



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 486 OF 2015

CLEAR WATER INDUSTRIES LIMITED...PLAINTIFF/1ST RESPONDENT

VERSUS

ELECTROWATTS LIMITED.....2ND RESPONDENT/DEFENDANT

JAMES MANG'ERERE.....ARBITRATOR APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 31st May 2017, brought under the provisions of Section 14(7) of the Arbitration Act, Orders 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act among other enabling provisions.

2. The Application is seeking for orders that;-

(i) The Honourable Court be pleased to give directions relating to the Arbitrator/Applicant's entitlement to fees or expenses in respect of services rendered;

(ii) The Honourable Court be pleased to assess the Arbitrator/Applicant's fees at Ksh 228,014 as per the fee note/invoice dated 22nd August 2016;

(iii) Costs of this Application be provided for;

(iv) This Honourable Court do make such further orders as it may deem fair and just in the interest of justice.

3. The Application is supported by the grounds thereon and an Affidavit sworn by James Mang'erere, an Advocate of the High Court of Kenya and an Arbitrator registered with the Chartered Institute of Arbitrators of Kenya.

4. The background facts of the matter are that, the Applicant was nominated by vide a letter from the Chartered Institute of Arbitrator's of Kenya, dated 13th July 2015 to arbitrate the dispute forming the subject matter in this suit. That the Respondents conceded to his nomination and appointment by signing/executing an Agreement on Arbitrator's remuneration charges agreed at Kshs 11,000 per hour.

5. On the strength of the aforesaid Agreement, the Respondents jointly paid a deposit sum of Kshs 100,000 at the time of commencement of the Arbitration proceedings. The Applicant avers that he diligently discharged his mandate until March 2017, when the Respondents withdrew his services by way of a consent in the subject matter, dated 21st March, 2016 and filed in Court on 12th April 2016, thus effectively giving it the status of a Court Order.

6. Subsequent to the filing of the consent, the Respondents wrote to the Applicant requesting for his final invoice, which was forwarded vide a letter dated 22nd August 2016, claiming a sum of Kshs 228,014. Regrettably, despite the services rendered, the Respondents have totally declined to settle his full fees. Therefore, the Applicant argues that, it is pertinent for the Honourable Court to give directions as to payment of his fees and/or costs. That unless compelled by the Honourable Court, the Respondents may never settle his fees.

7. The Application was served, and the Plaintiffs/Respondents filed grounds of opposition dated 15th June 2017, stating that the Arbitrator is not a party to these proceedings and as such he cannot bring this Application. That even then, he did no jurisdiction to hear and determine the

dispute and as such he is not entitled to any fees from them. That the tabulated fees is excessive.

8. The Parties agreed to dispose of the Application by filing written submissions. The Applicant submitted that, it is not in dispute that the Respondents signed an Agreement on the Arbitrator's remuneration charges, and paid Kshs 100,000 as deposit. It is also not in dispute that, the Arbitrator rendered Arbitration services to the Respondents following his appointment by the Chartered Institute of Arbitrator's of Kenya.

9. That, the only contested issue is the jurisdiction of the Court. The Applicant argued that Section 14(7) of the Arbitration Act, vests the Court with jurisdiction to give directions on the Arbitrator's fees. Thus, there is no better forum to seek for directions than the very same Court where the proceedings in the matter arose before referral for Arbitration. That it reduces multiplicity of suits and saves judicial time. The technical opposition by the Respondents on this front therefore holds no water.

10. The Applicant relied on Article 159 (2)(d) of the Constitution of Kenya which enjoins the court to overlook technicalities and dispense justice expeditiously.

11. On the issue of amount claimed as fees, the Applicant submitted that none of the Respondents have substantiated the allegation that the fees sought is excessive. That, the Respondents had ample opportunity to negotiate the amount of fees with him before commencement of the action but they ignored his calls for settlement and at the time of termination of his services, the 1st Respondent had on its own motion written to him requesting for his final invoice. Thus, the 1st Respondent is estopped from refuting the Applicant's entitlement to fees.

