REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 591 of 2009

IN THE MATTER OF THE ARBITRATION ACT1995 LAWS OF KENYA

AND
IN THE MATTER OF AN ARBITRATION

BETWEEN
DON-WOODS COMPANY LIMITED…………………….................….PLAINTIFF
VERSUS
SAMURA ENGINEERING LIMITED………………….................….DEFENDANT

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R U L I N G

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1. This is a Ruling on the Plaintiff's Notice of Motion dated 18th December 2012. The said application sought three (3) orders. First, the Plaintiff prayed that the order of the court made on 2nd March, 2012 dismissing the suit for want of prosecution be set aside. Secondly, That the Plaintiff's Notice of Motion dated 14th November, 2012 that was dismissed on 21st November, 2012 be reinstated, thirdly, that there be a stay of execution of the Arbitral Award made by the Arbitrator Haron G. Nyakundi, Esq. published on 22nd March 2012. The Plaintiff also prayed for costs. The grounds in support of the application were set out on the body of the application.

2. In support of the Motion were the affidavits of Catherine Tongoi, learned Counsel for the Plaintiff and her court clerk Richard Twele both sworn on 18th December, 2012. A Supplementary Affidavit of Donald K. Mwaura was also sworn and filed in Court on 11th February, 2013. The background to this application is that by an Agreement between the parties dated 11th November, 2002, the Plaintiff sub-contracted the Defendant for the installation of a PABX machine and related equipment in the proposed headquarters of Kenya Pipeline Company. The said agreement contained a clause whereby the parties agreed to refer any dispute arising from the execution of the Contract to arbitration. A dispute arose and was referred to Arbitration. However, an issue arose with regard to the appointment of the Arbitrator and the jurisdiction of the Arbitral Tribunal whereby the Arbitrator, made a ruling to the effect that the tribunal had jurisdiction to hear and determine the claim before it. Aggrieved by that ruling, the Plaintiff instituted this suit and sought a stay of the Arbitral proceedings pending the hearing and determination of the suit. By a ruling by Hon. Koome J (as she then was) the Court declined to stay those Arbitral proceedings which were allowed to continue.

3. The Plaintiff contended that it participated in the Arbitral Proceedings after the said court ruling under

protest. That Arbitral proceedings continued to their conclusion and an award in favour of the Defendant was made. Fearing enforcement, the Plaintiff applied to stay the execution thereof vide an application dated 14th November, 2011. It is then that the Plaintiff discovered that the main suit had been dismissed on 2nd March, 2012.

4. It was contented for the Plaintiff that while the Arbitral proceedings were ongoing, attempts to fix the suit for hearing were rendered futile as the Court file went missing. That this was occasioned by the moving of Milimani Commercial Courts to the Milimani Law Courts. That the Plaintiff was not issued with a Notice to Show Cause as is the usual practice. That failure to prosecute the instant suit was due to the fact that the Plaintiff was waiting for the outcome of the Arbitration. The Plaintiff therefore urged the Court to grant the orders sought in the Application.

5. The Application was opposed by the Defendant through a Replying Affidavit sworn by Irene Wanjiru Mburu, Advocate. It was contended that the reasons advanced by the Applicant were not sufficient to warrant a reversal of the Court's decision to dismiss the suit for want of prosecution. That the Plaintiff had not taken any steps to fix the suit for hearing for a period of two years before its dismissal. That sometime in February, 2012, the Court notified litigants and Advocates vide a notice on the Court Notice Boards, the Judiciary website and on the Kenya Law reports that it would on its own motion dismiss suits where no steps had been taken for over 1 year and would thus list the same for Notice to Show Cause hearings on weekly and daily cause list available on the court's notice boards and on the Kenya Law Report's Website. That in view thereof, the parties were properly notified of the intended dismissal. Consequently Counsel for the Defendant attended the hearing whereby the suit was dismissed. The Defendant also contended that the Plaintiff had not provided any proof in support of the allegations that the Court file in respect to this suit was missing and cannot therefore explain its failure to prosecute this suit for a period of two years.

