



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 11 OF 2011**

**DRAFT AND DEVELOP ENGINEERS LTD. .... PLAINTIFF**

**VERSUS**

**NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION .... DEFENDANT**

**RULING**

1. The Defendant filed a Notice of Motion dated 21<sup>st</sup> November 2013 under **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as under **Order 45 rules 1 & 2** and **Order 51(1)** of the *Civil Procedure Rules, 2010*. The Application sought to review the Orders of the Court made on 1<sup>st</sup> September 2011 by Hon. Lady Justice Mugo and to substitute the same by Orders of similar wording as follows:

**“4. An order of injunction do issue restraining the Defendant whether by itself, servants and/or agents from terminating, breaching or in any way howsoever interfering with the Contract No. NWC/HQ/07/08-09 between the Plaintiff and the Defendant relating to the construction of Umaa Dam and Associated Works within Kitui District pending the commencement and determination of any arbitration between the Plaintiff and the Defendant relating to the said Contract.**

**5. An order of injunction do issue restraining the Defendant whether by itself, servants and/or agents from disrupting, hindering, obstructing, stopping or in any way howsoever interfering with the Plaintiff’s execution of the works for the construction of Umaa Dam and Associated Works within Kitui District pending the commencement and determination of any arbitration between the Plaintiff and the Defendant relating to the Contract for the said construction.**

**6. An order of injunction do issue restraining the Defendant whether itself, servants and/or agents from entering upon the construction site and/or appointing any other contractor to complete the works and/or use material, plant and equipment on the construction site of Umaa Dam and Associated Works within Kitui District pending the commencement and determination of any arbitration between the Plaintiff and the Defendant relating to the Contract for the said construction.**

The Orders that the Defendant sought to substitute read as follows:

**“4. An order of injunction do issue restraining the Defendant whether by itself,**

**servants and/or agents from terminating, breaching or in any way howsoever interfering with the Contract No. HWC/HQ/07/08-09 between the Plaintiff and the Defendant relating to the construction of Umaa Dam and Associated Works within Kitui District under clause 46.1 of the Conditions of Contract part I pending the commencement and determination of the arbitration between the Plaintiff and the Defendant pursuant to this Court Order.**

**5. An order of injunction do issue restraining the Defendant whether by itself, servants and/or agents from disrupting, hindering, obstructing, stopping or in any way howsoever interfering with the Plaintiff's execution of the works for the construction of Umaa Dam and Associated works within Kitui District for any reason under Clause 46.1 of the Conditions of Contract Part I pending the commencement and determination of the arbitration between the Plaintiff and the Defendant pursuant to this Court's Order.**

**6. An order of injunction do issue restraining the Defendant whether by itself, servants and/or agents from entering upon the construction site and/or appointing any other contractor to complete the works and/or use material, plant and equipment on the construction site of Umaa Dam and Associated Works within Kitui District pursuant to contractual notice contained in the Defendant's letter dated 1<sup>st</sup> December, 2010, on consequences of slow progress of works under Clause 46.1. of the Conditions of Contract Part I pending the commencement and determination of the arbitration between the Plaintiff and the Defendant pursuant to this Court Order.**

**7. OR, IN THE ALTERNATIVE: An interpretation of the Court's Orders as to their extent and effect on the performance of the parties' duties and obligations, enforcement of their rights and exercise of their remedies accruing under the Contract pending the hearing and determination of the arbitration between the parties".**

2. Amongst the 26 Grounds in support of the Application, the Defendant indicated that the said Court Orders were issued in the context of the learned Judge's finding that the execution of the Contract Works and the performance in compliance with the contract conditions would continue notwithstanding the anticipated and indeed, ensuing arbitral proceedings. Further, there was an error apparent on the face of the record to the extent that the Court Orders granted were at variance with the reasoning and analysis of the Hon. Judge. The Defendant put forward the premise that the provision of a Performance Bond by the Plaintiff/Respondent was a fundamental term of the contract between the parties, breach of which entitled the Defendant to terminate the contract. As a result, the Defendant had sought to exercise its contractual right of termination for such fundamental breach but this had been thwarted by the Plaintiff/Respondent by citing the aforementioned Court Orders. The Defendant/Applicant observed that the Plaintiff/Respondent held the view that by the operation of the Court Orders and the pendency of the arbitral proceedings, it had no obligation to comply with its duties under the construction contract between the parties. As a result, the Defendant/Applicant maintained that it had suffered and continued to suffer heavy losses due to the non-execution of the contract and the contract works. In its view, the completion of the contract works was a matter of utmost public interest in relation to the residents of Kitui who were the main beneficiaries under the contract for, at present, they were unable to access clean water.

