



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 8 OF 2009

DAVID MUTHAMI MUTHEE ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

AFRICA MERCHANT ASSURANCE

COMPANY LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

INTRODUCTION

1. The Application before this Court is the Plaintiff's Notice of Motion dated **9th June 2014** and filed in Court on **11th June 2014**. It is expressed to be brought under **Order 50 Rule 5 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act**.
2. The Application is based on the grounds stated in the application and is supported by the Affidavit of **STEPHEN MWANZA GACHIE**, an Advocate of the High Court of Kenya, and sworn on **9th June 2014**.
3. The application is seeking for one main order that this honourable court be pleased to enlarge time within which to apply to set aside the Award of the Arbitral Tribunal made on 24th June, 2011.

THE PLAINTIFF'S CASE

4. The Plaintiff's case is that the Arbitral tribunal failed to comply with Order 46, Rule 10 of the Civil Procedure Rules, 2010 which is to the effect that an Arbitral Award must be filed in Court within 14 days. In that case he was unable to make any necessary move to challenge the Award within reasonable time.
5. It is also his case that the Advocate could not file the application in time as the Court file went missing and despite numerous inquiries from the registry the same could not be traced.
6. The Plaintiff filed his submissions dated 10th February 2015 on even date in support of his application.

THE DEFENDANT'S CASE

- 7 The Defendant opposed the application. There is a Grounds of Opposition dated 2nd October 2014 and

filed on even date as well as the Replying affidavit sworn on **8th October 2014** by PAULINE MWANIKI, described as the Legal Officer of the Defendant.

8. The Defendant's case is that the provisions of Order 46 rule 10, which the Plaintiff is relying on in bringing the current Application, are very clear that the order only applies to Arbitration proceedings arising from a suit where the parties to the suit agree to refer the suit to arbitration under supervision of the court. According to the Defendant, the said order does not apply to arbitration proceedings commenced pursuant to Section 6(1) of the Arbitration Act 1995.

9. It is also the Defendant's case that the application is hopelessly out of time and the unreasonable delay in bringing the application would be extremely prejudicial to it if the orders sought are granted.

10 The Defendant filed its submissions dated 18th February 2015 on 19th February 2015.

ANALYSIS

11. I have considered the application, the affidavits in support and opposition to the application as well as the rival submissions filed by Counsel. Having done so, I take the following view of the matter.

12. From the above pleadings, the main issue for determination is whether the Plaintiff is entitled to the orders sought, that is, enlargement of time within which to apply to set aside the Award of the Arbitral Tribunal made on 24th June, 2011.

13. The Plaintiff brought this application under Order 50 Rule 5 of the Civil Procedure Rules which provides thus:-

“The day in which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given shall not be reckoned in the computation of time allowed to plead, or take any other proceeding in the cause or matter”

This provision is not relevant to the Order sought for by the Plaintiff. The applicable order is Order 50 Rule 6, which provides for the enlargement of time in making an application where the time provided for has since lapsed.

14. I now turn to the substance of the matter. The Plaintiff's case is that he was unable to make an application for setting aside the arbitral award in time since the Arbitral tribunal failed to file the award in Court in time and that the Court file had gone missing in the registry.

15. On the issue of filing the Arbitral award in Court, the Plaintiff relied on Order 46 Rule 10, which provides that the Award was to be filed in Court within 14 days. On the Defendant's part, the provisions of the said order did not apply to arbitration proceedings commenced pursuant to Section 6 (1) of the Arbitration Act.

16. Order 46 of the Civil Procedure rules provides for Arbitration under an order of the Court. Rule 1 of the said Order provides that parties in a suit may agree to refer the dispute between them to arbitration. It does not envisage a scenario where there is already an arbitration agreement between the parties. The arbitration proceedings in this matter were as a result of the arbitration clause in the contract of insurance between the parties herein. Pursuant to an application by the Defendant under Section 6(1) of the Arbitration Act 1995 seeking referral of the matter to arbitration as was provided under the said contract of insurance, this Court referred the matter to arbitration. Therefore, the said arbitration proceedings were no longer under the supervision of this Court.

This Court finds the case of **IRIS PROPERTIES LIMITED & ANOTHER VS NAIROBI CITY COUNCIL (2002) eKLR** as relied on by the Defendant relevant. In that case the Court held as follows:-

“It is implicit from Rule 8 of the Arbitration Rules, 1997 that the effect of staying the suit and

referring dispute to arbitration under s.6 of the Arbitration Act is to terminate the suit save the question of costs of the suit. If parties in a pending suit reach an agreement that the matters in dispute be referred to arbitration and be determined in accordance with the Arbitration Act, the Arbitral Tribunal under the Arbitration Act supersedes the court in which the dispute is pending.

Further, the arbitral proceedings supersede the suit and the suit becomes spent save the question of costs of the suit. The Arbitral Award has to be enforced in accordance with the Arbitration Act and Rules. This is unlike where the parties in a pending suit have agreed to arbitration under the supervision of the court under order XLV CP Rules; which is not the case here. In that case, the arbitrator is required to cause the award to be filed in court in which the suit is pending (order XLV Rule 10 CP Rules) And, if, the court ultimately sets aside the award, the court supersedes the arbitration and proceeds with the suit (order XLV Rule 15(2) CP Rules)".
(underlining added)

Order XLV Rule 10 of the Old Civil Procedure Rules mentioned in the quotation above is equivalent to Order 46 Rule 10 of the Civil Procedure Rules 2010.

The result of the above findings is that there was no requirement for the Plaintiff to wait for the award herein to be filed for him to make an application for setting aside. In the circumstances, the Plaintiff's argument that he was unable to move the court appropriately to challenge the Arbitral Award due to failure by the arbitrator to file the Arbitral Award was therefore a misapprehension of the law.

17. It is not in dispute that the High Court has jurisdiction to set aside the Award under Section 35 of the Arbitration Act, 1995. However, as already established above, it seems that the Plaintiff did not adhere to the provisions of the Arbitration Act in making an application for setting aside the award. He was under the impression that Order 46 of the Civil Procedure Rules was applicable in the circumstances.

18. In addition to the above, there has been inordinate delay on the Plaintiff's part in bringing this application. **Section 35(3)** of the Arbitration Act provides for a period of 3 months within which a party can apply to set aside an arbitral award. The Arbitral Award herein was issued on **24th June 2011**. The current application was filed over three and half (3 ½) years since the Award was made.

19. The Plaintiff's explanation for the delay was that the court file was missing from the court registry. However, there is no evidence to show that the court file had been missing or in that case any efforts by the Plaintiff to trace the file by writing a letter to the Deputy Registrar. In the alternative, the Plaintiff should have applied for reconstruction of the Court file. In the circumstances, this Court can only find that the delay was inordinate and it would be prejudicial to the Defendant for the matter to be re-opened over three years since it was closed.

DISPOSITION

20. In the upshot, the Plaintiff's Notice of Motion dated **9th June 2014** and filed in Court on **11th June 2014** is hereby dismissed with costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF APRIL 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kiche holding brief for Gachie for Plaintiff

No appearance for Defendant

Teresia – Court Clerk