REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 21 OF 2013

SONGA OGODA & ASSOCIATES.....PLAINTIFF/RESPONDENT

VERSUS

UNIVERSITY OF NAIROBI.....DEFENDANT/APPLICANT

R U L I N G

The defendant/applicant University of Nairobi filed an application dated 19th November 2014 under Certificate of Urgency seeking for stay of arbitral proceedings between itself and Multiscope Consulting Engineers Ltd and between itself and Songa Ogoda and Associates pending the hearing and determination of JR 36/2014 wherein the University of Nairobi has sought setting aside of judgment entered against it on 14th May 2014 by Hon. Weldon Korir.

The application was heard yesterday 9th December 2014 and pending the main ruling, Mr. D. Kipkorir counsel for the applicant sought an interim order of stay as the arbitral proceedings were due to commence this morning which would prejudice the JR 36/2014 matter.

The application was brought under Section 6 and 7 of the Arbitration Act and Section 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules.

For avoidance of doubt, Multiscope Consulting Engineers Ltd are not party to thEse proceedings. They are party to proceedings in **HCC 47 of 2013** against the applicant herein University of Nairobi and Engineers Board of Kenya.

The parties hereto did by a consent filed on 12th March 2013 refer the matter/dispute herein to arbitration pursuant to Section 6 of the Arbitration Act, Cap 49 Laws of Kenya. The applicant complains that when they appeared before the arbitral tribunal on 26th August 2014, they learnt that the respondents herein were relying on a report titled, ***"Report on Accredited Checking of the Proposed University Of Nairobi Tower Project on Plot LR 209/18313, Nairobi"*** which had been quashed by the High Court in JR 36/2014 to which they were not parties and so they have sought to set aside that order as **HCC 47/2013** between **Multiscope Consulting Engineers Ltd – Vs – University of Nairobi** was stayed by consent pending the arbitral process. They are apprehensive that as the said report is a central document before the arbitral tribunal, if the proceedings quashing it are not set aside and which process they have put in motion, the defendant herein will be prejudiced, as their adversary is relying on the very judgment of Hon. W. Korir which is being challenged to defeat the University's claim. Mr. Ligunya for the plaintiff/respondent opposed this application contending that it is an afterthought as the applicants knew of the judgment before the Judicial Review Division in August 2014 and did nothing to challenge the

arbitral proceedings and only filed this application on 24th November 2014 and effected service on them on 1st December 2014 a sign of bad faith.

According to Mr. Ligunya who relied on the annexed sworn affidavit of Celestinus Lusweti Wose sworn on 5th December 2014, Multiscope Consulting Engineers Ltd are not party to this suit, even though their client has a similar arbitrator, which arbitration proceedings have not kicked off. In addition, he submitted that if the orders sought are granted, the arbitral proceedings would be affected and that in any event, the plaintiff herein did not file any JR proceedings before the JR Division and that therefore the JR proceedings between different parties should not be used to halt the process commenced by Songa Ogoda & Associates (plaintiffs). Further, that it had not been shown what prejudice would be suffered or irreparable harm anticipated if the stay is not granted.

I have carefully considered the application herein, the annextures in support, the response by the defendant and the rival submissions by the advocates for the parties.

It is not in dispute that the parties to this suit entered into a consent, in accordance with Section 6 of the Arbitration Act, to refer the dispute as filed, to the arbitral tribunal, which consent was adopted as an order of the court on 21st March 2013.

It is also not in dispute that Multiscope Consulting Engineers Ltd are not parties to this suit. They are parties to **HCC 47/2013** against the defendant herein and Engineers Board of Kenya.

It is further not in dispute that the Multiscope Consulting Engineers Ltd have a pending proceeding before the arbitral tribunal composed of the same panel as that selected by the respondent/plaintiff herein; and that the applicant/defendant herein is the adverse party to the said both arbitral proceedings in similar disputes that concern the construction of the University of Nairobi Tower.

Section 7 of the Arbitration Act provides that

> ***"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."***

Under Subsection 2 thereof, where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

The issue for determination, therefore, is whether this court can stay arbitral proceedings pending the hearing and determination of **JR 36/2014** proceedings.

My appreciation of the above provisions of Section 7 of the Arbitration Act as read with Section 18 of the Act is that the High Court can grant an interim measure of protection, which could be in the form of stay of proceedings or an injunction to preserve the subject matter or status quo to be maintained pending either the filing of the arbitral proceedings or pending the hearing and determination of the arbitral proceedings.

The Arbitration Act has no specific provision for the High Court to intervene and stay arbitral proceedings. However, under the Arbitration Rules, Rule 11 imports, so far as is appropriate the application of the Civil Procedure Rules to all proceedings under the Arbitration Rules.

In addition, Article 165 (6) of the Constitution confers on the High Court supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over superior courts. Under clause 7, this court is empowered to call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may

make any order or give any direction it considers appropriate to ensure the fair administration of justice.

In this case, it is clear that the hearing of the said arbitral proceedings have not commenced. This Court, in my view, has unfettered discretion to make orders in appropriate cases that may be necessary for the ends of justice, and in the achievement of the overriding objectives of the law as contemplated in Sections 1A and 1B of the Civil Procedure Act. The applicant has demonstrated that it intends to rely on the report which, to its surprise, was quashed by the Juridical Review court, for purposes of advancing its case before the arbitral tribunal.

That judgement in **JR 36/2014** may, as correctly pointed out by Mr. Ligunya advocate for the respondent, not be between the parties herein but it is not denied and it is on record that the subject report by the Engineers Board of Kenya affected the performance of the contract signed between the parties hereto.

