



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
WINDING-UP CAUSE NO. 1 OF 2000

TITUS THUO MACHARIA

(Suing as Administrator of the Estate of) GICHUHI

MACHARIA (deceased).....1ST PETITIONER/RESPONDENT

ONESMUS MWANGI MWAURA

(Suing as the Administrator of the Estate of)

DUNCAN MWAURA KAMAU (deceased)....2ND PETITIONER/APPLICANT

VERSUS

KIAI MBAKI.....1ST RESPONDENT

WAWERU MUGO.....2ND RESPONDENT

THIONGO KIUNGA.....3RD RESPONDENT

RULING

1. The Notice of Motion dated 29th June, 2019 by the Estate of Duncan Mwaura Kamau faces an early objection through a Notice dated 2nd July 2018 and filed on 3rd July 2018.

2. The Motion itself seeks the following orders:-

- a) **THAT this application be certified urgent and heard Ex-parte in the first instance.**
- b) **THAT pending the hearing and determination of this Application there be a stay of execution of the Award granted by Allen Waiyaki Gichuhu FCI Arb sole Arbitrator made on 6th October 2014 and confirmed by this Honourable Court on 4th December 2015.**
- c) **THAT the Consent Order made on 1st November 2012 and adopted by this Court on 1st November 2012 referring this matter to Arbitration be set aside.**
- d) **THAT the final Arbitral Award made by Allen Waiyaki Gichuhu FCI Arb on 6th October 2014 and adopted by this Court on 4th December 2015 and all other consequential orders be set aside.**
- e) **THAT the costs of this Application and the suit be provided for.**

3. The preliminary objection raises two wishes. The first is that the application is statute barred as it offends the provisions of Section 5 and 35 of the Arbitration Act. Second, that the application is res-judicata two rulings dated 1st December 2007 and 31st May 2018.

4. The preliminary objection is clearly misconceived and need not detain these proceedings.

5. First, the Arbitration which is the subject this matter of the motion was not an Arbitration under the provisions of the Arbitration Act. The Arbitration was by order of court and not pursuant to the Arbitration Act. That statute is in respect to arbitration commenced or undertaken pursuant to arbitration agreements between parties. Under Section 3 of the Arbitration Act an arbitration agreement means:-

“ an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

6. That then has to be read in conjunction with Section 4 which sets out the form of the arbitration agreement as follows:-

4. Form of arbitration agreement

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in—

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

7. The reference of the issue of shareholding in the matter at hand to Arbitration was made on 1st November 2012 and though by consent of the parties was also by an order of Court. The Winding Up Rules then applicable did not have provision for referral of matters to arbitrate. The reference was under the provisions of the Civil Procedure Rules whose limited application was saved by Rule 203 of the Winding Up Rules

8. Arbitration by order of Court is expressly contemplated by Section 59 of the Civil Procedure Act as follows;

59. Arbitration

All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.

9. Those rules are in Order 46 of the Civil Procedure Rules and Rule 1 provides when an arbitration by order of a Court may arise;

1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

10. In so far as the objection of time is taken up by the respondents on the basis of the provisions of the Arbitration Act then it is misconceived. There is similar time prescription under Order 46 Rule 17 where, perhaps, the current application should have been anchored. Whether or not such an application has merit is not a matter for now. What this Court is able to determine is that the objection as brought is misconceived.

11. And I need to add that this also deals with the argument that the application is *res-judicata* my Ruling of 31st May 2018 in which this Court struck out the chamber summons of 28th May 2018 as being time barred under the provisions of Section 25 of the Arbitration Act. Then, the Applicant had cited Section 35 the Arbitration Act as the basis of his application. He has changed tack and the current application is brought under the provisions of the Civil Procedure Act. This may well be the correct procedure as the Arbitration was by order of the Court.

12. Next. Is the application before Court *res judicata* issues addressed by Court in the Ruling of 1st December 2017? I think not. In that Ruling the Court dealt only with the propriety or otherwise of the order referring the matter to Arbitration. It did not deal with the merit of the decision by the Arbitrator which is the subject of this application.

13. The Preliminary Objection of 2nd July 2018 is devoid of merit and is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 27th Day of September 2019

F. TUIYOTT

JUDGE

PRESENT:

Ndirangu for 1st Petitioner

Gachomi for 2nd & 3rd Respondent

No appearance for Petitioner

Court Assistant: Nixon