REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 708 OF 2008

MAGNATE VENTURES LTD. ……..... 1ST PLAINTIFF

STANLEY KINYANJUI & IGNATIUS OBONYO

SUING ON BEHALF OF OUTDOOR ADVERTISING

ASSOCIATION OF KENYA ……..…. 2ND PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI ……..…… 1ST DEFENDANT

ADOPT-A-LIGHT LTD. ……..……. 2ND DEFENDANT

NORMAN MURURU ……. 3RD DEFENDANT

RULING

1. By a Notice of Motion dated 1st February, 2010, the 2nd Defendant/Applicant seeks for the setting aside of interlocutory orders given by Khaminwa, J on 10th March, 2009. The Motion is brought under the provisions of the old **Order XXXIX Rule 4** and **Order L** (now **Order 40 and 51** respectively) of the *Civil Procedure Rules* as well as **Sections 1A** and **1B** of the *Civil Procedure Rules*. The instant application is predicated on the grounds that in declining to participate in the arbitration, the Plaintiffs had maintained that the arbitration process as between the parties could only proceed after the legality or otherwise of the contract has been determined by the High Court. That position taken by the Plaintiffs was despite the findings of the Court of Appeal in a Ruling delivered on 31 July 2009. The second Defendant maintained that the Plaintiffs in declining to

participate in arbitral proceedings have caused the arbitrator to suspend the arbitration, such has resulted in the stalling of the arbitration process, which stalling poses a real threat to the survival of the applicant's business.

2. The application is supported by the Affidavit of **Esther Muthoni Passaris** sworn on 3rd February, 2010. Further to reiterating the contents of the grounds adduced in the Application, the deponent contended that the Plaintiffs' refusal to participate in the arbitration proceedings are aimed at undermining her business as a competitor and amounts to an abuse of the process of the Court. The applicant relied on the authorities of **High Court Civil Suit No. 92 of 2002 Edward Karanja Ragui v Barclays Bank of Kenya Ltd, Civil Suit No. 1357 of 2001 Reef Building Systems Ltd v Nairobi City Council, Civil Appeal Nyeri No. 103 of 1999 Kibunja v Kibunga (UR), Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, Civil Application No. Nairobi 258 of 2009 E. Muriu Kamau & Another v National Bank of Kenya Ltd (UR), Ukay Estate & Another v Shah Hirji Manek Ltd & 2 Others (2006) eKLR, Mucha v Ripples (2001) 1 EA 138, Civil Application No. Nairobi 175 of 1997 Unga Ltd v Budget Spray Works, Civil Application No. Nairobi 160 of 1997 Greenfield Ltd v Baber Mawji** and further as supplemented by its supplementary list of authorities, **Civil Appeal No. 36 of 1996 Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others** and **Njagi v Munyiri (1975) EALR 179.**
3. The 1st Respondent objected to the Application. In its Replying Affidavit sworn on 17th March, 2010, the deponent Karisa Iha, the Acting Director, Legal Affairs for the 1st Respondent, deponed that the matter was ***res judicata***, and therefore an abuse of the process of the Court. He deponed that the Applicant had lodged an Appeal in **Civil Application No. 159 of 2009** in which the Court of Appeal dismissed the application, similar to the relief sought by the Applicant in the instant application. Further, he deponed that the application was mischievous and disguised to try to achieve what the second Defendant had failed to do before the Court of Appeal. The 1st Respondent relied on the authority of **Civil Appeal No. 49 of 2001 Abok James Odera v John Patrick Machira** in support of its objection.
4. The Plaintiffs also objected to the Application. In the Notice of Preliminary Objection and Grounds of Opposition both filed on 18th March, 2010, they stated that the Court was *functus officio* following the rulings by the Superior Court on 10th March, 2009 and the Court of Appeal on 31st July, 2009 in *Civil Application No. 159 of 2009*. They further reiterated that the matter was *res judicata*, having been heard and determined by the Court of Appeal in *Court of Appeal Application No. 159 of 2009*. They relied upon the provisions of **Order XIV Rule 2**, **Order LI Rule 16** of the old *Civil Procedure Rules* and **Section 5** of the *Civil Procedure Act* as well as the authorities of **Mediterranean Shipping Co. SA v International Agriculture Enterprises Ltd & ETCO (MSA) Ltd [1999] KLR 183, Kamamo v Githinji [1999] LLR 5408 (HCK), Mkabara v Frisch [2002] 2 EA 475, Mburu Kinyua v Gachini Tuti [1976-80] 1KLR 790, Pop-In (K) Ltd & 3 Others v Habib Bank AG Zurich [1990] KLR 609, Rajwani v Roden (1990) KLR 4, Morjaria v Abdalla (1984) KLR 490, Namai Odder Beatrice v Kenya Reinsurance Corporation Ltd [2006] eKLR** and **Behan & Okero Advocates v National Bank of Kenya Ltd (2007) eKLR.**
5. The application was first placed before Njagi, J (as he then was) for determination on 27th May, 2010. The gist of this matter was that the Applicant had entered into a contract with the 1st Defendant on 28th March, 2002 ("the Contract"), the terms and conditions of which were as set out therein. The Contract had an Arbitration Clause at Clause 6 which reads in part;