3. The Application was supported by the Affidavit of the Managing Director of the Defendant/Applicant one Eng. Petronila A. Ogut sworn on 21st November 2013. The deponent detailed therein much of what had been contained in the 26 Grounds put forward by the Defendant/Applicant in support of its said Application. However the deponent noted that the Orders sought in the original application by the Plaintiff/Respondent were primarily predicated upon the anticipated termination of its employment by the Defendant/Applicant pursuant to a contractual notice issued by the Defendant/Applicant on 1st December 2010. Eng. Ogut maintained that the Court's Ruling of 1st September 2011 was categorical in that the construction contract between the parties

would continue, the work would go on even as the dispute resolution mechanism took its course. The deponent understood that to mean that the parties would continue performing their obligations and enforcing their rights under the contract between them. She noted the provisions of the clause 67.1 of the Conditions of Contract Part I which provided that unless the contract had already been repudiated or terminated, the contractor (the Plaintiff/Respondent) should, in every case, proceed with the works with all due diligence.

4. The deponent confirmed that arbitral proceedings had been commenced. She also confirmed that this Court's Orders were not intended to excuse the Plaintiff/Respondent from performing its contractual duties and obligations and neither did they shield nor prevent the Defendant/Applicant from enforcing its contractual rights. In that regard, in the event that one party committed a fundamental breach, that entitled the other party to terminate the contract. The deponent maintained that the Plaintiff/Respondent had consistently failed, refused or neglected to provide the Performance Bond which was a fundamental term of the contract as between the parties under Clause 10.1 thereof. That clause entitled the Defendant/Applicant to the remedy of termination upon certification of breach by the Engineer of the project under sub-clause 63.1 (d). Finally the deponent stated that she had been advised by the Defendant/Applicant's advocates on record that the Plaintiff/Respondent had committed a fundamental breach of contract by not providing a performance security and, as a result, the Defendant/Applicant was contractually entitled to terminate the contract between the parties. She noted that the Plaintiff/Respondent had never proceeded with the works on site even after the Court Ruling issued on 1st September 2011. As a result, the Defendant/Applicant was suffering and incurring heavy losses.

5. The Plaintiff/Respondent filed a Replying Affidavit through one of its directors **Peter Kibe Mwangi** sworn on 9th January 2014. Apart from picking up a technical point as regards the serving of the Notice of Change of Advocates by the firm of Nyamweya Mamboleo, the deponent maintained that the Application before Court was an attempt to irregularly reopen matters that have been clearly determined by the Court and to go into matters currently before the arbitral tribunal. He maintained that the Court's Orders were clear in restraining the Defendant/Applicant from terminating the contract as between the parties. To seek a reversal of that opinion, would be tantamount to asking this Court to sit on appeal against its own decision. It was not true that the Plaintiff had failed to continue with the execution of the contract works. On the contrary, the deponent maintained that it was the Defendant/Applicant who had abandoned the execution of the contract as between the parties. The Defendant/Applicant had so abandoned on the feigned pretext that this Court's said Orders barred it from entering the site of the works. The Defendant/Applicant had continually accessed the site at will but it had further proceeded on the basis that it was necessary for the arbitral tribunal to restate the obvious position that the contract was in force. It had been the Defendant/Applicant's intention all along to terminate the contract while attempting to avoid its obligations thereunder. These issues were before the arbitral tribunal. The deponent then went into considerable detail surrounding the issues in dispute between the parties in relation to the contract between them. It was not true that the Plaintiff had failed to continue with the execution of the works as it had:

**“remained on site, ready and willing to proceed with the execution of the contract..”**

According to the deponent it was the Defendant/Applicant who had abandoned the contract according to the Plaintiff by:

**“failure to make payment and obstruction of certification, obstruction, impediment and harassment, refusal to deal with contractual matters and withdrawal of Engineer's Representative and project vehicles”.**

According to the deponent, it was clear that the Defendant/Applicant sought a review of the Court's Orders so that it could now proceed to terminate the contract. The net effect of the Orders sought by the Defendant would be to scuttle and escalate the dispute away from the arbitral tribunal.

