



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC. APPLICATION NO. 57 OF 2018
IN THE MATTER OF ARBITRATION

BETWEEN

D.M. VEKARIA.....1ST APPLICANT

V.M. VEKARIA.....2ND APPLICANT

M.J. VEKARIA ELECTRICAL LIMITED.....3RD APPLICANT

-VERSUS-

SENTRIM CONTRACTORS LIMITED.....RESPONDENT

RULING

1. The applicants herein have taken out the Notice of Motion dated 17th October, 2018 supported by the grounds set out on the body thereof and the facts deponed in the affidavit of *Pramod Patel*. The applicants are seeking for an order that the execution of the decretal sums awarded on 17th July, 2018 be allowed before taxation of costs, together with costs of the application.
2. In resistance thereto, the replying affidavit of *Michael Maina Mwangi*, Project Manager for the respondent, was filed on 8th November, 2018.
3. The Motion was canvassed through written submissions. I have carefully considered the same alongside the grounds presented in the Motion and the facts as stated in the affidavit in support of and in opposition thereto.
4. A brief background of the matter is that the applicants filed a statement of claim on 14th September, 2016 before Mr. P.S. Kisia (Arbitrator) claiming the sum of Kshs.26,753,480/= from the respondent for a delay in the completion of Kitisuru Garden 5 Houses.
5. The aforementioned Arbitrator vide his award made on 2nd August, 2017 inter alia ordered the respondent to pay the 3rd applicant a total sum of Kshs.18,749,206/= while the 1st and 2nd applicants were ordered to pay the respondent a total sum of Kshs.13,375,527.40/=.
6. Thereafter, the applicants filed an application dated 11th January, 2018 seeking for *inter alia*, an enforcement of the arbitral award and an order of declaration that the respondent is in breach of the same.
7. When the said application came up for interpartes hearing before this court on 17th July, 2018, the parties entered into a consent on the terms hereunder:

i. Judgment in the sum of Kshs.12,178,677/= plus interest and costs is entered in favour of the applicants.

ii. The applicants acknowledge receipt of Kshs.4,975,000/=.

iii. The respondent to settle the outstanding balance by monthly instalments of Kshs.1,000,000/= with effect from 17th July, 2018 and on the 17th day of each succeeding month until full payment.

- iv. *In default, execution to be undertaken.*
- v. *Costs of the application are given to the applicants.*
- vi. *Each party to be at liberty to apply.*

8. In the meantime, the applicants filed a Bill of Costs dated 11th September, 2018.
9. From the foregoing, the issues to be determined are thus whether the respondent is in default of the relevant terms stipulated under the consent order and if so, whether the applicants should be permitted to proceed with execution.
10. With regards to the foremost issue, it is the applicants' submission that the facts presented in the replying affidavit are false and aimed at misleading this court.
11. The applicants also contend that the first instalment was tendered on 17th July, 2018 by way of two (2) cheques, one of which bounced but was later re-lodged for encashment on 25th July, 2018.
12. The applicants further argue that the second instalment due on 17th August, 2018 was tendered on 25th August, 2018 by way of two (2) cheques, one of which was unpaid but later replaced, adding that the applicants through their advocate indulged the respondent on condition that no further delay in complying with the terms of the consent order would be acceptable.
13. It is submitted by the applicants that the instalment due on 17th September, 2018 was not paid as and when due, but that instead, the respondent's advocate tendered two (2) cheques to accompany a letter dated 2nd October, 2018 and which cheques the applicant's advocate declined to accept since the application seeking to execute the consent order was being pursued.
14. The respondent in response argued that it has faithfully and consistently honoured its obligations in line with the consent order by paying the monthly instalments as and when due, adding that it is the applicants through their advocate who declined to accept the cheques for September, 2018; thereby frustrating the respondent's efforts at complying with the consent order.
15. After considering the parties' arguments, it would appear the payments for July and August, 2018 were settled; the issue has to do with the cheques for September, 2018.
16. I have perused the letter dated 2nd October, 2018 marked as "MMM-2" and annexed to the replying affidavit, thereby forwarding the cheques for September, 2018 and which cheques the applicants have admitted to having declined to accept.
17. I have also perused the above cheques and observed that they bear the date of 28th September, 2018 which evidently surpasses the date specified in the consent order. However, the applicants acknowledged in their submissions that this was not the first time the respondent had issued cheques beyond the stipulated dates but that they had chosen to indulge them and grant them a last opportunity.
18. In my humble view, the applicants were not to accept the cheques for September, 2018 since the same were issued later than was agreed in the consent order.
19. In the premises I find merit in the Motion. The same is allowed as prayed.

Dated, signed and delivered at NAIROBI this 31st day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....**for the Applicants**

.....**for the Respondent**