The said report is titled ***"Report on Accredited Checking of the Proposed University of Nairobi Tower Project on Plot LR 209/18319 NAIROBI"***. In support of the respondent's application for injunction dated 1st February 2013 filed on 4th February 2013 in this proceedings, the respondent alluded to the contract of construction on LR 209/18319 and sought an injunction against the applicant. I have further noted that in the attached and marked SO1, the defendant/applicant's letter of notification of appointment of the plaintiff/respondent as a consultant for the University Towers Ref UON T/41/2010-2011 dated 22nd November 2011 addressed to the plaintiff/respondent herein, it states:

> ***"This is to inform you that you have been appointed as part of the consortium to implement the construction of the proposed University Towers your part being quantity surveyors consultant ….***
>
> ***George A. O. Magoha, EBS, MBS***
>
> ***Vice Chancellor & Professor of Surgery***
>
> ***Cc: Multiscope Consulting Engineers Ltd – structural and civil engineers."***

The respondent also attached SO2 bills of quantities addressed to both the respondent as well as Multiscope Consulting Engineers Ltd. No doubt, the respondent's contract with the applicant was not exclusive of that of Multiscope Consulting Engineers Ltd as they were a consortium of consultants contracted to undertake the work of construction of the University Towers, each playing different roles, but which roles would complement each other.

In my humble view, the report by the Engineers Board of Kenya, being the primary document at the centre of the arbitration proceedings, having been quashed, and with the applicant's clearest intentions of seeking to have the quashing order vacated, whether the pursuit will not be successful is not for this court to determine. If it is dismissed, the hurdle will have been removed and the arbitrator will hear the dispute unimpeded.

What I find plausible is that the applicant has advanced a complaint that it was not party to the proceedings that quashed the report and having been adversely affected by the said judgment, has approached the court seeking to have the judgment set aside; which argument before this court satisfies this court to employ the cardinal principle that no person should be curtailed from advancing the course of justice to ventilate their grievances.

I note that the applicant has not alleged that the arbitrator is biased or not independent, as the Arbitration Act obliges the arbitrator to be independent in their determination of the dispute and where there is justifiable doubt as to his impartiality and independence, among other grounds, any party to the arbitral proceedings can apply to the High Court to have the arbitrator removed, following the laid down procedure under Section 14 of the Act.

But that is not the situation here. What is before me is that allowing commencement and continuation of the arbitral proceedings whereas the applicants' application challenging the quashing of the report that it

heavily intends to rely on during the arbitral proceedings is pending determination by a court of competent jurisdiction may jeopardize the progress and outcome of the arbitral proceedings, and defeat the very objects and intentions of arbitration, which is one of the methods of dispute resolution mechanisms recognized by Article 159 (2) (c) of the Constitution, and which is intended to ensure an amicable and quick resolution of the disputes between parties.

Although Section 10 of the Arbitration Act prohibits intervention in matters governed by the Act except as provided in the Act, however, in making this determination, I have weighed the claims of both parties and satisfied myself – that the applicant has raised a genuine concern and to pursue the arbitration when the JR matter is pending would result in unnecessary disputes and burden to the respective parties, contrary to the letter and spirit of Article 159 (2) (b) of the Constitution that justice shall not be delayed. Witnesses testifying and being recalled later, or documents that have been quashed by a court of competent jurisdiction being relied on and being subjected to the test of their validity is in my view, a waste of precious time in the proceedings.

Therefore, having weighed the peculiar circumstances of this application, to allow the arbitral proceedings to commence would clearly give one party an undue interim advantage over the other which would be unjust, as justice demands that the parties ought to be on equal footing until the final determination of the dispute by the arbitrator.

Furthermore, as the applicant was not party to the JR proceedings, which it is challenging, this court cannot purport to curtail that pursuit by making adverse comments that would tend to jeopardize the outcome of that matter. The applicant deserves, however to be accorded equal protection and benefit of the law by the tribunal and it ought not to walk there as a feeble party. I am fortified by the application of Article 50 (1) of the Constitution which guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body and which right to a fair hearing cannot be limited even by statute, by virtue of Article 25 (c) of the said Constitution. In my view, the applicant cannot get a fair hearing before the arbitral tribunal if the core instruments they intend to rely on to advance their cause are still tied up in other proceedings pending before this same court; and until the JR court determines whether the applicant has any justifiable cause or not, to allow arbitral proceedings to go on will be to create confusion in the justice circles.

The right to a fair hearing enables a party to proceedings to access justice as espoused in Article 48 of the Constitution. This court cannot be seen to be an impediment to accessing justice by parties.

I have however, found no sufficient evidence that the arbitral proceedings affecting Multiscope Consulting Engineers Ltd and Songa Ogoda & Associates against the applicant herein were consolidated. That being the case, I decline to grant any orders staying arbitral proceedings touching on the dispute involving Multiscope Consulting Engineers Ltd and the applicant, as the former are not parties to this application and proceedings and as it would offend the rules of natural justice to make a determination affecting the rights of persons who are not parties to these proceedings without according them an opportunity to be heard. An appropriate application can be made in the proceedings where Multiscope Consulting Engineers Ltd are a party.

In the end, therefore, I grant the applicant the prayer sought to the extent that the arbitral proceedings scheduled to commence on 10th December 2014 before the arbitral tribunal between Songa Ogoda & Associates and University of Nairobi be and are hereby stayed pending the hearing and determination of **NRB HC JR No. 36 of 2014**.

Each party to this application to bear their own costs.

Dated, signed and delivered at Nairobi this 10th Day of December, 2014.

R.E. ABURILI

JUDGE