



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
Miscellaneous Civil Application 130 of 2011

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1994

BETWEEN

KAY CONSTRUCTION CO. LTD.....APPLICANT

- VERSUS -

ATTORNEY GENERAL.....1ST RESPONDENT

ENG. JOSEPH T. THUO.....2ND RESPONDENT

R U L I N G

1. This is a Ruling on the **Notice of Motion** dated **28th February 2011** and filed in court on **3rd March 2012**. Actually there are two such applications dated and filed in court on the same dates. However, the first one seeks a stay of the proceedings while the other one seeks permanent orders terminating the services of the 1st Respondent's mandate as the Arbitrator to the dispute the subject matter of the suit.

2. There is nothing to distinguish these two applications save that one is for stay of proceedings and the other is for permanent orders. It is therefore no wonder that Honourable Justice Muga Apondi, when he wrote his Ruling based the same on the application seeking permanent orders and not the one alleged to have been argued before him for stay. Counsel are obligated to be clear in their pleadings and to assist the court to avoid common mistakes which they are largely responsible for. If I had not meticulously perused the two applications, even I would have been misled. This is so because the consent entered by the parties on **21.6.2012** read in part as follows:-

“2. The court does proceed to write and deliver a Ruling on the Notice of Motion dated 28th February 2011 and filed in court on 3rd March 2011 based on submissions on record.”

It must be noted that there are two such applications bearing same dates.

3. Having said the above it is now clear to me which application the parties intended to be heard. The brief history of this application is that there are proceedings being conducted by the 1st Respondent in respect of the dispute between the Applicant and the 2nd Respondent arising from a Contract No.

LAB/248/C dated **21st February 1991**. The agreement between the Applicant and the 2nd Respondent provided for the reference of disputes arising thereof to Arbitration. The Arbitral Tribunal herein was appointed through a default procedure provided for under **Clause 66** of the **Contract Agreement** between the Applicant and the 2nd Respondent herein. The 2nd Respondents filed a claim against the Applicant worth **Kshs.456,591,798.60** before the 1st Respondent. The oral hearing commenced on the **4th January 2010** with the evidence of the 2nd Respondent who had only one witness while the Applicant had two witnesses. The 2nd Respondent's witness gave evidence for a period of approximately nine months with the participation of the Applicant's counsel and witness. The Applicant's 1st witness began his evidence in chief on the **23rd September 2010** and completed on **24th September 2010**. On the **19th of November**, he was to be cross-examined by the 2nd Respondent's advocate. On the **19th of November 2010** the Applicant's witness was present for cross examination but the Applicant's counsel was absent on official duties to the Gambia.

4. The application is based on the many grounds stated therein and is supported by affidavit of **WARIGI KAMAU**. The dispute is stated to arise out of the contract agreement dated **21st February 1991**. The application is opposed by affidavit of the 1st Respondent, **ENGINEER JOSEPH THUO**. It is also opposed by affidavit of **PAUL GICHERU** counsel for the 2nd Respondent.

5. Factors giving rise to this application are stated in the grounds and supporting affidavit, but mainly hinge on the grounds that the Arbitrator appears high handed and impartial and denied the Applicant an adjournment which would have enabled the Applicant to proceed with evidence on **19th November 2010**. On this ground the Applicant is apprehensive that if the Tribunal continues to deal with the case before it the Tribunal will proceed to make orders which may be prejudicial against the Applicant.

The Applicant further submitted that the parties in the said arbitration had agreed to adopt the Chartered Institute of Arbitrators, Arbitration rules as the rules applicable, which rules at **16B (7)** provided that the Arbitral Tribunal has jurisdiction "*to proceed in the arbitration notwithstanding the failure or refusal of any party with these rules or with its orders or directions or attend any meeting or hearing, but only after giving that party a written notice that it intends to do so.*"

The Rules further provided at **20 (1)** that "*any notice or other communication that may or is required to be given under this rules shall, without prejudice to more explicit instructions given by the Arbitral Tribunal, be in writing and shall be delivered if not by post or physical delivery by registered post or courier services, or transmitted by telex, fax or other means of telecommunication that provided a record thereof.*"

The Rules also provided at **16 C (10)** that "*unless all parties at any time agree otherwise, or a contrary intention has been expressed in the arbitration agreement, the arbitral tribunal may, on the application of any of the parties or of its own motion, but in either case "only after hearing or receiving any representations from the parties concerned conduct the arbitration in whatever manner it considers appropriate provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."*

Section 19 of the **Arbitration Act** states that "*the parties shall be treated with equality and each party shall be given full opportunity of presenting his case.*"

6. It is against the above backdrop that the Applicant seeks the said orders of stay of proceedings.

7. In response the 1st and 2nd Respondents submitted that the Applicant's application for stay of any further proceedings lacks merit and ought to be dismissed with costs for *inter-a-alia* the following reasons:-

(a) Section 10 of the **Arbitration Act 1995** limits the extent to which a court can intervene in matters governed by the Act. This Provision of Law states as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

The Respondent submits that an Applicant who therefore seeks to obtain an order of any kind under the Provisions of the Arbitration Act must set out and establish that the Act empowers the court to issue the order sought.

A perusal of the Notice of Motion application for stay of proceedings shows that the Applicant relies on the Provisions of **Sections 13, 14 and 19** of the **Arbitration Rules** and **Rule 16B (7), 16 (c), 10 and 20 (1)** of the **Chartered Institute of Arbitrators Arbitration Rules of 1998** and the **Arbitration Rules of 1997** none of which empowers the court to issue an order of stay of proceedings in arbitration matters. By failing to point and set out any such Provision therefore, it is submitted that the Applicant is barred by the Provisions of **Section 10** of the **Arbitration Act** from seeking an order that is not expressly provided for by the Act.

