THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 2630 OF 1981

FRANCIS A.K MUINDI.....PLAINTIFF/ RESPONDENT

VERSUS

MUNICIPAL COUNCIL OF MACHAKOS.....DEFENDANT/ APPLICANT

RULING

(1) On the 31st March 2010, the Municipal Council of Machakos, the Defendant/Applicant (was the Respondent in the Arbitration) took out a Notice of Motion under Order XLV rules 15 and 8 of the Civil Procedure Rules seeking the following main orders —

"1. That the arbitral award filed herein on 6.2.2009 be set aside.

2. That the Court do supersede the arbitration and proceed with the suit."

The application is based on the grounds that the Arbitrators are guilty of misconduct; that it is in the interests of justice that the award be set aside. The Plaintiff also relies on the affidavit of Stephen M. Mbondo, its Town Clerk/Chief Executive Officer, sworn on the 31st March 2010. In paragraph 7 and 10 of his affidavit, Mr. Mbondo states as follows:-

"7. That in summary the award was to the effect that the Applicant do pay the Respondent the sum of:

(i) Kshs. 2 million expressed to be damages,

(ii) Kshs. 150,000/= expressed as fees for building plans,

(iii) Kshs.3,354,000/= expressed as interest on the sums awarded under 7(i) and (ii) from

November 1994 at 12%,

(iv) Interest at 12% on any of the awarded amounts not paid after 45 days "of taking up the award."

10. That as I am informed by the Applicant's advocates which information I verily believe to be true the award is liable to be set aside for misconduct on the part of the Arbitrators in that they:

(i) exceeded their powers and acted contrary to the Order of reference to arbitration,

(ii) awarded interest backdated to 13 years prior to the award contrary to the settled principles of law as to when interest on monitory awards made in matters in court should start to run,

(iii) introduced extraneous matters, dealt on issues which were not even pleaded on whereon no evidence was adduced and made findings thereon advance to the Applicant in particular their finding that the Applicant was to blame for the delay in the finalization of the matter and proceeding to award punitive interest against the Applicant,

(v) Showed open bias to the Applicant, ignored the Applicant's evidence then proceeded to give a deliberate wrongful analysis of the same and of the Court record as a whole.

(vi) Ignored the fact that the matter had been referred to arbitration on Order of the Court under Order XLV of the Civil Procedure Rules and wilfully made an award that is clearly wrong in law on its face,

(vii) Refused to consider relevant matters and considered irrelevancies,

(viii) Wilfully made findings not based on the evidence on record,

(ix) On the whole decided on the matter on a deliberate wrong application of the law."

Mr. Mbondo goes on to say that the award is a nullity as it was filed out of the time set out in the order of reference to arbitration in contravention of the provisions of Order XLV rule 8 of the Civil Procedure Rules.

(2) The Plaintiff/Respondent opposes the application on the grounds and reasons stated in his own affidavit sworn on the 12th August 2010 paragraphs 4,6 and 7 of which are in the following terms:-

"4. That I am advised by my advocate on record as to the law and facts, which advise I verily believe to be true that:-

(a) To the extent that the application is grounded on the Arbitrators' misconduct, the application is frivolous or vexatious and therefore an abuse of the court process in that:-

(i) The manner of excess of their power in which the Arbitrators are accused of is neither disclosed nor specified and all the other allegations of misconduct are unsupported by any evidence.

(ii) Contrary to what is deposed to in paragraph 10(ii) of the affidavit of Stephen M. Mbondo interest from the date of suit to the date of decree is allowed in Section 26 of the Civil Procedure Act and the only limitation as provided in Section 4(4) of the Limitation of Actions Act (Cap. 22) is in respect of interest after delivery of judgment.

(iii) None of the other accusations against the Arbitrators are within the parameters of Order XLV Rule 15 of the Civil Procedure Rules.

(b) As regards grounds number (b) of the Notice of Motion and the contents of paragraph 11 of the affidavit in support thereof if the award is a nullity the Applicant's application to set aside a nullity is in vain.

6. That the arbitral award was not filed out of time as demonstrated herebelow:-

7. (a) That on 11th November 2008 the parties filed a consent to the effect that the sum of Kshs. 390,000/= paid into court by the Defendants be released to Mururu and Associates who shall file the award within seven (7) days of the date of payments (annexed hereto and marked "FAKM-1" is a copy of the consent).

(b) The said consent was adopted as a court order on 2nd December 2008 and the court order was issued on 5th December 2009 (annexed hereto and marked "FAKM-2" is a copy of the court order).

(c) The said tribunals fees was paid to the Mururu and Associates by the Judiciary on 17.12.2008 (annexed hereto and marked "FAKM-3" is a copy of the letter from Mururu & Associates).

(d) Then the Arbitrators filed the award on 19.12.2008 within the 7 days limit agreed by the parties and in compliance with the court order.

(e) That the time set out in the said consent was complied with.

(f) The consent order referring the matter to arbitration made on 21.10.1993 and requiring the award to be made within 60 days was superseded by another consent order made on 7.7.1998 which further extended the time for filing of award.