6. Mr. Nyamweya, learned counsel for the Defendant/Applicant outlined the history of this matter as

before Court. He detailed that in January 2011, the Defendant/Applicant had directed that the construction work on site should be speeded up or the contract would be taken over by the Defendant/Applicant. This was when the Plaintiff/Respondent came to Court and was granted the Orders outlined in the first Part of the Application. The injunction granted was particularly widely worded and the sixth Order given by the Judge was even more Draconian in that it barred the Defendant/Applicant from entering the works site. Counsel asked the question as to how the Defendant/Applicant was supposed to carry out its side of the contract when it was even restrained from going on site. Further, the Order restraining the Defendant/Applicant from terminating the contract should be restricted to clause 46.1 thereof bearing in mind that such was not the only clause in the contract. He noted that there were other obligations in the contract to be observed by the Plaintiff/Respondent including the provision of a Performance Bond. As of now there was no Performance Bond in place. The most that the Defendant/Applicant could do was to require the Plaintiff/Respondent to carry out and comply with its undertaking under the contract. Counsel noted that the Plaintiff/Respondent had argued that there was no necessity for a Performance Bond to be in place pending the hearing and determination of the arbitral proceedings. The Plaintiff/Respondent always quoted the said Court Order as a defence to it putting in place the Performance Bond.

7. As to the position on the ground, Mr. Nyamweya noted that there was nothing going on at the works site while awaiting the hearing and determination of the arbitral tribunal. The Defendant/Applicant could not make payment to the Plaintiff/Respondent without the Performance Bond being in place and as a result of the Court Orders, the same were holding up the execution of the contract. The arbitral tribunal had found that the contract was in full force and effect. On the strength of that finding, the Defendant/Applicant had renewed its insistence that the Performance Bond should be in place. The response from the Plaintiff/Respondent had been that the Defendant is not entitled to seek a review of the Court's Orders at this stage, as the Defendant/Applicant had made a substantive appeal. Counsel maintained that there was no such appeal and the only applications pending before the Court of Appeal was for leave to be allowed to file the appeal out of time. That application before the Court of Appeal had been dismissed for non-attendance by the advocates for the Defendant/Applicant. The Plaintiff/Respondent had also argued that there was no apparent error on the face of the record or facts that were not known at the time that the Ruling was delivered. However, counsel maintained that there was a mismatch as between what the learned Judge had ruled and the Orders that were extracted. In counsel's opinion such was "sufficient reason" for the Ruling of the learned Judge to be reviewed. Counsel concluded by stating that if the Application for review was not allowed, there was an alternative prayer made by the Defendant/Applicant that the Court should use its inherent powers to meet the ends of justice. With respect to the Application the advocates for the Defendant/Applicant asked the Court to consider the authorities of Joseph Kiangoi v Wachira Waruru & 2 Ors (2013) eKLR, Paul Asin v Peter Mukembi (2008) eKLR and Bunge Corporation (New York) v Tradax Export SA (Panama) (1981) App L.R. 02/25.

8. Mr. Mwaniki, learned counsel for the Plaintiff/Respondent, submitted that there was no problem in putting in place the Performance Bond as required by the contract between the parties. It was all a question of the time when the same should be put in place and the amount thereof taking into account variations. The thrust of the Plaintiff/Respondent's objection to the Application before Court was that it did not meet the principles or standards as required by **Order 45 rule 1 (1)** of the *Civil Procedure Rules, 2010*. Firstly, the Application brought in matters which were the subject matter of the proceedings before the arbitral tribunal. The effect of changing the Orders as prayed for by the Defendant/Applicant would, according to counsel, seriously affect the proceedings before the arbitral tribunal. Further, the grounds upon which an application for review ought to be based are clearly set out in **Order 45 rule 1 (1)**. Such application should not be the subject of an appeal and there was no new evidence or matter put before the Court that was not unreasonably in the knowledge of the Court at the time that the Orders were made. Counsel also maintained that there was no error apparent on the face of the record and no sufficient reason for review. The application should have been made without unreasonable delay. Counsel was of the view that to wait 2 ½ years since the Orders seeking review were made, to bring the Application before Court, amounted to inordinate delay. In this regard, Mr. Mwaniki referred to the cases of Michael Mungai v Ford Kenya Elections & Nominations Board & Ors. (2006) eKLR in which the Court had borrowed from the principles as detailed in Nyamogo &

