REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIV. APPLN. NO. 24 OF 2019

BETWEEN

LEOPARD ROCK MICO LIMITED .....APPLICANT/RESPONDENT

AND

THE COUNTY GOVERNMENT OF MERU ..... RESPONDENT/APPLICANT

R U L I N G

1. Before is the a Motion on Notice dated 8th May, 2019 brought, *inter alia*, under ***sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 45 Rule 1 (b) of the Civil Procedure Rules.*** In the Motion, the Respondent/Applicant (hereinafter "the applicant"), sought the review of the ruling of this court made on 2nd May, 2019 in order to take account the applicant's submissions filed on 11th April, 2019.

2. The grounds upon which the application was predicated upon were that; the applicant filed its submissions on 11th April, 2019 within the time directed by the court, that in the ruling the court indicated that it had not considered the applicant's submissions thereby prejudicing the applicant and that this was an error apparent on the face of the record.

3. **Mr. Kibanga,** Learned Counsel for the applicant submitted that, since the applicant's submissions were filed in the normal manner and there was no suggestion that that was not the case, that amounted to an error on the face of the record. That the court should take into consideration the applicant's submissions before making the final orders.

4. The application was opposed by the Applicant/Respondent (hereinafter "the respondent") vide grounds of opposition dated 11th May, 2019. It was contended that the application was bad in law, incompetent, misconceived and an abuse of the court process.

5. It was further contended that the applicant's conduct in defending the application that resulted in the impugned ruling was wanting; that there was no error in the impugned ruling; that even if the court had considered the applicant's submission, the court would have arrived at the same conclusion and that the applicant was approbating and reprobating in that, a consent order had already been recorded by the parties in **Meru ELC Misc. Appln. No. 27 of 2019 Leopard Rock Mico Limited v. The County Government of Meru.**

6. **Mr. Wanyama,** Learned Counsel for the respondent submitted that, the position of the applicant was fully considered in the impugned ruling. That in view of the steps the parties had taken in the aforesaid **Meru ELC Misc. Appln. No. 27 of 2019 Leopard Rock Mico Limited v. The County Government of Meru,** the application was untenable and should be dismissed.

7. Having considered the documents filed for and against the application and having heard learned Counsel, the issues for determination are; **is there an error apparent on the face of the ruling made on 2nd May, 2019? If so, does that error warrant the review of that ruling?**

8. On the first issue, I have perused the impugned ruling. In paragraphs 9 and 10 thereof, the court observed that, since this is a commercial dispute that require expedited determination, the applicant should file its submissions within 3 days of 8th April, 2019. As at the time of writing the subject ruling, the applicant's submissions were not on record. Accordingly, the court only considered the submissions of the respondent and not of the applicant as they were not on record.

9. I have looked at annexture **"MK1 and MK2"** to the supporting affidavit of **Mutuma Kibanga** sworn on 8th May, 2019. It is the Submissions of the applicant dated 10th April, 2019. They were filed on 11th April, 2019 and paid for on the same day. A receipt No. 3595087 of the same date was issued in respect thereof.

10. In view of the foregoing, I am satisfied that the applicant filed its submissions on time and it was entitled to have the said submissions

considered before any final decision could be made on the respondent's application dated 7th March, 2019. It is the basic right of every litigant that its case should be considered by a court of law before any decision is arrived at.

11. In this regard, I hold that there was an error on the face of the record in the ruling of 2nd May, 2019 to the extent that the same was made without considering the submissions of the applicant.

12. That being the case, what is the remedy? The course to be taken, in my view, is that this court is enjoined to reconsider the respondent's application dated 7th March, 2019 in light of the submissions of the applicant. In so doing, the issue to be considered is whether in failing to consider the said submissions, the court erred in its determination and should reverse the same.

13. In its submissions dated 10th April, 2019, the applicant's contention was that; whilst the Lease Agreement between the parties had an arbitral clause, no dispute had arisen in terms thereof. The applicant further contended that this court did not have jurisdiction, in view of the arbitral agreement thereof, to appoint an arbitrator under ***section 12 of the Arbitration Act.***

14. It was the applicant's submission that the application was premature in that under *clause 2(d)* of the Lease Agreement, the applicant was obligated to pay the costs of any facilities built by the respondent at the expiry of the Lease which costs are to be ascertained by professionals approved by both the applicant and the respondent. That there was no evidence that the respondent had invited the applicant to jointly appoint the professionals contemplated in that clause.

15. After careful consideration, the court notes that the aforesaid position of the applicant were contained in the applicant's letters dated 22 nd January, 2009 and 11th February, 2019 In the impugned ruling, the court considered that the position the applicant had taken was, that no dispute had arisen; that the respondent was yet to take certain steps before arbitration could be proceeded to. The court dismissed that position in paragraphs 19 and 20 of the ruling. In this regard, it cannot be said that the applicant's position was not considered.