12. The Applicant relied on the case of; ***Mistry Jadva Parbat Company Limited vs Grain Bulk Handlers Limited (2012) eKLR***, where the Court gave directions in a matter similar to this matter.

13. However, in response submissions, the 1st Plaintiff/Respondent submitted that, only parties to a suit can file an Application before a court of law; therefore the Applicant is a stranger herein, as he is neither a party in these proceedings nor has he sought to be enjoined, in his private capacity, as a party. As such the Application is incompetent and ought to be struck out.

14. Reference was made to the case of; ***Rose Florence Wanjiru vs Standard Chartered Bank Kenya Limited & Another (2015) eKLR and the case of; Sammy M. Mawer, Commissioner of Insurance & Others vs Kiragu Holdings Limited, Civil Suit NO. 67 of 2012 (2013) eKLR***, where the court held;

***“...it is only after a party has been joined in a proceeding that it can purport to participate and seek relief in such a proceeding. There is no dispute that the 1st Interest Party did not seek leave to be joined in these proceedings. No order of joinder was ever made. To that extent the 1st Interested Party is a stranger to these proceedings. It cannot properly agitate any cause before this court.A party who approaches a court of law through a window or backdoor cannot expect to be entertained howsoever serious his interest may be. In this case, there having been no leave sought and/or granted, the 1st Interested Party's application is incompetent.*”**

15. On the issue of the Arbitrator's lack of jurisdiction, the 1st Respondent submitted that, there was no Arbitration Agreement between it and the 2nd Respondent as contemplated under Section 3(1) and 4 of the Arbitration Act No. 4 of 1995.

16. That Section 3(1) of the Act states that:

“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;”

17. While section 4 of the Act states that:

(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)

18. Further, to the foregoing, Section 4 of the Act provides that an Arbitration Agreement is only valid if it is contained in a document signed by all parties or where the existence of an agreement is alleged in the statement of claim and not denied by the other party.

19. That in this case, there was no document produced before the Arbitration Tribunal upto the time of close of pleadings that contained a valid arbitral agreement which meet the requirements of section 3 and 4 as cited above. The 1st Respondent implored upon the Honourable

court not to entertain matters that arose from a process that was conducted illegally and ultra-vires.

20. The 2nd Defendant/Respondent submitted that “Jurisdiction is everything”. Without jurisdiction, the court has no power to take one more step, and referred to the case of; *Seven Seas Technologies Limited vs Eric Chege (2014) eKLR* and the celebrated case of; *Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd (1989) KLR*, where the court stated that;

“I think that it is reasonable plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

21. The 2nd Respondent also relied on writings up by John Beecroft Sanders in a *“Treaties headed “Words and Phrases legally defined- Volume 3:1-N”* at page 113, where it is stated:

“by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

22. The 2nd Respondent thus argued that, since the consent recorded on 12th April 2016, clearly stipulated that:

“the parties to share the costs incurred so far in regard to the current Arbitration, Mr. Mang’erere.”

The issue of fees is settled and therefore the court has no jurisdiction to assess the disputed costs.

23. Finally, the 2nd Respondent submitted that, the fees sought by the Arbitrator is excessive in view of the fact that the Arbitrator met with the Respondents on two occasions and delivered only one ruling. The time expended on this does not tally with the hours put in the Arbitrator’s bill. Reference was made to the case of; *Mistry Jadva Parbat Company Limited (supra)*.

24. I have considered the Application, the grounds thereon and the Affidavit in support. I have also considered the grounds of opposition and the Replying Affidavit filed, alongside the submissions by the respective parties. I find that, there is no dispute that, the Applicant was appointed vide a letter dated 13th July 2015, to arbitrate over a dispute between the Respondents which was referred to the Arbitration Tribunal. It is not disputed that he presided over the dispute until March 2017 and that he has been paid a sum of Kshs 100,000 as his fees.