**Nyamogo Advocates v Kago (2001) 2 EA 173** as well as **Muyodi v Industrial & Commercial Development Corporation & Anor (2006) 1 EA 243**.

9. Counsel went on to say that there were no proper grounds for review that had been established by the Defendant/Applicant and what it seeks is tantamount to an appeal of this Court's own decision. Although the Defendant/Applicant may have disagreed with the Orders of the Court made 2 ½ years ago, it should have sought its remedy by way of an appeal not a review. He drew the attention of the Court that the Appeal had been lodged by a Notice of Appeal and that was followed by an application to file an Appeal out of time, which had been dismissed for non-attendance by the advocates of the Defendant/Applicant. A further application had been made to the Court of Appeal seeking reinstatement of the original application to file an appeal out of time but such had not, as yet, been heard although filed in January 2013. In counsel's view there were substantive appeal proceedings which clearly disentitled the Defendant/Applicant from seeking the remedy of review. Counsel then went into detail of the history of the matter prior to its coming before Court and the determination by Lady Justice Mugo in her Ruling of 1st September 2011. In that Ruling, the Court had given effect to the contract between the parties and had not interfered with the same. It had recognised that termination of the contract, as threatened by the Defendant/Applicant, would negate the whole process of the elaborate dispute resolution procedures provided for therein. Counsel further noted that the issue of extension of time for the performance of the contract was before the arbitral tribunal. It was the Plaintiff's position that the issuance of a Performance Bond depended upon the extension of time allowed by the tribunal. In counsel's further opinion, the whole dispute between the parties fell for determination by the arbitral tribunal. He noted that the arbitral tribunal's next hearing was scheduled for the month of March 2014 and should this Court make the Orders sought by the Defendant/Applicant, such would scuttle the tribunal proceedings. In counsel's view the small issue of the Performance Bond was a red herring to achieve termination of the contract between the parties by the Defendant/Applicant.

10. The first authority relied upon by the Defendant/Applicant being the **Joseph Kiangoi** case revolves around the filing and serving of a notice of change of advocates. Mr. Mwaniki had already indicated to this Court that he did not wish to pursue the point. The Defendant/Applicant's next authority being the **Paul Asin** case involved an application for stay of execution and I saw no relevance to the matter before this Court. Again the **Bunge Corporation** case gave this Court little assistance in terms of determining the Application before it. Turning to the authorities cited by the Plaintiff/Respondent, the principles outlined in the **Nyamogo & Nyamogo Advocates** matter as adopted in the **Michael Mungai** case by the following quotation at page 174 of the authority was relevant to the matter before Court, being:

**“We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”.**

Similarly, the finding of the Court of Appeal in the **Muyodi** case is equally of assistance to this Court where it was held:

**“for an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he**

had to show that there was some mistake or error apparent on the fact of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.

An error on the fact of the record could not be defined precisely or exhaustively, as there was an element of indefiniteness inherent in its very nature to be determined judicially on the facts of each case. There was a real distinction between a mere erroneous decision and an error apparent on the face of the record. An error that had to be established by a long drawn out process of reasoning or on points where there may conceivably be two opinions could hardly be said to be an error apparent on the face of the record. However, where an error on a substantial point of law stared one in the face, and there could reasonable be no two opinions, a clear case of error apparent on the face of the cord would be made out; *Nyamongo and Nyamongo v Kogo* applied”.

