REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION CASE NO. 51 OF 2011

MUSLIMS FOR HUMAN RIGHTS (MUHURI).....PETITIONER

VS

MUNICIPAL COUNCIL OF MOMBASA.....1ST RESPONDENT

KAPS MUNICIPAL PARKING LIMITED.....2ND RESPONDENT

RULING

Introduction

1. The Petitioner Muslims for Human Rights (MUHURI) is a non-partisan non-profit making organization and a Human Rights Membership Organization established in Kenya in the year 1997. It moved the court by an Originating Notice of Motion dated 16/08/2011 filed on 19/08/2011 supported by an affidavit sworn by the Director Hussein Khalid Khamis. The following specific orders were sought:

> 1) The court to declare that the involvement of the 2nd respondent in the affairs of the 1st respondent in general and in particular collection of revenues from the parking services within the municipality violates the Constitution of Kenya.
>
> 2) The 2nd respondent be ordered to cease from collecting revenues originating from the parking services within the municipality.
>
> 3) The 2nd respondent be ordered to produce an account of all the revenues originating from parking services from the year 2006 to date.
>
> 4) The court to declare that the agreement entered into between the respondents herein awarding the 2nd respondent the right to collect revenues from parking services unconstitutional and thus null and void. Further that the agreement signed between the respondents on or about the 28th June 2006 exceeds the statutory provisions contained in the Local Government Act.
>
> 5) Costs of the application be borne by the respondents.

2. The 1st respondent through it's Deputy Town Clerk Rose Juma Ngowa filed a response in court on 19/11/2011. She confirmed that the contract document was never availed to the council once it was executed on 28th June 2006; that there was no approval made by the Council to authorize any sealing of the contract document and that the former Mayor and Town Clerk of the council entered into the agreement without authority of the Council as required by the law.

3. The 2nd respondent's legal officer Lawrence Odera Madialo filed a replying affidavit in response to the Originating Notice of Motion. He stated that the 1st respondent had invited tenders for provision of motor vehicle parking services, which it won. The Council entered into a public private partnership agreement dated 28th June 2006. The partnership was to improve on the provision and regulation of parking services within Mombasa Municipality through the use of modern technology.

4. The 2nd respondent filed a further affidavit on 17th July 2012 in response to the 1st respondent's replying affidavit and urged that the Originating Notice of Motion was an abuse of the court process since there was an ongoing arbitration. The 2nd respondent also filed written Submissions on 18th November 2011 urging the Court to dismiss the Originating Notice of Motion with costs.

5. The applicant MUHURI urged the court to uphold its application and to declare the agreement entered between the 1st and 2nd respondents

unconstitutional with regards to Article 1(1)and 2 of the Constitution.

6. The 2nd respondent filed its submissions dated 18th November 2011 in opposition to the Originating Notice of Motion. He had urged the court to find that the Constitution 2010 does not in any way invalidate the Agreement and that Article 23 thereof provides for authority of courts to uphold and enforce the Bill of Rights; the applicant has not demonstrated the manner in which the rights of people of Mombasa have been violated and consequently prayed that the Originating Notice of Motion be dismissed.

The 2nd respondent's application.

7. Before the Originating Notice of Motion herein could be heard and determined, the 2nd respondent filed an application by Chamber Summons dated 10th August 2012 under section 6(1) of the Arbitration Act, 1995 and Rules 2 and 8 of the Arbitration Rules 1997, seeking the following reliefs:

a) There be a stay of the proceedings filed herein including the Originating Notice of Motion dated 16th August 2011 pending hearing and determination of the ongoing arbitration between the 1st and the 2nd respondent.

b) In the alternative to the above prayer the Originating Notice of Motion dated 16th August 2011 be struck out for being scandalous, vexatious, frivolous and an abuse of the process of the court.

c) Costs of the application.

8. The said application was premised on the following grounds:

a) That the 1st and 2nd respondents entered into a public private partnership agreement dated 28th June 2006 under which a joint venture company was incorporated to provide parking services within the Municipality of Mombasa.

b) A dispute arose under the agreement and the same was referred to Arbitration as per clause 22 of the Agreement to determine the validity of the said agreement since the applicant and the 1st respondent have raised various issues.

c) The 2nd respondent believes that the 1st respondent is behind the applicant's application due to the facts pleaded and the documents produced.

d) That the application goes against the principle of the sanctity of the contract, which is a cardinal rule in Contract Law and therefore no third party, is allowed to interfere in the guise of a constitutional reference. The court should give effect to the arbitration clause in the agreement and allow the prayers sought.

