

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 571 OF 2011

BELLEVUE DEVELOPMENT COMPANY

LIMITED.....PLAINTIFF/APPLICANT

Versus

VINAYAK BUILDERS LIMITED1ST DEFENDANT/RESPONDENT

NORMAN MURURU2ND DEFENDANT/RESPONDENT

PARTIAL RULING

Need for further information

[1] I really appreciate the tempo and pitch at which the parties herein have, through their counsels, expressed their respective standpoints on the matters in issue. It is quite robust and unrelenting; skilful and in service to their clients. It is also apt service to the court by those counsels. On one hand, I can see the Applicant is quite zealous in his quest to have court orders obeyed. On the other hand, I reckon that the dispute herein is yet to be resolved; no doubt whatsoever. The Applicant admits that ***the contract between the parties is not disputed, the arbitration clause between the parties is not disputed, what is disputed by the plaintiff is the action of withdrawal by the 2nd Defendant post-judgment delivery on 21st March 2012 and the appointment of Paul Mwaniki Gachoka as a substitute for the 2nd Defendant by the Chairman of the Architectural Association of Kenya.*** Then the 1st Respondent submitted that the order by Odunga J made in this case does not proscribe any or every arbitration on the dispute herein as such interpretation would be a foreclosure of the right of the Respondent to have the dispute in question resolved by an arbitral tribunal as provided in the arbitration clause and the law. The Respondent further submitted that the arbitral proceeding being conducted by Mr Gachoka is a new one and is separate from the earlier one which was conducted by the 2nd defendant. And according to them, the plaintiff ***has failed to live up to this hallowed principles and calling of the constitution and has at every opportunity and turn frustrated and delayed the determination of the matters the substance to the Arbitration proceedings. The reason being quite obvious, to delay as much as possible the day of reckoning and to keep the 1st Respondent as far away for the longest period from its day before the Arbitrator and in turn deny it the fruits due to it from the Arbitration.***

[2] The above recapitulation of the submissions by the parties and the numerous issues I need to determine brings me to the point where I am convinced that the issue on whether the proceeding before Mr Gachoka is different from that which had been presided over by the 2nd defendant is the substantial question on which the decision of the court may well turn on. But that particular issue has not been sufficiently or has barely been addressed by the parties. It being a factual as well as legal issue, I find no sufficient material on the record which will ascertain that fact. Now therefore, as this matter emanates from arbitral proceeding, the best practice in the sphere of arbitration impels the court to call upon the parties to address it on that particular point before pronouncing the final decision on the application dated 13th day of May, 2013. The course I have taken is also

guided by prudence and diligence in judicial practice and adjudication of disputes. That way, the court will not only give parties the opportunity to appreciate the importance of the issue at hand, but will be enabled to resolve the real issues in controversy effectually and completely, and deliver justice of quality that meets the constitutional threshold in Article 159 of the Constitution; i.e. upholding fair, just and proportionate resolution of disputes including Alternative Dispute Resolution. Accordingly, in the best interest of justice and legitimate exercise of the judicial power of the court, I call upon the parties to provide further information or address the court on whether or not the arbitral proceeding being conducted by Mr Gachoka is a new one and is separate from the one which was being conducted by the 2nd defendant. The address or further information shall be rendered in the form of written submission or affidavit if additional evidence is needed or as shall be agreed among the parties; to be filed not later than three days of today. I will then deliver the final ruling on the application within 7 days from the date of the tendering of the address or submissions requested for herein.

Dated, signed and delivered in open court at Nairobi this 18th day of March, 2014

F. GIKONYO

JUDGE