42 Rule 6(1) and (2) and Order 15 of the Civil Procedure Rules 2010, Section 39 of the Arbitration Act No.4 of 1995. Article 2(2), 2(3), 2(4), 22(1),31, 50(i), 50(2). 157, 159(2), 233 and 245 (d) of the Constitution of Kenya 2010**, and was supported by the Affidavit of even date sworn by **DENIS OSANO KUTE**, a Director of the Applicant.

3. The application was opposed by the Respondent **ICT AUTHORITY** who filed a Preliminary Objection dated **13th November 2019**. The application was canvassed by way of written submissions. The Applicant filed its written submissions on **22nd January 2020** whilst the Respondent filed its submissions **12th February 2020**.

BACKGROUND

4. On **8th December 2014** the Applicant, the Respondent and the **Nairobi City County (NCC)** signed a World Bank funded agreement known as the **Contract for Consultancy Services for a Strategic information Communications & Technology Partner** (hereinafter “**the Contract**”). During the execution of the said contract a dispute arose which dispute was declared on **16th March 2015** and was thereafter referred to a **Sole Arbitrator Hon Justice (Retired) Aaron Ringera** for determination. In referring the dispute to arbitration the parties recorded a consent on **25th November 2016** before **Hon Lady Justice Nzioka** as follows:-

“(a) The parties identify commercial issues in dispute for reference to a common arbitrator within the following 7 days from the date hereof.

b. The matter be referred to a single Arbitrator mutually agreeable to all parties, in this case, the Retired Justice A. Ringera subject to his acceptance.

c. All proceedings in this matter be stayed, pending the Arbitral Award.

d. The Orders of this court [Justice E. Ogola] issued on **5th December 2015** are extended until the Arbitral Award.

e. The parties shall not publish information relating to this matter to any third party save the Arbitrator, state investigative agencies and this court.

f. Further mention on 2nd December 2016 to submit the agreed commercial issues for reference to the Arbitrator.”

5. The sole Arbitration heard the matter and made his Final Award on 24th April 2019 which Award was collected by the parties on 1st July 2019. The following is a summary of Finding as made by the Sole Arbitrator in his Final Award dated 24th April 2019.

“SUMMARY OF FINDINGS

The overall result of my findings is as follows:-

1(a) The parties to the Contract are the Claimant and the Respondent only.

(b) The role of the Claimant was to render the services contracted for in accordance with Contract as per Clause 2(a) of the Contract and Clause 26 of the GCC and Appendix A thereto, and

(c) The role of the Respondent was to pay for the contracted services as per Clause 2(b) of the Contract and Clauses 37 and 41.2 of the GCC and as per payment schedule specified in the GCC.

2. The scope of the Contract is what is specified in Appendix A.

3. (a) The Contract was tainted with fraud.

(b) The effect of the fraud was to give the Respondent a right to void and terminate the Contract in accordance with Clause 19.12 thereof: and

(c) The contract is deemed voided and terminated on 21st April 2015.

4 (a) The Claimant breached the Contract

(b) The Respondent did not breach the Contract and

(c) The effect of the Claimant’s breach of is that the same become voidable.

5. The Respondent shall bear the costs of the Arbitration to the extent of ninety (90) per cent. The quantum of such costs to be determined by me in my further or final award, if the same shall not have been agreed by the parties within sixty (60) days of the date of the publication of the Award)”

6. The Arbitrator then proceeded to make the following Final Award

AWARD

Having considered the parties pleading, the oral and documentary evidence tendered and the submissions of Counsel for the parties herein.

I DO HEREBY AWARD AND DIRECT in full and final settlement of the claims in this arbitration, that an award shall issue on the following terms:-

1. The Claimant claim against the Respondent be and is hereby dismissed.

2. The Respondent’s Counter-claim be and is hereby dismissed.

3. The Claimant shall pay to the Respondent ninety (90) per cent of costs of the reference and the Award to be agreed and if not agreed within sixty (60) days of the publication of the Award, to be assessed by the tribunal.”

7. The Applicant being aggrieved by the entire decision and finding of the Arbitral Tribunal lodged a Memorandum of Appeal. By this Notice of Motion the Applicants seeks orders to stay the execution of the Final Award if Hon Justice Ringera of 24th April 2019 pending the hearing and determination of said appeal.

8. The Respondent in opposing the Application submit that the same is a non-starter as this court has no jurisdiction to entertain the application which they contend has been brought contrary to the provisions of the Arbitration Act.

ANALYSIS AND DETERMINATION

9. I have carefully considered the submissions filed by both parties in this matter as well as the relevant law. The application is premised on the grounds inter alia that:-

“3. Fundamental questions of law have arisen out of the Final Award which ought to be determined by this Honourable court.

4. The Applicant is apprehensive that the Respondent may seek to enforce the orders granted in the Award against when the fundamental legal and constitutional questions arising out of the Award remain unresolved.

5. For the reasons explicated in the Memorandum, the Appeal is arguable and substantial loss may result to the Applicant if the orders sought herein are not granted and the Honourable court should exercise its discretion judiciously in to avoid rendering the Appeal nugatory.

