



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL & TAX DIVISION
MISC. CIVIL APPLICATION NO. 636 OF 2012

HERITAGE CONSULTANTS LTD.....PLAINTIFF/APPLICANT

VERSUS

PERMANENT SECRETARY

MINISTRY OF REGIONAL DEVELOPMENT.....DEFENDANT RESPONDENT

J.M. KIBUCHI, Arbitrator t/a

KIBUCHI & CO. ADVOCATES.....INTERESTED PARTY/RESPONDENT

RULING

1. The Application herein is a notice of motion dated 13th October 2016, brought under the provisions of Order 40 Rule 2 and Order 46 Rule 13 of the Civil Procedure Rules 2010, Section 1 and 3A of the Civil Procedure Act, Section 25, 32 and 34, of the Arbitration (Amendment), Act 2009, the Arbitration Rules 2012, and all the enabling provisions of the law.
2. The Application is based on the grounds on the face of it, and an Affidavit sworn by Beatrice Sabana. It is seeking for orders that, J. M. Kibuchi t/a Kibuchi & Co. Advocates be enjoined in this matter as an Interested Party, and that, the Court be pleased to issue a mandatory order directed upon the Interested Party, as the sole Arbitrator, compelling him to forthwith release the Arbitral Award that has been pending since the year 2014. Further that the Interested Party do render an account of the deposit paid. The costs of this Application be provided for.
3. The Applicant avers that, pursuant to a Court ruling delivered on 23rd May 2013, by (Rtd) Hon. Justice Havelock herein, the Interested Party was appointed by the Chairman of the Chartered Institute of Arbitrators, as the sole Arbitrator to arbitrate on the dispute between the Parties herein.
4. The dispute was heard before the Arbitrator with effect from the 23rd July 2014, and concluded on 5th September 2014. The Arbitrator thereafter directed that, upon the filing of the submission by the Parties, the Arbitral Award would be released on notice. The last submissions were filed by the Respondent, on 21st November 2014.
5. The Applicant is aggrieved that, at it has taken three (3) years since then and the Award has not been released, occasioning it great prejudice due to this prolonged and unexplained delay. That, the Applicant wrote a letter dated 11th September 2015, to the Arbitrator over the delay and the Arbitrator replied vide a

letter dated 17th September 2015, informing the Applicant that the Award was almost ready. The Award was not rendered whereupon; the Applicant wrote follow up letters; dated 9th November 2015 and 14th January 2016. The Arbitrator responded on 21st January 2016, requesting for a deposit of Kshs.300,000.00 from each party, however, there was no indication to whether the Award was ready or not. The Applicant wrote back to the Arbitrator giving a commitment to pay the amount upon the release of the Award. To date the Arbitrator has not received a responded, hence the filing Application.

6. The Arbitrator/Interested Party opposed the Application by filing a Preliminary Objection, on the 8th November 2016. The Preliminary Objection basically states that, the Applicant has not complied with the provisions of Sections 32(B) (3) and 32 (B) (4) of the Arbitration Act of 1995. The Arbitrator argued that, since the sums owed by the parties in the terms of fees and expenses of the Arbitration process is yet to be declared, it impossible for either party to approach the High Court for a determination of arbitration fees, and costs, since a Party must first deposit into Court amounts demanded by the Arbitration Tribunal prior to making an application such as this one at hand. The Interested party further argued that, he been joined in this existing suit without the Applicant first seeking the leave of the Court, hence the Application is improper.

7. The Arbitrator also swore and filed a Replying Affidavit dated 8th November 2016 in opposition to the Application. He acknowledged his appointment as aforesaid, and stated that, the hearing of the dispute took place between 23rd July 2014 and 5th September 2015, after which the Parties filed their respective submissions as directed. He averred that the matter of the dispute was of a complex nature, with extensive and evidence of Nine (9) witnesses and over one thousand (1,000) pages exhibits, all of which had to be carefully examined and considered for determination of the dispute. On 23rd April 2015, he responded to the inquiry over the delay in the release of the Arbitral Award, and on 21st January 2016, he requested each Party to pay the Kshs.300, 000. 00 before, the Award could be released. None of the Parties has paid the money. The Arbitrator maintained since the Applicant has not complied with the above stated provisions of; Section 32 (B) (3) and (4) of the Arbitration Act of 1995, the Application should be immediately dismissed with costs to him. That he is ready and willing to release the Award only after being paid a deposit o Kshs.300, 000. 00 from each Party and even before the full fees is paid. He termed the Application as “*malicious, frivolous, pre-mature, and only serves as a further waste of precious time, as the Interested Party has indicated that, the Award is ready*”. That the Court should direct the Parties to settle his fee Note and the Award be released.