11. In my view, the Defendant/Applicant’s Notice of Motion dated 21st November 2013 cannot succeed for the very obvious reason in relation to the wording of **Order 45 rule 1 (1)** as follows:

**“(1) Any person considering himself aggrieved –**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed,”** (Underlining mine).

It is quite clear in this matter that the Defendant/Applicant has preferred an Appeal to the Court of Appeal. Exhibit “PKM 1” to the Replying Affidavit dated 9th January 2014 quite clearly shows that a Notice of Appeal dated 13th September 2011 was lodged and that from “PKM 2” a Record of Appeal was prepared along with a detailed Memorandum of Appeal. The appeal was even given a number being Civil Appeal No. 192 of 2012. That memorandum quite clearly states that it is an Appeal from the Ruling and Order of the High Court (Honourable Justice Mugo) dated the 1st day of September 2011 in the High Court Civil Case Number 11 of 2011. This is the case before this Court. What amounts to an appeal has been defined by the Court of Appeal in the case of **Equity Bank Ltd v West Link Mbo Ltd (2013) eKLR** as per **Musinga JA** when he detailed:

**“I must go back to the question – ‘*what is an appeal?*’ The Constitution does not define what an appeal is. The Constitution is the fundamental law of the land and provides a general framework and principles that prescribed the nature, functions and limits of government or other institutions. Acts of Parliament and subsidiary legislation contain the details regarding its operationalization. I must therefore turn to *rule 2 (2) of the Court of Appeal Rules* which states that:**

***‘appeal’, in relation to appeals to the Court, includes an intended appeal.***

**What is ‘an intended appeal’? *Rule 75 (1)* states as follows:**

***‘Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.’***

**The first step in instituting an appeal is the filing of a notice of appeal. *Order 42 rule 6 (4) of the Civil Procedure Rules* is also relevant in considering what an appeal is. It states that:**

***‘for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.’***

**It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence.....”**

I have no doubt that the Defendant/Applicant herein has filed an appeal to the Court of Appeal. As a

result of this Court is unable to entertain its Application under the provisions of **Order 45** for review.

12. Learned counsel for the Defendant/Applicant has submitted that the Application before this Court could be allowed under its inherent jurisdiction. It seems to me that what the Defendant/Applicant is asking this Court to do is to ignore the clear provisions of **Order 45** so as to allow for a review of the Orders made by **Mugo J.** on the 1st September 2011, for the benefit of the Defendant/Applicant. In this regard I would refer to the authority of **Wilson Evans Otieno versus the Law Society of Kenya & 2 ors (2011)e KLR** in which my learned brother **Musinga J.** (as he then was) had concluded:

**“What should the court do in light of the submissions made by the petitioner that the court is obliged to disregard procedural technicalities in dispensation of justice? I do not agree with the petitioner that the issue of competence of pleadings, and particularly where such incompetence arises from circumstances as in this case, can be termed as procedural technicality. This is a substantive question of law which goes to the root of the matter. The provisions of Article 159 (2) (d) of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The Petition and Chamber Summons dated 8th March 2011 must therefore be struck out with costs to the respondents, which I hereby do.”**

With all respect to the learned counsel for the Defendant/Applicant, knowing full well that an Appeal had been made to the Court of Appeal in respect of those Orders granted by Mugo J., this Application should never have found its way before this Court. The best course of action that the Defendant/Applicant should take is to pursue its Appeal. Further, the Conditions of Contract for the construction of the Umaa Dam at Kitui contain clear provisions for resolution of disputes as between the parties through arbitration. The parties themselves have chosen this route and from the evidence before this Court the arbitral process is well underway when one takes into account the interim determination as regards preliminary applications made by the parties delivered by the arbitral tribunal on 24th October 2013. It may well be that the Defendant/Applicant did not find the interim award of the arbitral tribunal given in its favour hence this current Application before Court for review. Again, the Defendant/Applicant is strongly advised to participate in the arbitral process to the full.

13. The outcome of all the above is that I dismiss the Defendant/ Applicant’s Notice of Motion dated 21st November 2013 with costs to the Plaintiff/Respondent.

**DATED and delivered at Nairobi this 25<sup>th</sup> day of February, 2014.**

**J. B. HAVELOCK**

**JUDGE**