THE APPLICANT'S GROUNDS OF OPPOSITION AND SUBMISSIONS

9. The applicant/respondent (MUHURI) filed its grounds of opposition dated 17th September 2012. Some of the grounds raised are as follows:

1. That the said Chamber Summons application is incompetent and an abuse of the court process as provided under article 160(1), Article 25(C) and Article 159(2)(a) and (c) of the Constitution.

2. That the 2nd respondent has raised matters in private law litigation that cannot cause the Constitutional reference be stayed or struck out. This is because it was not a party to the Public Private Partnership Agreement entered into between the 1st and 2nd respondents on 28th June 2006. Further the arbitration process does not affect it.

3. That the 2nd respondent's application attempts to undermine the superior authority of the High court as provided under Article 165 of the Constitution thus the application be struck out with costs.

10. In addition to the above the applicant/ respondent (MUHURI) filed its skeleton and substantive submissions on 14th November 2012 in opposing the 2nd respondent's Chamber Summons dated 10th August 2012. The applicant/ respondent raised several issues and arguments.

a) Whether they were bound by the arbitration clause in the public private partnership agreement entered between the 1st and 2nd respondents. It was their submission that parties to a contract have to hold onto the promises made by both the words and the terms therein. It is a stranger to the performance and enforcement of the agreement entered by the 1st and 2nd respondents. Clause 22 of the Agreement states as follows, "***Save as herein otherwise specifically provided any dispute between the parties hereto as to matters arising pursuant to this agreement which cannot be settled amicably within thirty (30) days after receipt by one party of another party's request for such amicable settlement may be submitted by any party to arbitration."*** Further that no other means can be used to settle any dispute other than what is provided in the clause. The court can only be asked to give effect to the arbitration clause. Therefore the applicant/ respondent is not in any way bound by the arbitration clause. It's Originating Notice of Motion seeks to establish the constitutionality of the Agreement therefore an arbitrator has no jurisdiction to determine Constitutional matters.

b) Whether the court can invoke Section 6 of the Arbitration Act, 1995 to stay the proceedings pending before the Court. The Court can only invoke section 6 of the Arbitration Act 1995 if the matter before court is a subject of an arbitration agreement and the

application for stay is made at the time of entering appearance or before acknowledgement of the claim by the parties seeking stay of proceedings. The applicant's application is constitutional in nature. The 2nd respondent should have applied for stay at the earliest opportunity, not later than the time for filing appearance, pleading, or taking any other step in the matter. In this application, the 2nd respondent let the matter to proceed to the extent of parties filed their submissions. See ***Billy Graham Owuor v. Daudi Sabin Bahira & Anor,*** HCCC No. 18/2012 ***(***unreported).

c) Section 6(1) of the Arbitration Act provides as follows –

" *A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies, not later than the time when a party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration."*

The 2nd respondent ought to have moved the court from the moment they entered appearance. They cannot, therefore, invoke the use of section 3A of the Civil Procedure Act at this stage. This position was established in ***Taparu v. Roitei*** (1968) EA 618 and in ***Industrial and Commercial Development Corporation v. Otachi,*** [1979] LLR 69. In ***Corporate Insurance Co. Ltd v. Wachira*** (1995-1998) 1 EA 20, the Court held, "***that the if the appellant wished to take the benefit of the clause, it was obligated to apply for a stay after entering appearance and before delivering any pleading, by filing a defence the appellant lost its right to rely on the clause."***

d) Whether the court can strike out the Originating Notice of Motion dated 16th August 2012 for being an abuse of the court process. It is their submission that the Originating notice of Motion challenges the Constitutional threshold as regards the collection and management of public funds and resources under Chapter Twelve (12) of the Constitution. Article 3 (1) provides that every person has an obligation to respect, uphold and defend the Constitution. The Originating Motion was filed so that the court can investigate and determine how the rights as enshrined have been violated. They urge the court to find the 2nd respondent's application as an afterthought, incompetent and an abuse of the court process and prayed that it be struck out with costs and the Constitutional Reference to proceed from where it had reached.

e) Counsel relied on the speech of Lord Diplock in the case of ***Bremer Vulkan v. South India Shipping Corporation Ltd*** (1981) 2 WLR 141 on the Court's power in intervening in arbitration proceedings. The 1st respondent has a perpetual succession and it has to lay before the court all facts within its knowledge and if those facts are not in support of the 2nd respondent's case then it should not be a ground to have the constitutional reference struck out. This position was held in ***Nitin Properties Ltd v. Kalsi & Anor*** (1995) 2 EA 257 where the court held that:

"***striking out is a drastic remedy and it has been held time and again that striking out procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution***."