8. The Parties agreed to dispose of the Application by filing submissions. I have considered the said submissions and find that, the following issues arise for determination:

- i. Whether the Interested Party was properly enjoined in this matter.***
- ii. Whether there has been inordinate delay in the release of the Arbitral Award herein.***
- iii. If the answer to (ii) above is yes, whether the Interested Party has offered a reasonable and/or excusable reason for the delay.***
- iv. Whether the Court should grant the orders sought for. If so, on what terms.***
- v. Who should pay the costs of this Application?***

9. As regards the first issue, I find that there is no evidence on record that the Applicant sought for and was granted leave of the Court to enjoin the Interested Party in this matter. The manner in which the Interested Party was brought into this matter was thus un-procedural. However, when he was served with the Application, he did not protest. He proceeded and filed a response and subsequently, the submission on the Application. I therefore find that, by virtue of the fact the Applicant has participated in the hearing of the Application, the issue has been overtaken by events. In any event the provisions of Article 159(d) of the Constitution of Kenya will come into play, where the Court is directed to disregard issues of technicalities and uphold substantive justice. Even then I strongly condemn the Applicant for the sheer

disregard of procedural requirements.

10. I shall now deal with the issue of delay. It's clear from the averments of the Parties that, submissions were filed on the Application, on or before the 17th November 2014. That is about two years to the date when the Application herein was filed. In the absence of a reasonable and sound explanation for the same, that will amount to an inordinate delay. That leads me to the 3rd issue, as to whether there is an excusable reason advanced. In this regard, the Interested Party attributes the delay to mainly two factors:

i. The fact that the subject matter of the dispute was of a complex nature with extensive issues and length witness testimonies and documents.

ii. The non-payment of the instruction note of Kshs.300,000.00 by each Party as requested for.

11. In my considered opinion, whether either of the above reasons holds water or not, this is clear case where the Parties are treating each other with "suspicion" and "mistrust" in relation to payment of the Arbitration fees and/or associated expenses. The Applicant is apprehensive of paying the sum sought before the Award is released and the Arbitrator/Interested Party is apprehensive of releasing the Award before he is paid. Indeed the Applicant submitted that, vide a letter dated 30th June 2016, it replied to the Interested Party's request for payment by "***giving a commitment to pay any other costs and/or fees upon release of the Award***". The Applicant went on to state:

"...it is thus crystal clear from the aforesaid letter that the Applicant herein was and is still willing to settle the Arbitrator's fees on condition that the Award is released."

12. On the other hand, the Interested Party submitted that, Section 32(B) (3) of the Act aforesaid expressly allows the Arbitrator to withhold delivery of the Award to the Parties, to the Arbitration, until the Arbitrator is in receipt of full payment of the fees and expenses arising from the Arbitration process. The Interested Party reiterates that there is no compliance with the provisions of Section 32 (B) (4) of the Act, in that, no notice was first given to the Arbitral Tribunal of the delay in release of the Award, and neither has payment of the fees and expenses been made into Court as demanded by the Arbitral tribunal. Reliance was placed on the case of; ***Ivis Properties Ltd & Another Vs Nairobi City Council HCC No. 947 of 1999.***

13. However, I find that, although in this particular case, there was no notice given to the Arbitral Tribunal as envisaged under the above cited provisions of the law, but there is adequate evidence that several letters were written to the Arbitrator/Interested Party, over the delay in release of the Award. In all the responses thereto, the Arbitrator he did not attribute the delay, to the complexity of the matter nor non-payment of the requisite professional fees until much later, in the last communication, when he sought to be paid the said Kshs.300,000 by each Party. That of course has not been done. He says the Award is now ready. He requires to be paid before the release of the Award. The Plaintiff/Applicant states, they are willing to pay the same, save after the release of the Award. This hard stand position taken by the Parties uncalled for and unnecessary, Neither does this conduct by the Parties reflect professionalism or promote the nurtured principle of access to justice. The provisions of Sections 1A and 1B of the Civil Procedure Act, requires parties in any dispute settlement forum to assist in its efficient, and expeditious disposal thereof and in a less costly manner. It is not therefore in the interest of the parties or justice to "purposely or intentionally or otherwise" delay finalization of this matter.

14. In view of the aforesaid, I order that, the Plaintiff/Applicant, and the Defendant/Respondent, pay the the sum of Kshs.300, 000. 00 requested for within fourteen (14) days of this order. Upon the payment thereof, the Arbitrator shall release the Arbitral Award to the Parties within seven (7) days of receipt of the payment. In default of compliance, either Party shall be at liberty to apply. In view of the fact that, both Parties have in one way or another as aforesaid, arising out of their strong stand points, contributed to the necessity to file this Application, , each party to bear its own costs.

15. Finally before I rest the matter, an issue has been raised concerning the subsequent fee not of kshs.2,076,400.00 raised by the Interested Party, to be paid by the Parties to the Arbitral process. This

issue arose after the filing of his Application and through the responses and submissions filed. The Court has not been formally moved to determine the same and neither is it a subject of the Application herein. I shall leave it to rest where it has fallen and or within the right forum.

16. Those then are the orders of the Court.

Dated, delivered and signed on this 20th day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In the open Court in the presence of:

Mr. Macharia Mr. Mandala for the Applicant

Mr. Kiarie for Kihara for the Respondent

Mr. Bukania for Mr. Kibuchi for the Interested Party