6. It is the interest of justice that the orders sought are granted.”

10. On the other hand, the Respondents Preliminary Objection opposing the application is based on the following grounds:-

1. THAT the present Application has been brought contrary to the provisions of the Arbitration Act.

2. THAT no appeal lies from the decision of a sole arbitrator in an arbitral award under Arbitration Act.

3. THAT the appeal was filed prematurely without mandatory leave contrary to Section 39 of the Arbitration Act.

4. THAT parties have not agreed nor consented amongst themselves that an appeal should lie.

5. THAT in any event there are no questions of law arising from the arbitration or otherwise arising from the arbitral award to be raised for determination by court.

6. THAT to the extent the present application seeks the intervention of the Honourable Court, the same is contrary to the provisions of Section 10 of the Arbitration Act.

7. THAT the intervention of the Honourable Court under the Arbitration Act is only contemplated for purposes of interim measures of protection under Section 6 of the Arbitration Act.

8. THAT an interim measure of protection under Section 6 of the Arbitration Act can only apply before or during arbitral proceedings.

9. THAT the present Application is not in respect of an impending or otherwise pending arbitral proceedings but rather concluded proceedings whereupon the final Award has been delivered.

10. THAT in the circumstances, the Honourable court has no jurisdiction to either grant the Orders prayed or otherwise entertain the said Notice of Motion application dated 10th October 2019

11. THAT ultimately and in any event, stay of execution contemplates the existence of a proper appeal before court as contemplated under Order 42 of the Civil Procedure rules which happens not to be the case in the present action. There being no contemplation of appeal against an Arbitral Award.

12. THAT the said Application for stay of execution has not been brought within reasonable time or otherwise without undue delay.

13. THAT in the circumstances the present action by the Appellant/Applicant is bad in law and an abuse of the court process.”

11. The **Arbitration Act** does not contemplate an appeal and/or challenge to an Arbitral Award except in circumstances provided for by **Section 32** of the said Act. **Section 32A** of the **Arbitration Act** provides:-

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it and no recourse is available against the award otherwise than in the manner provided by this Act.”

12. **Section 35** of the **Arbitration Act** provides the framework for challenging an Award vide **Section 35(1)** which provide:-

“Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsection (2) and (3).” [own emphasis]

13. The only question which arises for determination is whether this Court has the jurisdiction to grant the prayers ought in this application.

Section 39 of the Arbitration Act which allows a party to challenge an Arbitral Award provides thus:-

“Where in the case of a domestic arbitration, the parties have agreed that:-

a. An application by any party may be made to a court to determine any question of law arising in the course of the arbitration: or

b. An appeal by any party may be made to a court on any question of law arising out of the award: such application or appeal as the case may be, may be made to the High court”

2. On an application or appeal being made to it under subsection (2) the High Court shall-

a. Determine the question of law arising;

b. Confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed to that arbitral tribunal for consideration.” [own emphasis]

14. The issues being raised by the Applicant herein include allegations that the sole arbitrator made errors in law and fact and that he misapprehended the law in reaching his Final Award. These are matters which fall squarely within the ambit of an appeal. Section 39 is clear and unambiguous in providing that parties must reserve to themselves the right to appeal, in order for an appeal from an arbitral award to be entertained by the High Court.

15. There is no evidence of and the Applicant has not alleged that there existed a prior agreement between the parties to refer the Final Award to Appeal before the High Court. In the case of ANNE MUMBI HINGA –VS- VICTORIA NJOKI GATHARA [2009] eKLR, the Court in establishing the threshold for an appeal under Section 39 of the Arbitration Act held as follows:-

“As stated elsewhere the superior court had no business entertaining the application giving rise to this appeal as well and should have struck it out for lack of jurisdiction.

Again the appeal to this Court is incompetent because it does not comply with the requirements set out in Section 39(1) and (3) of the Arbitration Act.

We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as of previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in by Section 39 of the Arbitration Act.”[own emphasis]

16. The Arbitration Act is a complete Code and as a general rule the Court will not interfere in matters arbitration except as specifically provided for by the Act. In the Anne Mumbi Hinga case [supra] it was stated as follows:-

“A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration act a complete code and rule 11 of the rules cannot override Section 10 of the Arbitration Act which states:-

“Except as provided in this Act no court shall intervene in matters governed by this Act.

In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This excludes entertaining application the subject matter of this appeal and all the other application purporting to stay the award or the judgment/decreed arising from the award.”[own emphasis]

17. The Applicant submits that Section 39 of the Arbitration Act is unconstitutional as it denies to a party the right to appeal. However, I do not agree with this submission. The Arbitration Act does not completely rule out the right of Appeal. It merely provides under Section 39 that the right of Appeal must be reserved by the parties themselves. Thus where a party wishes to reserve to itself the right to appeal it is entitled to do so. No party is forced into arbitration. This is a mode of dispute resolution selected by the parties themselves. In the same way that parties agree to subject themselves to arbitration, they are also at liberty to reserve the right to appeal. This was not done in this case.

18. Accordingly, I find that the present application is a non-starter and the same has no merit. I dismiss in its entirety the Notice of Motion dated 10th October 2019 and award costs to the Respondent.

Dated in Nairobi this 18th day of September 2020.

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Justice Maureen A. Odera