REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISON

MISC APPLICATION . NO.532 OF 2015

IN THE MATTER OF ARBITRATION ACT, 1995, LAWS OF KENYA

AND

IN THE MATTER OF ARBITRATION

BETWEEN

MAKWATA CONSTRUCTION AND

ENGINEERING COMPANY LIMITED.....CLAIMANT/APPLICANT

VERSUS

LIMURU GIRLS HIGH SCHOOL.....RESPONDENT

RULING

1. This Court is asked to consider and determine the Notice of Motion of 29th February 2016 whose main prayers would now be:-

> 6. That a Mandatory Injunction be issued to Messrs. MBUSERA AUCTIONEERS directing them not to attach the School properties over which they caused a proclamation to be issued on 22nd February 2016.
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> 8. The Judgement entered against the Defendant/Applicant and all consequential orders be set aside.
>
> 9. That leave be granted to the Respondent/Applicant to defend the suit.

2. The Grounds and reasons in support of that Application are on the face of the Application itself and the Affidavit of Margaret W. Chege sworn on 29th February, 2016. These are:-

> (a) That these proceedings are an abuse of Court Process as the same matters were heard and determined in Nrb Misc. Hcc. No.106 of 2015 (Makwata Construction and Engineering Company –vs- Board of Governors/Board of Management, Limuru Girls High School (hereinafter Misc.HCC No.106 of 2005).
>
> (b) That the proceedings leading up to the Judgment were conducted Exparte and the Applicant was not served.
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> (c) The Applicant has a credible and triable Response to the claim.
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> (d) That the Execution process contravenes the provisions of Order 22 Rule 6 of The Civil Procedure Rules as the Applicant was not notified of the judgment.

The Court is also asked to consider that the Applicant is a Public School and learning therein would be disrupted by Execution of the Decree.

3. The Application is opposed.

4. There is a short history to this matter. A dispute arose between the parties herein in respect to building contract of 2nd February 2005 which was referred to Arbitration. The appointed Arbitrator Haron Nyakundi heard the dispute and published a final award on 21st October 2007 in which he dismissed the Applicant's Defence and Counterclaim and made an award in favour of the Claimant as follows:-

> 1. THAT within thirty (30) days after the release of this Award, the Respondent shall pay the Claimant the residual amount of Kenya Shillings Four Million Seven Hundred and Ninety Four Thousand Nine Hundred and Seventy Seven Cents Thirty only (Kshs.4,794,977.30) in full an final settlement of all the issues referred to me in this Arbitration.
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> 2. THAT if the sum I have awarded or any portion of it shall remain unpaid beyond the thirty (30) days as I have directed, the same shall attract simple interest at the rate of 18% per annum for as long as it shall remain unpaid.
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> 3. THAT the cost of this Award which I now tax and settle at Kenya Shillings One Million Five Hundred and Twenty Nine Thousand One Hundred Cents Forty only (Kshs.1,529,100.40) and in view of the needless delays by both sides and the overall outcome of these proceedings, the cost of this Award shall be borne and apportioned between the Claimant and Respondent in the proportions of 30% and 70% respectively (Claimant:Kshs.458,730.13, Respondent: Kshs.1,070,370.28). If the Claimant shall have paid the whole or part of these costs, the Respondent shall reimburse to the Claimant the due sum so paid within thirty (30) days after the date of release of this Award and vise versa. Any delay to attract interest as above.
>
> 4. THAT the Respondent shall pay the Claimant Seventy (70%) its costs of and incidental to this Arbitration within thirty (30) days from the date of filing an such costs to be taxed by me if not agreed.

5. Following that award, the Applicant applied to Court to have the Award set aside. That Application being Nrb Civil Suit NO.170 of 2009(O.S) was dismissed for want of prosecution on 24th November, 2014.

6. There was then Nrb Misc. Application No.106 of 2015. An Application for Leave to Enforce the Award herein. An Application by the Claimant. That Application was declined on 16th November, 2015 because the Claimant was described as Makwata Construction & Engineering Company and not Makwata Construction & Engineering Company Ltd. The word Ltd (short form of Limited) had been omitted.

7. These proceedings were therefore commenced. There is evidence that the Notice of filing of the Award was served on the Applicant on 13th January 2016 (see Affidavit of service of Josephat Kutekha Khatikwi sworn on 20th January 2016). Thereafter the Claimant moved Court under the provisions of Rule 6 of The Arbitration Rules for Leave to enforce this Award as a Decree. That Application dated 27th January 2016 was granted on 18th February 2016.

8. The provisions of Rule 6 of the Arbitration Rules are as follows:-

> "If no application to set aside an arbitral award has been made in accordance with section 35 of the Act the party filing the award may apply ex parte by summons for leave to enforce the award as a decree".

9. The proceedings are exparte in nature and need not be served upon the Respondent. At the time of the Application of 27th January 2016 was filed, the Award had not been set aside and there was no challenge to it as the Applicant's attempt was dismissed on 24th November, 2014. The manner in which the Appellant moved Court and the Orders obtained on 18th February 2016 cannot be faulted. That settles the Applicant's complaint that it was not notified of the proceedings leading to the Decree.

10. Was the Respondent obliged to notify the Applicant of the Decree in terms of Order 22 Rule 6 of the Civil Procedure Rules? These provisions are as follows:-

> "Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:
>
> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution".

As is clear these provisions are in respect to Decrees obtained in pursuance of Exparte Judgement. This is not the case here. The Decree herein is for Enforcement of an Award from Arbitral proceedings. Proceedings in which the Applicant participated. But even more critical was that Applicant notified of the filing of the Award as required by Rule 5 of The Arbitration Rules, 1997? Rule 5 reads,

> "The Party filing the Award shall give notice to all parties of the filing of the Award giving the date thereof and the cause number and the Registry in which it has been filed an shall give an affidavit of service".