2ND RESPONDENTS SUBMISSIONS

11. The Counsel urged the court to find that the application dated 10th August 2012 has merit and to strike out the Originating Notice of Motion dated 16th August 2011. They filed their skeleton submissions on 7th November 2012. The counsel stated that a dispute arose and parties were referred to arbitration before Chacha Odera Esq, and that prior to this they had filed HCCC NO. 434 of 2009 ***Kenya Airports Authority & KAPS Municipal Parking Services Limited v. Municipal Council of Mombasa*** whereby an order for interim protection was issued. Further that the application filed by the applicant/ respondent raises issues, which relate to the Agreement. The 1st respondent could be behind the filing of the Originating Notice of Motion in view of the responses, facts pleaded and documents that they have produced.

12. An Arbitrator has jurisdiction to determine the legality of the agreement as seen in ***Safaricom Limited v Ocean Beach Hotel Limited & 2 others*** [2010] eKLR where the court of Appeal held that an arbitral tribunal can rule on the validity of the underlying contract. Section 10 of the Arbitration Act 1995 provides that, " ***Except as provided in this Act, no court shall intervene in matters governed by this Act".*** Therefore the courts have to recognize and enforce the agreements on matters falling within the arbitration. The arbitration agreements have to be upheld in accordance with the principle of sanctity of contracts. The urged the Court to consider ***Anne Mumbi Hinga v. Victoria Njoki Gathara*** [2009] eKLR and ***Kenya Shell Limited v. Kobil Petroleum Limited*** [2006] 2EA 132 where the Court of Appeal respectively observed that where the parties have opted for arbitration under the Arbitration Act the courts would take a back seat and Section 10 of the Arbitration Act 1995 envisages the court's role as being supportive and not intrusive.

13. The Counsel urged the court not to allow concurrent proceedings on the same subject matter. Section 6(2) of the Arbitration Act does not permit parallel proceedings to be handled simultaneously. In ***Construction Engineering and Builders (Kenya) Ltd v. Municipal Council of Kisumu*** (1982) eKLR it was held that it is a common thing to stay an action in one dispute and at the same time allow it to proceed. He urged the court to deem the 2nd respondent's application to have been filed within section 6 of the Arbitration Act. It would be an injustice to allow the Applicant's Originating Notice of Motion to determine the validity of the agreement and the 1st respondent shall suffer no prejudice. He urged the Court to rely on Article 159(2) of the Constitution. Counsel urged the court in the interest of justice and pursuant to its inherent power to excuse the 2nd respondent's failure to file the application dated 10th August 2012 in accordance with section 6 of the Arbitration Act and requested the Court to deem the application as filed in accordance with section 6 of the Arbitration Act.

14. Further counsel urged the court that it has inherent power to grant stay of proceedings as determined in ***Harnam Singh and others v. Mistri*** [1971] EA. It was an agreement between the 1st and 2nd respondents that any dispute arising shall be determined by way of arbitration. This court has jurisdiction to determine constitutional matters but an arbitrator does not have. The applicant/ respondent has not demonstrated how there is a denial, violation, or infringement to a right or fundamental freedom in the bill of rights. It is their prayer that in the interest of justice parties are allowed to proceed with the arbitral proceedings as opposed to the determination of the Originating Notice of Motion, which may make a final determination of the agreement. The Originating Notice of Motion should be struck out since it was

mischievously filed in order to frustrate the ongoing arbitration. In ***Karuri & Others v. Dawa Pharmaceuticals Co. Ltd*** (2005) LLR and in ***Dr. Kiama Wangai v. John N. Mugambi & Anor*** eKLR it was held that the court has power to strike out proceedings which were an abuse of the court process.