6. The Defendant contended that the Plaintiff was not keen on the conclusion of the dispute herein and was guilty of laches, that in any event, the Plaintiff had not applied to have the Arbitral Award set aside within the stipulated time. That the attempt to challenge the award through the instant suit was an afterthought and a delaying tactic. That the unexplained delay of the Plaintiff in prosecuting this case, has been extremely prejudicial to the Defendant as the parties entered into the subject agreement more than 10 years ago and that further, the Defendant has experienced cash flow problems on account of the sums of monies expended in performance of the contract herein in excess of Kshs. 20,000,000/-. In the premises, the Defendant prayed that the Application herein be struck out and/or dismissed with costs.

7. I have carefully considered the Application and the affidavits on record. I have also considered the submissions of the learned Counsel. The principles applicable in an application to set aside dismissal orders are well known. There are that the court should consider the length of the delay. If the delay is inordinate, whether the same has been explained. The court has also to consider whether the delay has caused any prejudice to the Defendant.

8. The first issue that was raised by the Plaintiff was that of notice. It is not in contest that no notice of dismissal was served on the parties by the court. From the Court record, it would seem that no notice to show cause was served upon either party. It is however, not disputed that in February, 2012, the court notified litigants and Advocates through notices on both the Court Notice boards, the Judiciary Website and on the Kenya Law Reports website that it would on its on motion dismiss suits where no steps had been taken for over one year and that it would further list the same for Notice to Show Cause on a weekly and daily cause lists available on both the Court's Notice boards and the Kenya Law Reports Website. The Plaintiff has contended this was no adequate notice and that a proper Notice to Show Cause should have been issued by the Court and served upon the parties. I agree with the Plaintiff's contention. Order 17 Rule 2(1) requires a formal notice to be served upon the parties. The failure to serve the formal notice may explain the Plaintiff's failure to attend Court at the time the suit was dismissed.

9. In view thereof, my view is that the court has then to consider whether if the notice had been served, the Plaintiff would have shown cause. Firstly, the period in question is between 5th February 2010 and 2nd March, 2012, approximately (2) years. To my mind, that is inordinate delay. The suit was filed on 14th

August 2009. At that time, there were ongoing arbitral Proceedings. After Hon. Koome J dismissed the Plaintiff's application for stay the Plaintiff decided to participate in those proceedings, albeit under protest. It was deponed that whilst the Plaintiff was awaiting for the conclusion of those proceedings, it tried to fix the suit for hearing but the court file went missing because of the transfer of the files from the Milimani Commercial Courts to the Milimani Law courts. This assertion in my view does not aid the Plaintiff's case. I find that there is no evidence before this court to support the Plaintiff's averments. There are neither letters to the Deputy Registrar of the Division by the Plaintiff with regard to the missing file nor any request to the Deputy Registrar for the reconstruction of the Court file. In any event, there are no letters of invitation to the Defendant to fix the matter for trial. The only application for fixing of the suit seems to have been attempted in May, 2012 way after the suit had been dismissed. One would therefore safely conclude that no steps had been taken by the Plaintiff in the suit for over two years. To my mind therefore, the delay has not been explained.

10. On prejudice, I form the view that reinstating this suit against the backdrop of the facts before me would be prejudicial to the Defendant as the subject Agreement was entered more than ten (10) years ago. The Defendant contended that it has been facing financial constraints on account of monies expended towards the execution of the agreement which was in excess of Kshs. 20,000,000/=. To my mind, litigation has to come to an end. The Plaintiff has admitted the amount awarded against it in the Arbitral Award is payable by its employer the Kenya Pipeline Company which has indicated its willingness to pay. Why then derail the wheels of justice? I see no reason for this court to further aid the Plaintiff in delaying the conclusion of this matter. It is my opinion that an Award of costs cannot adequately compensate the Defendant for the inconvenience it may suffer by any further delay.

11. Accordingly, I find the Application dated 18th December, 2012 to be without merit and dismiss the same with costs to the Defendant.

DATED and **DELIVERED** at Nairobi 29th Day of April, 2013.

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A. MABEYA

JUDGE