



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Case 16 of 2012**

**STIRLING CIVIL ENGINEERING LIMITED .....PLAINTIFF**

**VERSUS**

**TM-AM CONSTRUCTION GROUP (AFRICA) .....DEFENDANT**

**R U L I N G**

1. Before me are two applications. The Plaintiff's Notice of Motion dated 23<sup>rd</sup> January, 2012 brought under Order 40 Rule 6, Order 37 Rule 16 and Sections 1A, 1B and 3A of the Civil Procedure Act and Rules. It seeks injunctive orders to restrain the Arbitrator from continuing with Arbitral proceedings and/or stay of Arbitral proceedings pending the hearing and determination of this suit. The second application is the Defendant's Notice of Motion dated 18<sup>th</sup> July, 2012 seeking the review of the order made on 20<sup>th</sup> April, 2012.

2. I propose first to deal with the motion dated 18<sup>th</sup> July, 2012 since if it succeeds there will be no need of considering the Plaintiff's motion. The grounds upon which the application for review are grounded are set out in the body of the motion, that there was errors of law apparent on the face of the ruling of 20<sup>th</sup> April, 2012. The application was supported by the Affidavit of Dan Ameyo sworn on 18<sup>th</sup> July, 2012, it was contended on the part of the Defendant that there was an error on the part of the court in holding that Arbitration (Amendment) Act 2009 does not exist yet that legislation exists, that the holding that the court has jurisdiction to entertain the matter under Section 14(2) was an error as it was contrary to Section 10 of the Arbitration Act, No. 4 of 1995, that it was erroneous for the court to rely on the Arbitration Act Chapter 49 Laws of Kenya which was repealed by section 42 of the Arbitration Act No. 4 of 1995, Mr. Ameyo, learned Counsel for the Defendant ably submitted on the grounds set out in the motion. He urged that the court having found that it had jurisdiction to entertain the appeal by the Plaintiff, it erred in failing to discharge the injunctive orders as that was in contravention of Section 10 and 14(8) of the Arbitration Act Chapter 49 Edition 2010 (1995). Counsel urged that the application be allowed.

3. In opposing the applications the Plaintiff filed Grounds of Opposition contending that the application was misconceived and an abuse of court process, that the application had been brought after inordinate delay, that the orders sought were vague and incapable of being granted, that the court is functus officio in all matters raised and that the Defendant cannot purport to represent the Arbitrator.

4. Mr. Mungu, learned Counsel for the Plaintiff submitted that applications for review are not provided for under the Arbitration rules, 1997, that the Arbitration (Amendment) Act 2009 was spent after it amended the 1995 Arbitration Act, that there was no error apparent on the face of the record, that the court has a discretion to or not to stay Arbitral proceedings under Section 14(3) of the Arbitration Act Chapter 49 2010 Edition is valid. Counsel urged that the application be dismissed.

5. I have considered the Affidavits on record, written submissions and oral hi-lights of Counsel. This is an application for review of my Ruling and order of 20<sup>th</sup> April, 2012. The Application seeks to review the said order on the grounds that there was an error apparent on the record in that the court erroneously held that the Arbitration (Amendment) Act 2009 does not exist and the court erroneously relied on the Arbitration Act, Chapter 49 Laws of Kenya which was repealed by the Arbitration Act. No. 4 of 1995. That because of the said legal errors the court failed to address the legal issues involved.

6. An application for review is not an appeal lest a court sits on appeal on its own decision. That will be untenable. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau (CA No. 211 of 1996) UR** the Court of Appeal held:-

***“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review, that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provision of law cannot be a ground for review.” (Emphasis added).***

7. The grounds upon which the present application was brought are set out in the body of the motion as follows:-

***“(1) THAT the Honourable Trial Judge erred in holding that the Arbitration (Amendments) Act 2009 does not exist.***

***(2) THAT the Honourable trial Judge erred in law in relying on the Arbitration Act, Chapter 49 Laws of Kenya which was repealed by the Arbitration Act, No. 4 of 1995.***

***(3) THAT by so holding the Honourable Court failed to judiciously address the legal issues involved.”***

8. My view is that, the grounds raised by the Defendant are that this court misconstrued the law and thereby reached a wrong decision. That in my view is not a proper ground for review but for appeal as held by the Court of Appeal in the above case of **National Bank of Kenya Ltd –vs- Ndungu Njau (supra)**. That decision is binding on this court. On that ground alone the motion dated 18<sup>th</sup> July, 2012 is for dismissal.

9. If I am wrong on this, is there an error apparent on the face of the record as contended by the Defendant? The Defendant’s contention is that the court wrongly held that the Arbitration (Amendment) Act 2009 does not exist and that it was wrong to apply the Arbitration Act, Chapter 49 Laws of Kenya as the same had been repealed by the Arbitration Act. No. 4 of 1995. I have seen the ruling of 20<sup>th</sup> April, 2012. The relevant portion of the ruling at pages 11 and 12 read:-

***“I have carefully perused the Laws of Kenya published by the National Council for Law Reporting and was not able to see the so called Arbitration (Amendment) Act 2009. If it does exist, those amendments must have been incorporated in the Arbitration Act Chapter 49 Edition 2010 (1995) which I believe is the statute applicable at the moment on matters touching on arbitration in this country.***

.....”

I will refer to and consider the issues raised and provisions touching on the Arbitration Act, Chapter 49 Laws of Kenya (1995) as amended.”

