

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CAUSE NO. 340 OF 2011

DAVID WAMBUA NGII 1ST CLAIMANT/APPLICANT

MALUKI K. KISANGULA 2ND CLAIMANT/APPLICANT

VERSUS

KIESTA INDUSTRIAL TECHNICAL SERVICES LIMITED 1ST RESPONDENT

PETER M. KABECHA 2ND RESPONDENT

LAZARUS M. MURATHE 3RD RESPONDENT

EVANS V. BOGE 4TH RESPONDENT

FREDRICK N. KIMANI 5TH RESPONDENT

ABEDI S. ALEMBI 6TH RESPONDENT

RODGERS M. NGOTYA 7TH RESPONDENT

RULING

1. On 18 September 2012, I dismissed the Applicants' application dated 14 March 2011 for the reasons that the same was defective as a result of non-compliance with **section 36 (2)** of the *Arbitration Act*. Now the Applicants are back before this court with a fresh Application dated 28 November 2012 seeking review of my said Ruling on the grounds that there has been discovery of new and important matters or evidence that were not in the possession and within the knowledge of the Applicants at the time. The Applicants detailed in their Grounds in support of the Application that they had obtained the original copy of the Award and a copy of the original Arbitration Agreement in line with **section 36 (2)** of the said Act. The Applicants had also obtained a copy of the Claimant's letter to the appointed arbitrator dated 7 February 2012 and a copy of the arbitrator's letter to the Respondent's dated 9 February 2012. It had also obtained a copy of the original letter from the Chartered Institute of Arbitrators, Kenya Branch appointing the Hon. Richard Mwangi as the arbitrator.

2. The Application was supported by the Affidavit of the first Claimant, **David Wambua Ngii** sworn on 28 November 2012. In the said Affidavit, the deponent detailed that the final award was given by the arbitrator on 30 April 2009 but corrected on 24 February 2012. He maintained that the new and important matter that was not before the court prior to its Ruling of the 18 September 2012 was the original and corrected Award of the arbitrator as well as copies of correspondence relevant to the arbitration and a copy of the Memorandum and Articles of Association of the first Respondent. Further, the deponent annexed a copy of the original Arbitration Agreement. Finally, the deponent detailed that the Respondent would not suffer any prejudice if the Application before Court was allowed.

3. The Application was served upon Messrs. Ashimosi Shitambasi & Associates, the advocates on record for the Respondent on 18 January 2012. I am satisfied as to the service particularly as there has been no

response to the Application by the Respondents. The Applicants filed their submissions herein on 27 February 2013 in which they quoted the dismissal of the initial application by my Ruling of 18 September 2012. They noted that the Applicants did not have the original Award in their possession at the time of filing the initial application dated 11 March 2011. However they had obtained a copy from the arbitrator as he had amended the original Award by rectifying his order in relation to costs. To their minds, this was a new and important matter to be placed before Court. Further, the Claimants maintained that they have now complied with the provisions of **section 36 (2)** of the *Arbitration Act*.

4. I have perused the Application as well as the Affidavit in support thereof sworn by the first Claimant on 28 November 2012. I am satisfied that the Claimants have now complied with the above section of the Arbitration Act. Although attached to the Supporting Affidavit, the original Award of the arbitrator dated 30 April 2009 has now been filed in Court. Also filed is the arbitrator's Final Award on Costs corrected on 24 February 2012. Similarly, the letter of appointment of Hon. Richard Mwangi by the acting Chairman of the Chartered Institute of Arbitrators (Kenya Branch) has been certified by a Commissioner for Oaths and is also filed in Court. These are new matters before this Court that were not available at the time that the Ruling dated 18 September 2012 was delivered. I am satisfied that the Applicants have done enough to satisfy the provisions of **Order 45 Rule 1 (1)** of the *Civil Procedure Rules, 2010* before me to review the said Ruling above referred to. The Applicants have provided the necessary documentation and proved the same through the Supporting Affidavit.

5. Consequently, I allow the Application before Court and set aside my Ruling of 18 September 2012. I enter judgement for the Claimants as against the Respondents in terms of the said Arbitral Award dated 30 April 2009 as well as the Final Award on Costs dated 24 February 2012. The Claimants may now take enforcement proceedings as regards the Award as necessary.

DATED and delivered at Nairobi this 28th day of May, 2013.

J. B. HAVELOCK

JUDGE