> **"Any dispute between the parties shall be referred to an independent arbitrator agreed by the parties or, in default appointed by the Chairman for the time being of the Chartered Institute of Arbitrators."**

Following an alleged breach of Contract by the 1st Defendant, the Applicant declared a dispute for referral and determination by an arbitrator, in accordance with the Arbitration Clause in the Contract. The matter was referred to the 3rd Defendant as the sole appointed Arbitrator. During the Arbitration proceedings, the Plaintiffs sought to be enjoined as parties to the proceedings, to which application a

decision by the Arbitrator was delivered on 18th November, 2009. The arbitrator denied the Plaintiffs that opportunity. On 1st December, 2009, the Plaintiffs filed an application seeking an injunction restraining the 1st & 3rd Defendants as well as the Applicant from proceeding with the arbitration process in their absence. In the Ruling of Khaminwa, J delivered on 10th March, 2009, (which is the genesis of the present application) the Court allowed the Plaintiffs' application and made the following orders (as per the Plaintiff's Notice of Motion paragraph C):

> **"…the Plaintiffs were issued with an interlocutory order restraining the Defendants from proceeding with the arbitration;**

i. **Without the participation of the Plaintiffs;**

ii. **Without the prior determination of the questions of jurisdiction and illegality of the Contract."**

6. The Applicant being aggrieved by the Ruling and the alleged conduct of the Plaintiffs in refusing to participate in the Arbitration as a result of the Ruling, filed an application in the Court of Appeal in **Civil Application No. 159 of 2009 Adopt-A-Light Ltd v Magnate Ventures Ltd & 3 Others** in which Omolo, Tonui and Waki, JJA (as they were then) on 31st July, 2009 dismissed the application. However, the learned judges in addressing the issue of jurisdiction to determine the legality or otherwise of the Contract reiterated that:

> **"It would appear to us that the respective advocates for the respondents in the motion before us were contending that the arbitral process could only proceed after the superior court itself had determined the legal issues of jurisdiction and validity of the contract, the subject of the arbitration. As we have seen from the prayers made before the superior court, nobody had asked that court that it must itself determine those issues. The learned judge herself did not say anywhere in her ruling that the High Court itself had to determine the issues before the arbitrator could proceed."**

In disallowing the application for stay, the Court of Appeal allowed the appeal to proceed being **Civil Appeal No. 254 of 2009 Adopt-A-Light Ltd v Magnate Ventures & 3 Others**, which, the Court is informed, is still pending hearing and determination. The Appeal challenges the superior Court's Order allowing the Plaintiffs to be parties to the Arbitration proceedings.