15. The applicant/ respondent indicated that the current application seeking stay raises matters of private law litigation between the respondents. It is their submission that this is not a ground to disqualify the Court from granting prayers sought. Further the applicant/ respondent has failed to show how Article 160(1) of the Constitution has been violated and they cannot claim that the arbitrator's jurisdiction should not be upheld. Article 159(2)(c) states that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. This is precisely why they are seeking stay of the proceedings in the Originating Notice of Motion and the prayers sought shall not impede on the right to fair trial under Article 25(1) of the Constitution.

Supplementary affidavit.

16. With leave of the Court, Mr. Jackson Mwangi swore a supplementary affidavit on behalf of the 1st respondent stating that an ex parte order was issued by Hon. Lady Justice Lessit on the 17th June 2009 restraining the defendant whether by its servants, agents, directors from acting in any manner pursuant to the purported termination of the agreement dated 28th June 2006 made between the first plaintiff and the defendant by imposing , advertising or otherwise undertaking any dealings howsoever arising and in relation to the provision and regulation of parking services within Mombasa Municipality pending the hearing and determination of this application. The application was heard inter-parties and Kimaru, J. issued orders on 24th March 2010 restraining the defendants from interfering with the ***status quo***, as it existed on the 17th June 2009. It is their averment that there was no indication where the court mentioned until the hearing and determination of the Arbitration. The 2nd respondent is frustrating the 1st respondent since they have never listed the application dated 17th June 2009 for hearing. Hon. Justice Havelock dismissed the 2nd respondent's application for contempt against the 1st respondent's officers on 31st July 2014. It is their prayer that the Petition herein be heard.

DETERMINATION

17. The issues arising for determination by the Court are two fold, namely –

a) Whether the application for stay of proceedings pending arbitration is competent, or put another way whether application dated 10th August, 2012 seeking stay of proceedings pending the hearing and determination of the ongoing Arbitration between the respondents was filed in accordance with **Section 6 of the Arbitration Act, 1995**; and

b) Whether the Originating Notice of Motion is liable to be struck out for being frivolous, vexatious and an abuse of the Process of the Court.

18. To begin with, the provision of Section 6(1) of the Arbitration Act is to the effect that: -

"A court before which proceedings are brought in a matter which is the subject of an arbitration shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of proceedings and refer the parties to Arbitration unless it finds-

a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

b)That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration…"

19. The jurisdiction of the Court to stay proceedings filed in court pending the hearing and determination of arbitral proceedings is secured under **Section 6** of the **Arbitration Act, 1995**. See also the case of HCCC No. 487 of 2013**,** ***Nanchang Foreign Engineering Co. (K) Limited v. Easy Properties Kenya Limited,*** and ***Jadra Karsan v. Harman Singh*** [1953] 20 E.A.C.A**.** ***74*** where it was held as regards the general power of court to stay proceedings that -

"[T]***here is no doubt that there is an inherent power of stay of proceedings where the ends of justice so require*****."**

20. The jurisdiction to stay proceedings pending arbitration is exercised upon well known principles as follows:

a)THAT the application seeking a stay of the proceedings with a view to having the matter referred to arbitration is presented to the court not later than the time when the applicant enters appearance or otherwise acknowledges the claim against which the stay of proceedings is being sought;

b) THAT the arbitration agreement is not null and void, inoperative or incapable of being performed;

c) THAT there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

Whether the application seeking a stay of the proceedings pending arbitration is competent.

21. The 2ndrespondent's Application dated 10th August 2012 invoked section 6 of the Arbitration Act where if any party so desires to make

an application for a stay of proceedings pending referral to arbitration, it was compulsory that the party ought to make such an application not later than the time when the party enters an Appearance. Furthermore, the Application for stay of proceedings needs to be filed on the same day as the Memorandum of Appearance. This position was well established by the court in ***Charles Njogu Lofty v. Bedouin Enterprises Ltd*** [2005] eKLR where the Court of Appeal held that:

> "***The court is entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so was not made at the time of entering appearance, or if no appearance is entered, at the time of filing any pleadings or the time of taking any steps in the proceedings."***

22. From the facts presented, it is indeed clear that the 2nd respondent has failed to meet the criteria set out in **Section 6 of the Arbitration Act**, in that the application was made way after the 2nd respondent acknowledged the suit, after parties had filed submissions in the year 2014. The applicant's application was filed on 19/08/2011. The court cannot aid the indolent. Further the 2nd respondent did not bring it to the court's attention about the arbitral proceedings. It is for that reason the order issued by Justice Kimaru did not touch on it. The same was never brought to the court's attention. Sir Charles Newbold in ***Lakhamshi Brothers Ltd v. Raja & Sons*** [1966] E.A. 313 reiterated the words of the predecessor court in ***Raniga v. Jivraj*** [1965] EA 700 (K) where the Court held that;

> ***"[A] court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention."***

Whether the arbitration agreement is null and void, inoperative or incapable of being performed.