25. However, I find that two issues remain for resolution, namely;

(i) *Whether, the Court has jurisdiction to entertain this Application; and,*

(ii) *Whether the fees claimed by the Applicant is excessive.*

26. On the issue of jurisdiction, I find that, it is a fact that jurisdiction is everything. The celebrated case of; *Owners of the Motor Vessel “Lilian S” (supra)* has settled this issue well. The 1st Respondent’s borne of contention is that; the Applicant is not a party to this matter. That is correct. I believe that is an issue of locus standi and the argument is also informed by the doctrine of privity of contract.

If the Court upholds the Respondents argument on that point, it can be concluded that, the Application herein is incompetent and should be struck out.

27. However, the Applicant invited the Court to invoke the provisions of Article 159(2)(d) of the Constitution 2010 which states:

“justice shall be administered without undue regard to procedural technicalities”

28. Before I re-examine these provisions, I wish to address the 2nd Respondent’s submissions on jurisdiction. It is argued that, the consent order recorded herein on 12th April 2016 settled the issue of the Arbitrator’s fees and therefore the court has no jurisdiction.

29. I have considered the total arguments on the issue of jurisdiction and I find that, indeed a party requires locus standi to pursue a right in any given suit. However, two issues arise herein. First and foremost, the Arbitrator was appointed in relation to this subject matter herein. Secondly, when the matter was settled by a consent order on 12th April 2016, the Respondents clearly agreed vide the said consent that, they shall share the costs incurred in so far as it relates to the Arbitrator, (Mr. Mang’erere’s) fees.

30. By virtue of this consent, the right to remuneration accrued to the Arbitrator and he has a right to seek for enforcement of the same. Thirdly, the question that arises is; what prejudice will the Respondents suffer if they were to pay the costs based on that consent order having conceded to payment of the Arbitrator's fees and costs.

31. In that regard, I find that, as much as the issue of jurisdiction and/or locus standi cannot be termed as a technicality, in the same vein, it is in the interest of substantive justice to save the otherwise scarce judicial time to resolve the issue in this Application than treat the Application as fatally incompetent, and order a proper Application be filed. This finding is based on the substantive provisions of Section 1A and 1B of the Civil Procedure Act.

32. Even, then, the Court can still give directions based on the consent of 12th April 2016 that, the Respondents do honour if they were to pay the fees based on that consent order.

33. I shall now deal with the issue of the sum sought being excessive. I note that, the Applicant has annexed on the Affidavit in support of the Application;

(i) The letter of appointment to arbitrate the dispute dated 13th July 2015;

(ii) A letter of acceptance dated 15th July 2015

(iii) The Agreement on Arbitrator's charges & Confidentiality of the Arbitration proceedings showing an agreed sum of Kshs 11,000 hourly charges;

(iv) The consent order filed herein dated 21st March 2016; and,

(v) A bill of costs dated 22nd August 2016 which lists the various items and totaling to an amount of Kshs 228,014.

34. The said Bill of Costs is not supported by any statutory provisions and/or Regulations or Rules, similar to the Advocates Remuneration Order. But then, the Respondents who allege that, the amount sought is excessive have not been helpful to the court by substantiating their claim. The Court cannot therefore disallow the amount sought without any justification. The best the Court can do is, to award the amount as claimed.

35. However, having allowed this matter be canvassed herein, I believe, it will be in the interest of justice to allow the Respondents an opportunity to file a response on which items they are disputing if they so elect. I therefore allow them 15 days period from the date of this order for the same. If at the end of the said period, nothing is filed, I order the sum sought be payable within 15 days of the expiry of that period. Again if no payment is received within the 15 days, the said sum to attract interest at the Courts rate from the date of 1st demand by the Applicant for payment to payment in full (that is 22nd August, 2016).

36. The costs of this Application is awarded to the Applicant.

37. It is so ordered.

Dated, delivered and signed in an open Court at Nairobi this 19th day of January 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Balala holding brief for Mr. Owino for the 1st Respondent/Plaintiff

Ms. Nkonge holding brief for Mr. Inonda for the 2nd Respondent/Defendant

No Appearance for the Applicant/Arbitrator though aware

Teresia.....Court Assistant