



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 54 OF 2012

S.G.S. SOCIETIES GENERALE DE SURVEILLANCE SA.....1ST PLAINTIFF

SGS JEBTA KUNUTED.....2ND PLAINTIFF

- VERSUS -

TRACER LIMITED.....1ST DEFENDANT

PETER NANYUMBA ECHESAH.....2ND DEFENDANT

AUTOMATED LOGISTICS KENYA LIMITED.....3RD DEFENDANT

RULING

1. By the **Notice of Motion** Application dated 31st August 2015 and filed herein on 10th September 2015, the 2nd and 3rd Defendants/Applicants seek an order of Review of this Court's Ruling delivered on 23rd June 2015. The application is premised on the grounds that the said Ruling was dismissed on grounds that it was overtaken by events as the matter was then under arbitration before Mrs. Funke Adekoya in International Chamber of Commerce Case No. 18169/ARP. Further grounds are that there is discovery of new and important evidence which could not be produced at the time the ruling was delivered on 23rd June 2015. This new evidence is that the Award was delivered on 20th April 2015, and this fact was not made known to the court. The said Award was declared and directed against the 1st Defendant only, and the arbitrator rejected claims against the Applicants herein. The Applicants now urge that dictates of justice demand that the said Ruling be reviewed, and the prayer therein to dismiss the suit against the Applicants be granted.

2. The application is opposed by the Plaintiff/Respondent through Replying Affidavit of **Albert Stockell**, sworn on 21st November 2015. **Mr. Stockell** describes himself as the managing Director of the Plaintiff and has the authority to depone to the affidavit. **Mr. Stockell** confirms that indeed there is an Award published on 20th April 2015. However, the said deponent is aware that the 1st Defendant herein has filed an application in the High Court in Nairobi seeking to set aside the aforesaid award in Miscellaneous Civil Case No. 331 of 2015. He annexed copy of that application as annexure "**AS-1**". **Mr. Stockell** deponed that the present application is premature and vexatious as the application seeking to set aside the arbitral award is pending determination. The deponent further states that the rulings herein of 16th March 2012 and 20th June 2012 have not been varied or set aside but the Defendants herein filed a Notice of Appeal in respect of the ruling of 16th March 2012. The said rulings were made with the 2nd and 3rd

Defendants/Applicants in mind and so, as long as they exist, the 2nd and 3rd Defendants cannot be released from this suit. It is the Respondent's case that the continued presence of the Applicants as parties in this suit is important pending the final determination of the pending applications in relation to the aforesaid arbitral award.

3. Parties with the leave of the court filed submissions to the application, which I have considered. I raise the following issues for determination:

i. Whether the application for review satisfies the requirements of Order 45 Rule 1 of the Civil Procedure Rules.

ii. Whether the current application is premature.

BRIEF FACTS OF THE CASE

4. On 23rd June, 2015 this Court made a Ruling following the 2nd and 3rd Defendants application dated 29th October, 2014. In the said Ruling, the court found that;

“In light of the foregoing authorities, it is clear that 2nd and 3rd Defendants’ prayer that the suit be dismissed against them is res judicata. The court conclusively determined the position of the 2nd and 3rd Defendants in the suit while granting the injunctive orders against them.”

The Court further held that;

“The court in the Ruling of 6th March, 2012 established that the said Defendants were so closely connected to the agreements which this Court was aware the 2nd and 3rd Defendants were privy to. The Court in its ruling of 6th March 2012 established that the said Defendants were so closely connected to the agreements and therefore they were to be bound by any orders the Court would give as a temporary measure.”

5. The court then directed the dispute to arbitration under the Rules of Arbitration of the International Chambers of Commerce in Paris, France before Mrs. Olufunke Adekoya San as the sole arbitrator.

6. The arbitration was heard as International Chamber of Commerce Case No. 18169/ARP and the arbitral award subsequently published on 20th April 2015.

7. On 17th July, 2015, the 1st Defendant filed an application at the High Court in Nairobi seeking to set aside the arbitral award in Miscellaneous Civil Case No. 331 of 2015 and the said application is still pending in this court.

8. Now the 2nd and 3rd Defendants have filed this application seeking this Court to review the Ruling and the Order of this court delivered on 23rd June, 2015.

9. From the foregoing paragraphs of this ruling the inescapable verdict is that the Notice of Motion application dated 31st August 2015 by the 2nd and 3rd Defendants/Applicant lacks merit and is herewith dismissed with costs to the Respondents.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 15th DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Munge for Plaintiff

Mr. Akheabi hb Ndolo for Defendant

Teresia – Court Clerk