7. Now, the applicant seeks for prayers from this Court to set aside that interlocutory order of 10th March, 2009 issued by Khaminwa, J. The deponent to the Supporting Affidavit averred that the Plaintiffs' failure and/or refusal to participate in the Arbitration proceedings as per the Court's Orders, has led to the stalling of the process and, as a result, the Applicant is apprehensive of the losses it stands to incur. Further, the Applicant maintains that the Plaintiffs have continually abused the process of the Court. In its submissions dated 15th April, 2010, the Applicant submitted that the issues raised in the instant application and the application before the Court of Appeal are not similar and therefore the matter is not res judicata. It went further ahead to state that there has been no application and the Court has never been called upon to decide whether or not the injunction given on 10th March, 2006, should be set aside. The Applicant further submitted that the court was neither *functus officio* nor *coram non judice* as there are provisions under the Civil Procedure Rules vis-à-vis **Orders 9B Rule 8**, **Order 35 Rule 10** and **Order 44 Rule 1** which empowers the Court to set aside or review its decision notwithstanding the fact that an appeal has been lodged under **Order 42**. The Applicant relied on the ruling of Ringera, J (as he then was) in **Edward Karanja Ragui v Barclays Bank of Kenya** (supra) in which the learned judge held inter alia:

> **"In my opinion, as an order for injunction is an equitable remedy issued to prevent the ends of justice from being defeated, it may be discharged or set aside if it is shown to be unjust or inequitable to maintain it in force."**

See **Reef Building Systems Ltd v Nairobi City Council** (supra). The Applicant further relied on **Kariuki, J's** ruling in **George Muraya Kirira v Zadock A.M Enane (2006) eKLR** in which the learned judge held:

> **"…the Court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if it does not serve the ends of justice. It must be borne in mind that an injunction order is a discretionary remedy issued to protect legal and equitable rights and where it is issued at an interlocutory stage, it is meant to preserve the subject matter or to maintain the status quo."**

On the issue as whether the matter was res judicata, the Applicant, in its submissions referred to **Section 7** of the *Civil Procedure Act* and also the determination in **Ukay Estate & Another v Shah Hirji Manek Ltd & 2 Others** (supra) and **Greenfield Ltd v Baber Mawji** (supra). It is the Applicant's contention that the issues of setting aside and stay of orders are distinct and separate and should not be misconstrued to mean the same thing. The stay application dismissed by the Court of Appeal was in relation to the intended pending appeal under **Rule 5 (2) (b)** and therefore, not substantially or directly in issue with the present application. It is the Applicant's contention that **Civil Appeal No. 254 of 2009** challenges the Order issued on 10th March, 2009 on other grounds including but not limited to the jurisdiction of the superior court to issue such Orders.

8. The jurisdiction to set aside an Order of the Court is set out under the provisions of **Order 40 Rule 7** of the new *Civil Procedure Rules*. The provision reads:

> **"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."**

The Applicant relied on a number of authorities in support of its application. The authorities set out the basis upon which this Court may set aside an Order of the Court. In as much as the Court may have unfettered discretion to vary and/or set aside an Order as provided under **Order 40 Rule 7**, the discretion has to be informed and exercised with caution. In **George Muraya Kirira v Zadock A.M Enane** (supra) Kariuki, J in determining an application to set aside an ex-parte injunction, reiterated that it was upon the Applicant to demonstrate that the maintenance of injunctive Orders was unjust, oppressive or against the interest of justice. The laying of the basis for an application to set aside an Order was also elaborately illustrated by Ringera, J in **Reef Building Systems Ltd v Nairobi City Council** (supra) where he held:

> **"In the absence of any guidance, I have cogitated on the matter and come to the conclusion that as the order for injunction is an equitable relief issued to prevent the ends of justice from being defeated, it may be discharged or varied or set aside if it is shown it is contrary to the ends of justice to retain it in force. Such would be the case, I venture to think, if it is shown, for example, that the order was irregularly obtained, or there was such a subsequent change in circumstances that it was unjust to maintain it in force, or it was otherwise unjust and inequitable to let the order remain."** (Underlining mine).

The onus is clearly upon the Applicant to show that the maintenance of the Orders of the Court issued on 10th March, 2008 are contrary to justice, unjust and/or oppressive and would otherwise not serve the ends of justice. (See **George Muraya Kirira v Zadock A.M Enane**). Has the Applicant established the grounds for setting aside an order as reiterated in the aforementioned cases?