Only after giving this notice can a party apply for enforcement under Rule 6. This Notice gives a party an opportunity to satisfy the Award or to challenge it by way of setting aside. The Respondent herein fully complied with the Provisions of Rule 5 and the Applicant cannot be

heard to say that it is was surprised by the Decree.

11. In the written submissions by the Applicant, a lot of focus was given to the issue of description of the Claimant. The Award was made in favour of a Claimant described therein as Makwata Construction and Engineering **Ltd**. In the Application for enforcement presented in 106 of 2015 the Claimant was described as Makwata Construction and Engineering Company. The word 'Ltd' was omitted. This anomaly attracted the following remarks by Ochieng J,

> "22. The question stems from the fact that the Claimant in the Arbitral Award is cited as MAKWATA CONSTRUCTION & ENGINEERING LTD.
>
> 23. The word 'LIMITED', whether used as such or in its short form of "LTD" ordinarily connotes a limited liability company, duly incorporated in accordance with the Companies Act.
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> 24. In the circumstances, it implies that the Claimant was a limited liability Company, and it is that entity that was awarded the sum of Kshs.4,794,977.20 plus costs.
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> 25. However, the said limited liability company has not come to court, to have the award recognized as a Judgment of the Court, so that it could thereafter be executed.
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> 26. The person who has come to Court is MAKWATA CONSTRUCTION AND ENGINEERING COMPANY.
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> 27. In the Affidavit in support of the Application, Patrick Anyangu Makwata has declined himself as "the proprietor" of the Applicant/Claimant".

It is therefore apparent that the Court rejected the Application because the Claimant therein was not the Body Corporate that was the Claimant in the Award.

12. The Application before me is filed by Makwata Construction & Engineering Ltd. This is the Claimant in the Award. In so far as one effect of the Decision in 105/2015 was that the Application was brought by a wrong party, the present Application cannot be resjudicate that matter as suggested by the Applicant herein. Matters in respect to the Application as brought by the correct Claimant have not been determined.

13. Yet another issue is raised by the Applicant. It is submitted as follows:-

> "Your Lordship, at the time of entering into the Construction Contract with Limuru Girls School, the Claimant was described as Makwata Construction & Engineering Co. Ltd. It has since been established that Makwata Construction & Engineering Co. Ltd never existed. Under the Companies Act, Cap 486 (as amended in 2015), a company only comes into existence after being issued with a Certificate of Incorporation. The Claimant has not annexed any certificate of incorporation to demonstrate that the company existed at the time the contract was signed."

14. However there was no evidence placed before this Court to support the assertion by the Applicant herein that the Claimant did not exist as a body corporate at the time the Contract was made. The submissions in respect to the legal status of the Applicant must therefore be rejected.

15. What about the argument that Limuru Girls School is non-suited as the body which should have been sued is the Board of Management of the School. This same argument was taken up before the Arbitrator who resolved it as follows:-

> · "The Respondent argues that Limuru Girls School has no legal capacity to sue or be sued and that it is only the Board of Governors which has the capacity.
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> · On the other hand, the Respondent affirms that the contract for the Multipurpose Hall is soundly valid.
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> · I note that in the contract for the Multipurpose Hall, the Employer (or Client) is named as Limuru Girls School. It is signed by the Chairman of the Board of Governors. A name is a means of identification and the Board chose to enter the contract under the name "Limuru Girls School".
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> · Even in the Counter claim, the Respondent repeatedly refers to "the School". It is also obvious that the Principal of the School was at all times acting on behalf of the Board of Governors.
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> · Within the context of the Contract that the Parties signed, therefore, I find that the suit before me to proper with two antagonists who have the capacity to battle under the Arbitration Act."

16. This Court is not sitting on Appeal over the Decision of the Arbitrator, and the Applicant lost an opportunity of taking up that matter in the Application for setting aside of the Award (170/2009(O.S) it failed to prosecute. It must be too late for this issue to be revisited.

17. This Court does not find merit in the Notice of Motion of 29th February 2016. The Applicant was found liable to pay a sum of Kshs.4,794,977.00 on 21st October, 2007. That would be 9 years ago and the sum is unpaid. Parties cannot litigate indefinitely. Litigation must come to an end.

18. However, this Court feels some sympathy for the Applicant which is a National School. Any Execution proceedings against it will certainly cause hardship to the many students in that School and disrupt learning therein, something undesirable. Yet there cannot be justification not to pay the Claimant who duly performed its part of the bargain under the terms of the Contract and more so when the indebtedness has been found to be due as far back as 9 years ago

19. Whilst this Court can simply dismiss the Notice of Motion on 29th February 2016 and allow the Execution to proceed, it cannot turn a blind eye to the difficulty such Execution may cause to the School. For this reason this Court gives the Applicant an opportunity of resolving this matter in a manner that is less disruptive and painful.

20. These then are my final Orders.

(1) The Notice of Motion of 29th February 2016 is hereby dismissed with costs.

(2) There shall be temporary stay of Execution to enable the Chairman and/or Secretary to the Board of Management of the Applicant School to attend this Court with a proposal of how the Decree herein will be satisfied.

(3) In default of attendance as set out in (2) above and failure to provide an acceptable proposal, Execution to proceed.

Dated, Signed and Delivered in Court at Nairobi this 24th day of November, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Lubulellah for Claimant

N/A for Respondent

Alex - Court clerk