



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS SUIT NO. 106 OF 2015
MAKWATA CONSTRUCTION AND
ENGINEERING COMPANY LIMITED.....CLAIMANT/APPLICANT
VERSUS
BOARD OF GOVERNORS/BOARD OF
MANAGEMENT, LIMURU GIRLS HIGH SCHOOL.....RESPONDENT

RULING

1. The application before me is for leave to enforce, as a Decree, the Final Award dated 21st October 2007. The said Award was made by the Sole Arbitrator, **Qs HARAON G. NYAKUNDI**.
2. The applicant has now moved the court pursuant to Section 36 of the Arbitration Act as read with Rule 6 of the Arbitration Rules 1997, with a view to being enabled to execute the Award as a Judgement of the court.
3. In the face of the application, the respondent has come up with Grounds of Opposition. Essentially, the respondent contends that the Arbitration proceedings were a nullity for lack of legal capacity of both parties.
4. The parties were said to have lacked capacity to either enter into the Contract or to reach an agreement that the dispute between them would be resolved through arbitration.
5. I have perused the record of the proceedings before the Arbitrator and noted that the Applicant had previously raised the question regarding its legal capacity to be sued.
6. The arbitrator expressed himself thus on that issue;

“Either the Respondent, while fully aware that it had no capacity to enter into a binding Contract misled the Claimant or it did not realize the full implications of the Chairman of the BOG signing the documents in the name of the School, thus giving it the legal impetus.

In any event, going by the manner in which the project was handled “Limuru Girls School” and the “Board of Governors for Limuru Girls School” appear to have been swapping roles, thus making them one and the same thing and if any distinction existed to render the two jointly and severally liable for debts incurred by either of them”.

7. By holding that the 2 were jointly and severally liable, the Arbitrator was, indirectly, stating that “Limuru Girls School” was a separate and distinct entity from the “Board of Governors for Limuru Girls School”. I say so because if the two names or descriptions referred to one and the

- same entity, the arbitrator would not have made reference two entities, which were jointly and severally liable.
8. Nonetheless, I am not sitting on an appeal over the arbitrator's decision. I therefore cannot purport to upset the Award, even if I were to find fault with it.
 9. The respondent had the opportunity to challenge the validity of the arbitral award, when it instituted proceedings in **BOARD of GOVERNORS LIMURU GIRLS HIGH SCHOOL Vs MAKWATA CONSTRUCTION AND ENGINEERING COMPANY Hccc No; 170 of 2009 (O.S)**.
 10. However, the respondent failed to prosecute its case diligently, leading to the dismissal of the case for want of prosecution.
 11. The dismissal of the respondent's application on 24th November 2014 destroyed the only spear which had been available to the respondent, for use to attack the Award.
 12. In the circumstances, the respondent now has only a shield to hold up against the application dated 16th March 2015.
 13. But the applicant insists that it was not open to the respondent to assert that the applicant did not exist, yet, at the same time, the respondent was acknowledging that the applicant existed as a company registered under "*Business Names*" as No. **BN 115257**.
 14. Obviously, the applicant is right: the respondent must take only one position regarding the existence of the applicant. Either the applicant was duly registered or it was not registered.
 15. I also accept the applicant's contention that if the respondent wanted to challenge the existence of the applicant, there should have been an affidavit which provided the facts to support the respondent's assertion.
 16. On its part, the applicant submitted thus;

"The Respondent is aptly sued as the Board of Governors of the Limuru Girls School, there is absolutely nothing wrong with that".

17. It is true that these proceedings were instituted against the "**BOARD of GOVERNORS/BOARD of MANAGEMENT, LIMURU GIRLS HIGH SCHOOL**", as the Respondent.
18. However, the Final Award which the applicant wishes to enforce was not against the Respondent, as named above.
19. The Award was specifically against **LIMURU GIRLS SCHOOL**. Of course, I am aware that the arbitrator did conclude that the **LIMURU GIRLS SCHOOL** was just another name for the **BOARD of GOVERNORS for LIMURU GIRLS SCHOOL**.
20. But, as I have already indicated, I will not re-visit that issue, because I am not sitting on an appeal against the decision of the arbitrator.
21. My concern stems from the identity of the applicant. In that regard, the issue of concern is not whether or not the applicant was duly registered.
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.
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. 4,794,977.30 plus costs.
25. However, the said limited liability company has not come to court, to have the award recognized as a Judgement of the court, so that it could thereafter be executed.
26. The person who has come to court is **MAKWATA CONSTRUCTION AND ENGINEERING COMPANY**.
27. In the affidavit in support of the application, **PATRICK ANYANGU MAKWATA** has described himself as "*the proprietor*" of the Applicant/Claimant.
28. It is trite law that a limited liability company is a body corporate, which is distinct from its shareholders. Neither can sue or be sued instead of the other.
29. Therefore, I have come to the conclusion that the person who has asked the court for leave to enforce the Arbitral Award as a Decree of this court has failed to demonstrate the nexus between him and the Claimant in the Award which he seeks to have enforced.
30. Accordingly, I reject the application dated 16th March 2015.

31. Each party will bear his own costs. I so order because the respondent appears to have derived benefit from the construction work carried out at the Limuru Girls School. It would thus be inequitable to allow the school to derive costs from an entity which they have denied knowledge of.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of November 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Lubullelah for Mutubwa the Claimant/Applicant

walubengo for the Respondent

Collins Odhiambo – Court clerk.