It was held by the Court of Appeal in the case of **EAST AFRICAN POWER MANAGEMENT LIMITED – VS – WESTMOUNT POWER (KENYA) LIMITED [NAIROBI CA. 55 OF 2006]** that the court under **Section 10** of the **Arbitration Act** had a limited role in intervening in matters where parties had agreed to refer a matter to Arbitration except where the Act specifically provided for such intervention. The court consequently held that the said Provision was mandatory and that the court’s role in Arbitration matters was a facilitative one.

The Respondent further submitted that the second but the most critical and fundamental fact that renders the two applications incompetent and legally untenable is the fact that the Arbitrator sought to be removed has already prepared the final award and there are no further proceedings pending before the Arbitrator capable of being stayed. The Arbitrator cannot also be challenged and or removed as sought in the substantive application.

Both the 1st and 2nd Respondent have produced a letter dated **2nd March 2011** where the Arbitrator informed the parties that the final award was now ready for collection and that any party could collect the award from the Chartered Institute of Arbitrator’s Secretariat upon payment of the Arbitrators fees whose particulars are set out in the letter.

The 2nd Respondent has produced the letter which is annexed as annexure **P5** to the Replying affidavit sworn by **PAUL GICHERU** on behalf of the 1st Respondent on **21st March 2011**. The 1st Respondent confirmed that the final award is now ready in his replying affidavit sworn in opposition to the application. The Arbitrator, it is submitted, is therefore in law *functus-officio* and can neither be challenged, removed nor can any order of stay of further proceedings be issued against him.

For this submission the 2nd Respondent relied for authority on the extract from the book **“Arbitration of Commercial Disputes” International and English Law Practice** by *Andrew Tweeddale and Keren Tweeddale* which the 1st Respondent cited in his submissions in opposition to the application.

The authors of the said book have captured the effect of a final award in arbitration proceedings at page 870 of the book in the following but clear statement of the law:- **“The effect of making the (final) award brings the Arbitration to an end and the tribunal becomes functus officio.”**

Although the above text captures the position at common law, the Provisions of **Section 33 (1)** of the **Arbitration Act** are to the same effect and the said provision states in clear terms that the Arbitral Proceedings shall be terminated by the final Arbitral award or by an order of the Arbitral Tribunal terminating the proceedings under **Sub-section (2) of Section (3)** of the **Act**. The position at common law therefore applies with equal force in Kenya pursuant to the Provisions of **Section 33 (1)** of **Act**.

No order of stay of proceedings can therefore be issued nor can an Arbitrator who has made a final award be challenged and or his mandate terminated.

Based on above submissions the Respondents stated that the Applicant's application lacks legal basis and the same is therefore an abuse of the court process and ought to be dismissed with costs.

8. I have considered the entire application and submission of the parties. In particular I appreciate the position of the law as espoused by the counsel for the 2nd Respondent, and especially the submissions that the court has little to do in this matter and that the extent to which the court can interfere in these proceedings are clearly restricted. However, clearly, the 1st Respondent as the Arbitrator has a great responsibility and when his conduct is questionable the court must listen to such grievances. For me, there are only two issues to determine, and both relate to the conduct of the arbitrator:-

(1) Has the arbitrator displayed complete partiality to inspire confidence in both parties?

(2) Has the arbitrator considered the tenets of natural justice considering the magnitude of the claim in this matter?

9. In response to the first issue, the Arbitrator in my view failed in his duty to appear impartial. On **19th November 2010** he ought to have allowed the application for adjournment by the Applicant. There were several grounds to warrant this among them that the proceeding started in **January 2010** and the Respondents had always had their day in court upto **24th September 2010**. More importantly the Arbitrator was aware that the Applicants' principal counsel Caroline Oyula was out of the country for good reasons. Considering that the Principal Counsel was away, and considering the magnitude of the claim and the time it had taken, granting the adjournment sought was the lesser evil. Bias need not be actual. An appearance of bias is equally devastating. Secondly, after denying the said adjournment the Arbitrator appeared to be in a hurry and prepared the award notwithstanding the fact that the Applicant had lodged a challenge. One would ask; why was the Arbitrator in a hurry? The hearing had taken a long time already. Persons who accept the office of judicial or *quasi* judicial nature must be prepared to be, and appear impartial. The conduct of the arbitrator on **19th November 2010**, and his conduct subsequent thereto, did not inspire confidence on the Applicant. The Arbitrator had a duty to appear impartial to both parties, and considering the amount under Arbitration, that duty was undoubtedly hugely magnified.

10. On the second issue, I also find that after all is said and done, and after all Sections of the Law have been quoted by the Respondents, natural justice must be seen to be adhered to. The Arbitration appears to have forgotten his fundamental duty to the parties. The duty to deliver, and appear to deliver justice as per statutes, and justice in its natural form. A claim for a sum of **Kshs.465,591,798/60** is by no way a small claim. Any judicial officer arbitrating over such a claim must have the presence of mind to be, and to appear impartial, and alert to the demands of natural justice. The Arbitrator appeared to have handled the matter high handedly, arbitrarily and without due regard to natural justice. The net result of such capriciousness is that one party lost faith in the Arbitrator's ability to do justice, despite the possibility that the Arbitrator's actions may have very well been within the law.

11. For the foregoing reasons I allow the application in the following terms:-

(a) I order the stay of proceedings, being conducted by the 1st Respondent in respect of the dispute between the Applicant on behalf of the Government of Kenya and the 2nd Respondent herein arising from their contract agreement dated **21st February 1991** pending the hearing and determination of the substantial application.

(b) The costs of this application shall be borne by the Respondents.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 24TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE

PRESENT:

N/A for the Applicant

Katwa H/B for Gicheru for the Respondents

Teresia – Court Clerk