9. In the submissions filed on behalf of the 1st Defendant, the terms "stay" and "set aside" were defined. It is from the definition of these terms by the 1st Defendant that it came to the conclusion

that the two terms were invariably similar. It concluded that the Applicant, in its instant Application, was making an attempt at rehashing a matter that had effectively and conclusively been determined and was therefore *res judicata*. Further, it is submitted that the Court of Appeal determined the matter vide its Ruling in **Civil Application No. 159 of 2009** (supra) which was dismissed as against the Applicant hence the issue of *res judicata*. It has been determined in the case of **Abok James Odera v John Patrick Machira** (supra) in which Keiuwa, JA (as he then was), adopted the ruling in **Uhuru Highway Development Ltd v Central Bank of Kenya & Others** (supra) in which it was held;

> **"That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within a suit. If that were not the intention, we can imagine that the Court could and would be inundated by new applications after the original one was dismissed."**

It was further contended that the matter is still pending hearing and determination by the Court of Appeal in **Civil Appeal No. 254 of 2009** (supra) in which the Applicant challenges the jurisdiction of the Superior Court in its determination dated 10th March, 2009. It is the 1st Defendant's opinion that the Applicant cannot pursue both remedies contemporaneously i.e. setting aside as before this Court as well as appealing the Orders of the same.

10. In following the same line of argument as the 1st Defendant, the Plaintiffs, in submissions filed on their behalf dated 6th April, 2010, submitted that indeed the matter was res judicata. This was as a result of the Court of Appeal having dismissed the Applicant's application in **Civil Application No. 159 of 2009** (supra). It was also submitted that the case of issue estoppel arises as the Applicant intends, in its Application, to abuse the process of the Court in essentially re-instituting a matter that has already been determined. The Court was directed to the cases of **Mburu Kinyua v Gachini Tuti** (supra) and **Pop-In (K) Ltd & 3 Others v Habib Bank AG Zurich** (supra) in which the Courts held that the *issue estoppel* doctrine applies not only to issues that the Court was required to form an opinion and pronounce judgment, but also every point belonging to the subject of the litigation. See **Rajwani v Roden** (supra). It followed therefore that the second Defendant's Application was an abuse of the Court process. The Plaintiffs also submitted that the Applicant having pursued two parallel applications to seek similar remedies went against the decision of the Court of Appeal in **Nishit Yogendra Patel v Pascale Mirreile Baksh & Another** (supra) wherein it held:

> **"On that admission, we are of the view that the application before us is an abuse of the Court process, as stated earlier, by pursuing same remedies in parallel courts which are competent to deal with the application. Such conduct must be deprecated and discouraged."**

As a result, has the applicant shown that the maintenance of the Orders as issued by the Court on 10th March, 2009 is contrary to the ends of justice? Even if so, has the matter been determined by the Court of Appeal in **Civil Application No. 159 of 2009** and is therefore *res judicata*?

11. The first issue for determination by the Court requires an examination as to whether the Applicant has satisfied the grounds for setting aside an Order as per **Order 40 Rule 7** as applied in following the determinations of Ringera, J and Kariuki, J in **Reef Building Systems Ltd v Nairobi City Council** (supra) and **George Muraya Kirira v Zadock A.M Enane** (supra) respectively. In this matter, the Plaintiffs had filed a Chamber Summons application dated 1st December, 2008 which was heard inter parties. The Court, on 10th March, 2009, rendered its ruling allowing the application. In the Applicant's grounds in support of its Application, it was reiterated that pursuant to the Orders of the Court, the Plaintiffs were invited to participate in the arbitration proceedings. The Applicant has not reiterated or contended, in its Application, that the Orders issued by Khaminwa, J were contrary to the ends of justice or that their maintenance would be unjust, inequitable or oppressive. In **Civil Application No. 159 of 2009**, the Applicant did not state that

the Order of the Superior Court was obtained by any fraudulent means, misrepresentation or concealment of any information. However, the Applicant in its Supporting Affidavit herein at paragraph 27 reiterated as follows:

> **"27. I verily believe that the Plaintiffs actions, in obtaining an injunction preventing the arbitration proceedings from being conducted in their absence and then refusing to participate in the arbitration proceedings, are aimed at undermining the 2nd Defendant's business as a competitor and amount to an abuse of the process of the Court."**

In the ruling of **Kariuki, J.** in **George Muraya Kirira v Zadock A.M Enane** (supra), the learned judge in his Ruling held inter alia:

> **"The burden reposed on the Defendant to show that the Plaintiff has procrastinated and unduly delayed the hearing of the application or that there are changed circumstances that rendered the maintenance of the injunction unjust, oppressive or against the interest of justice."** (Underlining mine).