10. I have seen a copy of the Arbitration (Amendment) Act 2009 produced by Mr. Ameyo. That was an Act of Parliament to amend the Arbitration Act, 1995. It was not a separate statute by itself. Indeed as held in the Ruling of 20<sup>th</sup> April, 2012, upon enactment the provisions therein were subsumed in the

Arbitration Act, 1995. The same are contained in the Arbitration Act, Chapter 49 Laws of Kenya Edition 2010 (1995) which is the statute the court applied in its ruling of 20<sup>th</sup> April, 2012. For the said reason, I believe that it has not been shown that there was any error apparent on the face of the ruling of 20<sup>th</sup> April, 2012 to warrant its review. Accordingly, I dismiss the Defendant's application with costs.

11. This now brings me to the application by the Plaintiff dated 23<sup>rd</sup> January, 2012 as amended vide the consent letter dated 30<sup>th</sup> August, 2012. The application sought orders of injunction against Mr. Festus Liku Esq. the arbitrator restraining him from continuing with the arbitral proceedings before him in the alternative an order of stay of the Arbitral proceedings pending the conclusion of this suit. The application was supported by the Affidavit of Dr. Eng. Maurice De Souza sworn on 23<sup>rd</sup> January, 2012. The Plaintiff contended that it had asked the Arbitrator to recuse himself by an application dated 18<sup>th</sup> November, 2011 for lack of integrity, undue familiarity with the complainant, incompetence, but the same was dismissed peremptorily, that the Plaintiff had challenged the basis of the entire arbitral process, that the arbitrator's action has breached the Plaintiff's right to be heard, that allowing the arbitral process to continue will saddle the Plaintiff with huge costs and that the issues for determination are accounts whose process of resolution is set out in the agreement.

12. Mr. Mungu, learned Counsel for the Plaintiff submitted that there had been no Replying Affidavit to the matters set out in the Affidavit in Support, that the allegations therein were uncontroverted and therefore true, that the application was not opposed as there were no grounds of opposition, that the Arbitration Act was not based on **UNCITRAL RULES** and that the court had jurisdiction to grant the orders sought. Counsel therefore urged that the application be allowed.

13. The Defendant did not file any Replying Affidavit or Grounds of Opposition. It only filed written submissions dated 17<sup>th</sup> September, 2012 which Mr. Amayo, learned Counsel for the Defendant expounded. It was argued on behalf of the Defendant that since the court had ruled that it had jurisdiction to entertain the appeal challenging the Arbitrator by virtue of Section 14(8) of the Arbitration Act, Chapter 49 Edition 2010 (1995), the court should allow the arbitral proceedings to continue whilst it considers the appeal.

14. I have considered the Affidavit in support both written submissions and oral hi-lights of counsel. This is an injunction application as well as an application for stay of proceedings in the alternative. To grant an injunction, one has to establish the principles in the **Giella –vs- Cassman Brown** case that he has a prima facie case with a probability of success, that damages are an inadequate remedy and if in doubt the court will decide the matter on a balance of convenience. Prima facie case is a case in which on the material produced, a tribunal directing its mind properly will hold that the rights of an applicant have been breached as to require a rebuttal by the Respondent. In this case, has it been established that there are rights of the Plaintiff which have been breached?

15. It is important to note that the Applicant has alleged various matters. These include that the Arbitrator has misconducted himself, that the arbitral process is being conducted in a skewed manner, that a challenge to the Arbitrator was peremptorily dismissed, that the Applicant's right to be heard under the constitution is about to be breached in those proceedings. These are just but some of the serious allegations and/or complaints the applicant has raised on oath. These were never denied by the Respondent. This therefore leads to the conclusion that they are prima facie true. On that basis alone, I am satisfied that the applicant has established a prima facie case with a probability of success.

16. One other thing, since there was no Replying Affidavit or Grounds of opposition filed in response to the application, the application was unopposed. I looked for any of such documents and I did not find any. Even when Mr. Mungu raised the same in his oral hi-light Mr. Ameyo did not address that issue. On that basis also, the applicant's application may be held to be meritorious.

17. I did allow Mr. Ameyo however to respond to the application by way of written submissions and oral hi-lights. He submitted that by virtue of Section 14(8) of the Arbitration Act, the court should allow the arbitral process to continue whilst the appeal on the challenge on the Arbitrator is pending in this

court. I agree with Mr. Ameyo that the mere filing of an appeal to challenge a decision of the Arbitrator does not per se lead to the stalling of the Arbitral process. Interference on such process by the court should be left to the bare minimum and only in very rare and deserving cases. I have considered the circumstances of this case, very serious complaints have been made against the process, the Applicant has claimed that huge costs are or will be incurred if that Arbitral process is allowed to continue. This was neither denied nor challenged.

**18.** Looking at the totality of all the issues raised and the circumstances of this case, I am of the view that in the interests of justice a temporary stay of the Arbitral proceedings is called for. I need not address the issue of damages in this case as I believe the balance of convenience tilts in favour of maintaining the status quo for the time being. Allowing the impugned proceedings to continue and in the event the appeal herein succeeds, the parties would have been subjected to unnecessary costs which can be avoided at this stage.

**19.** Accordingly, I allow the applicant's application dated 23<sup>rd</sup> January, 2012 as amended. I direct that there be a stay of proceedings now pending before the Arbitrator Mr. Festus Litiku Esq. between **TM – AM CONSTRUCTION GROUP AND STIRLING INTERNATIONAL CIVIL ENGINEERING LIMITED**. This stay shall be for a limited period. For the reason of the impending court vacation, the appeal should be listed for hearing within 60 days. The order of stay herein shall be in force for a maximum period of four (4) months from the date of this order after which it shall forthwith lapse without the necessity of making any further application.

It is so ordered.

DATED and DELIVERED at Nairobi this 24<sup>th</sup> day of October, 2012.

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**A. MABEYA**  
**JUDGE**