23. The justification under this limb is that to stay proceeding in a case where there is no valid Arbitration Agreement would otherwise amount to denying the applicant justice as he or she may not be able to get redress by enforcing the arbitration agreement to which he not a party. From the facts presented, it is evident that the matter under this limb is not contested since the subject matter under arbitration has a Clause for arbitration which already is before Chacha Odera Esq. as the sole arbitrator.

Whether there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.

24. A stay of proceedings should be refused if the court finds*; **that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration*****.** The wording ***not in fact any dispute*** has been sufficiently addressed by the courts in the cases of ***Addock Ingram East Africa Limited V Surgilinks Limited*** [2012] eKLR**;** and ***UAP Provincial Insurance Company Ltd vs. Michael John Beckett*** [2013] eKLR**.** Where in both, the courts held that, the dispute must relate to matters agreed to be referred to arbitration. For the foregoing reasons I find the request for stay of proceedings pending the hearing and determination of the ongoing arbitration is an to delay the fair trial of this case.

Whether the Applicant's Originating Notice of Motion dated 16th August 2011 should be struck out for being scandalous, vexatious, and frivolous and an abuse of the court process.

25. Order 2 Rule 15(1) of **the Civil Procedure Rules** provides that:

> "*15. (1) at any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—*
>
> *(a). it discloses no reasonable cause of action or defence in law; or*
>
> *(b). it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d). It is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

26. In light of the above, the application before this Court is competently only one to strike out the applicant/respondent's Originating notice of motion dated 16th August 2011 on grounds of the suit being incompetent, frivolous or vexatious and otherwise an abuse of the process of the Court. In the case of ***Kenya Airways Ltd v. Classical Travel and Tours Ltd*** [2003] LLR 2704 (CCK), Emukule J. defined a matter to be frivolous when it is without substance or unarguable. He equally defined an action is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble or expense. Therefore, as to whether the notice of motion dated 16th August 2011 is frivolous, vexatious, incompetent and an abuse of the process of the Court. The applicants/respondents submitted that the Originating Notice of Motion challenges the constitutional threshold as regards the collection and management of public funds and resources under chapter 12 of the Constitution.

27. On the other hand, the second respondents/ applicants in their written submissions argued that the applicant has failed to outline the specific fundamental rights and freedoms which it claims to have been violated, and if such denials, violation or infringement has not been specified then the Court cannot be called to exercise its jurisdiction over that matter. That, with respect, is a matter for the trial court during the hearing of the constitutional application, on its merits.

28. Consequently, having carefully considered the affidavit evidence, the pleadings herein, the written submissions and the case-law in support of the parties' respective cases, the Court was not persuaded that 2nd Respondent had demonstrated that the Applicant's Originating Notice of Motion dated 16th August 2011 was vexatious, frivolous, or an abuse of the court process.

29. Without prejudice to the hearing of the Originating Notice of Motion, the Petition appears to raise serious questions to be presented to the constitutional court as to the constitutionality of the agreement between the 1st respondent public body and the 2nd respondent private enterprise and as to whether the same is *ultra vires*, the applicable Local Government Act, both which are matters within the proper province of the Court rather than Arbitration.

30.I respectfully accept the principle of ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another*** (1983) KLR 1, [1980] eKLR] that –

> "*A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*
>
> "*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*"

ORDER.

a) Accordingly, for the reasons set out above, the 2nd Respondent's application for stay of proceedings pending Arbitration is dismissed with costs to the petitioner and the 1st respondent.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 19TH DAY OF FEBRUARY, 2018

.....

JUDGE

APPEARANCES:

M/S Sherman Nyongesa & Co. Advocates for the Petitioner.

M/S Buti & Co. Advocates for the 1st Respondent.

M/S Hamilton, Harrison & Mathews, Advocates for 2nd Respondent.