Also see, **Ringera, J's** Ruling in **Reef Building Systems Ltd v Nairobi City Council** (supra).

12. Are there circumstances which have invariably changed such that the maintenance of the Orders issued by Khaminwa, J would be unjust, oppressive or against the interests of justice? In her affidavit, the deponent for the Applicant stated that the Plaintiffs after being granted injunctive orders, failed to adhere to the same by refusing to participate in arbitration proceedings that they had instigated that they should allowed to join into the first place. The change in circumstance was therefore, that the arbitration proceedings could not proceed as the Plaintiffs were unwilling to participate in them. Having been granted such Orders by the Court, it would only seem sensible and reasonable for the Plaintiffs to participate in those arbitration proceedings. For the Plaintiffs now to turn around and refuse to participate in the arbitral proceedings, is in my opinion, unfair and unjust. It is obvious that as a result of such failing to participate, both the 1st Defendant and the Applicant, continue being held at ransom. In the Civil Application ruling, the Court of Appeal found that this Court never stated in its Ruling that it was only the High Court that was to rule on the issue of validity or otherwise of the Contract. The learned judges further went on to refer to the provisions of the law, and in particular **Section 17 (1)** of the *Arbitration Act*. The bench reiterated on the issue of the arbitral tribunal deliberating and determining the validity of a contract thus:

> **"It is clear under this Section (**read Section 17**) that an arbitrator has power to rule on the issue of his own jurisdiction and on the validity or otherwise of the agreement, the subject of the arbitration and may even rule that the contract is null and void."**

This finding amounted to a further change in the circumstances, in that the Court of Appeal has allowed for the parties to proceed in having the issue of validity of the contract, determined by the arbitrator. In my view, it is incumbent upon the parties, to proceed with the arbitration, in light of the Ruling to that end issued by the Court of Appeal. The Plaintiffs, however, have still failed and/or neglected to participate in the arbitration proceedings, thus necessitating the instant application.

13. In my opinion, following the decision by the Plaintiffs to refuse to participate in the arbitration proceedings, the Applicant had two options to which to pursue the matter further: either make an application for setting aside the Order of this Court, as provided for under **Order 40 Rule 7** of the *Civil Procedure Rules*, or file an appeal against the decision of Khaminwa, J pursuant to **Order 43 Rule 1 (u)** of the same Rules. The Applicant decided to pursue both alternatives. In as much as this Court has an unfettered discretion to set aside its own Orders, such discretion should not be abused. The Applicant should have been pragmatic enough to follow the Rules of law, and procedure, especially as set out under **Section 1A (3)** of the *Civil Procedure Act*, to allow for the expeditious, proportionate and affordable resolution of this matter. In my view, by filing the instant application, pending the hearing and determination in the Court of Appeal of *Civil Appeal*

No. 254 of 2009, the Applicant would be abusing the process of the Court, by pursuing the same remedy in two parallel and competent Courts. Such decision follows the Court of Appeal's Ruling in **Nishit Yogendra Patel v Pascale Mirreile Baksh & Another** (supra). In the premise, the issues of *functus officio* and *res judicata* as argued by the 1st Defendant and the Plaintiff do not suffice in the instant application.

14. Unfortunately, this Court being bound by the Court of Appeal's decision as above, the Applicant's Application dated 1st February, 2010 stands dismissed. I would not wish to anticipate the Court of Appeal's findings as regards *Civil Appeal No. 254 of 2009*. However, in my opinion, the Plaintiffs would do well by reconsidering their refusal to participate in the arbitration proceedings as before the 3rd Defendant. In all the circumstances, I don't see why costs should not follow the event and the same, in relation to the 2nd Defendant's Application, are awarded to the Plaintiffs and the first Defendant respectively.

DATED and determined at Nairobi this 28th day of June, 2013.

J. B. HAVELOCK

JUDGE