16. In the submissions, it was contended that the respondent had not proved that it had invited the applicant to concur on the professionals contemplated in *clause 2(d)* of the Lease.

17. I should point here that, in the impugned ruling the court did not deem it necessary to refer to the correspondence between the parties for two reasons. Firstly, all the factual depositions in the supporting affidavit of **Micheal Dechauffour** had not been denied by the applicant and secondly, the court made a finding that the applicant had been recalcitrant in the matter. Since the applicant does not seem to be satisfied with these two, the court will elaborate.

18. In annexture **"MD5"** to the supporting affidavit of **Micheal Dechauffour** sworn on 7th March, 2019, there is produced a bundle of emails exchanged between the parties between January, 2018 and October, 2018. Those emails show the following: -

i) the respondent's attempt to bring the applicant to the negotiation table and sort out the matter amicably, without any success;

ii) that there were various meetings where the aim was to agree on the way forward including the appointment of the subject professionals;

iii) the respondent's arrogance and contemptuous treatment of the respondent;

iv) the applicant's calculated attempt to frustrate any meaningful discourse that aimed at settling the matter in accordance with the Lease Agreement or at all;

v) that it is after feeling frustrated by the conduct of the applicant that the respondent decided to appoint its own professional and moving forward. By that time, the applicant had exhibited all intentions to storm the facility the subject matter of the Lease and taking it forcibly!

19. The foregoing notwithstanding, the applicant still contended that no dispute had arisen capable of being referred to arbitration. This begs the question of what constitutes a dispute. **Oxford Advanced Learners Dictionary, Oxford University Press, 8th Edn 2015 at pg 422** defines a dispute as:-

"an argument or disagreement between two people, or groups; discussion about a subject where there is disagreement"

20. To my mind, while the applicant had terminated the Lease by giving the requisite notice which the respondent had agreed to, the parties were not in agreement on how to proceed on the consequences of such termination. There was obviously a dispute.

21. In view, of the foregoing, I hold that the respondent had clearly satisfied the court that there was a dispute that required to be referred to arbitration. The differences that had arisen had to be solved one way or the other and the question was, how? The answer was obvious, through the mode agreed between the parties, and that is arbitration.

22. The other issue raised by the applicant was that the court had no jurisdiction to appoint an arbitrator under ***section 12 of the Arbitration Act.*** With greatest respect, I am not in agreement with **Mr. Kibanga** that the High Court can only appoint an arbitrator in the circumstances specified in that section and not in the circumstances of this cae. That will be hamstringing the jurisdiction of this Court.

23. To my mind, where the parties have agreed that any dispute between them be referred to arbitration but fail to specify the appointing

authority, this court has power under ***section 12 of the Arbitration Act,*** and a duty under ***Article 159 (2) (c) of the Constitution*** to appoint an arbitrator. The court will breathe life to the Arbitral agreement by appointing an arbitrator. That will not be re-writing the agreement between the parties but effecting the intention of the parties.

24. The fact that the applicant's legal advisers drafted the Lease Agreement so slovenly as to refer to the Arbitration Act 1968, in an agreement made in 2008 (and not the Arbitration Act, 1995) and in the process incorporate an arbitral clause that was not self executing, does not in itself take away the jurisdiction of this court under ***Section 12*** aforesaid and the duty in Article. 159 (2) (c) of the Constitution.

25. Accordingly, having considered the submissions of the applicant dated 10th April, 2019, I am satisfied that the ruling of 2nd May, 2019 was in order. That the applicant did not suffer any prejudice as its position was fully considered. The applicants application is therefore for dismissed.

26. However, the applicant invited the court, if it was inclined to allow the respondent's application, to adopt the method applied by the court in the case of **Stefa Trading Limited v. Frogorex EA Ltd [2014] eKLR.** This I will accede to.

27. I direct that, when appointing the sole arbitrator in terms of the ruling of 2nd May, 2019, the Chairman of the Institute of Arbitrators shall not appoint any of the following, who had been proposed by the respondent; **Prof. Githu Muigai, Dr. Kariuki Muigua, Ms. Njeri Kariuki, Mr. John Ohaga, Mr. Collins Namachanja, Ms. Nazima Malik and James Ochieng Oduor.**

28. The order of stay that was made on 15th May, 2019 is hereby discharged and set aside. The Chairman aforesaid should forthwith comply with the order of 2nd May, 2019 without any further delay.

It is so ordered.

DATED and **DELIVERED** at Meru this 23rd day of May, 2019.

A. MABEYA

JUDGE