(g) That the above mentioned consent order made on 7.7.1998 was superseded by the aforementioned consent order made on 11th November 2008 which the Arbitrators complied with within time as demonstrated herein above."

The Defendant also filed the Supplementary affidavit of Mutinda Ngei (its Town Clerk at the material time) on the 20th September 2010 in answer to the Plaintiff's replying affidavit.

(3) The Defendant filed its written submissions on the 15th March 2011 contending that on the face of the award it is evident that the arbitrators and the umpire were guilty of gross misconduct on the grounds and for the reasons set out in paragraph 10 of the supporting affidavit dated the 31st March 2010 in particular.

(4) In reply, the Plaintiff filed his written submissions on the 4th April 2011. He contends that the application does not lie because the Defendant has not demonstrated the alleged mis-conduct of the arbitrators and the umpire; that the award was made on the basis of the pleadings and that the Plaintiff is entitled to interest under the provisions of section 26 of the Civil Procedure Act.

(5) I have considered the application in light of the respective submissions of the parties in conjunction with the Award of the Arbitrators made on the 20th March 2008 and filed on the 6th February 2009.

It is clear from a perusal of the Award that the Arbitrators considered the background and pleadings leading to the reference to arbitration, the issues for determination by them, the evidence adduced before them as well as the law applicable in the circumstances.

(6) On the aspect of damages, the Arbitrators rendered themselves thus

"4.3 Damages

The Claimant produced before the Tribunal some statements giving the expected income for eight years and the expenditure for the same period ending with a profit of Ksh 20 million which according to him represented the loss of business. This evidence which was produced by his witness was attacked by the defence Counsel on the grounds that:-

4.3.1 The claim for loss of business is a claim for Special Damages which ought to have been specifically pleaded and proved.

4.3.2 It cannot be legally termed as a claim for loss of business as the school did not exist.

4.3.3 The income relied upon is based on a number of students bigger than the number allowed by Condition No. 5 of the lease.

4.3.4 The projection of the expected income stretched from 1980 to 1995 without giving basis for this period and in any event after Claimant had sold his interest in the land in 1988.

It is a fact that the school was not built and that it would be a matter of conjuncture as to whether if the school were built, it would of necessity make a profit. What is certain is that the Claimant was unable to build the school due to a breach of duty by the respondent.

Looking at the correspondence between the Claimant and the various authorities concerned, it shows that the project had wide support indicating its potential to make a profit had it been built it is therefore reasonable to accept that the Claimant incurred a loss when the venture fell though, although for that very fact, it is not easy to tell the exact amount of the loss.

The Court of Appeal in the case of City Council of Nairobi v. Hitenkumat Amrithal in Civil Appeal No. 102 of 1987 **accepted the principle that the Plaintiff's damages for a breach of contract should be assessed by reference to the profits which both parties contemplated that he would make and which the Defendant's breach of contract had prevented him from making. In this case any claim for loss of profit will be a conservative estimate of the likely loss arising from the action or omission by the Respondent. The Tribunal assesses these damages at Kenya Shillings Two Million (Ksh 2,000,000.00) and awards accordingly. In addition, the Respondent will also pay Kenya Shillings One Hundred and Fifty Thousand (Ksh 150,000.00) being the fees paid by the Claimant for the building plans, bringing the total of Ksh 2,150,000.00."**

(7) The Arbitrators also considered the aspect of interest and summarized their award in the following terms under this head —

4.4 Interest

The dispute first erupted in 1981 when it was filed in the High Court as HCCC No. 2530 of 1981, it was taken out of court by consent and referred to arbitration. For a myriad of reasons attributable to both parties, but mostly to the Respondent, the arbitral process did not commence until 1995. After the bulk of the proceedings was completed, tragedy struck and the Chairman of the Tribunal passed away. Thereafter started another long tussle between the parties regarding filling the vacancy and further attempts by the Respondent to remove one of the remaining Arbitrators. Several trips to and from the High court plus a visit to the Court of Appeal only contributed to costs and further delay in resolving the subject disputes. As the Arbitral Tribunal writes this Award 26 years have elapsed since the commencement of the dispute! Sad to say, such a protracted "battle" does no credit to litigation or arbitration. It is something to be avoided strenuously by all concerned.

The Tribunal has briefly summarised the unfortunate history of this case so as to put the issue of interest in its proper context. Under normal circumstances, the prevailing party would be entitled to interest for the period it has been put out of its just fruits. But, as stated above, this is anything but a normal case. For this reason, the Tribunal considers that it would be greatly unjust to charge the Respondent with the liability of paying interest to the claimant on the principal award for all of

those 26 years. True, the Respondent had a big input in the matter of causing delays. But the Claimant was not wholly blameless either. And most unfortunately, when acts of God intervened to throw the proceedings off balance, the delay thereby caused could not be placed at anyone's door. For all these reasons, the Arbitral Tribunal considers that to award interest on the principal award from November 1994, when the Arbitral Tribunal was finally agreed upon, would be just and proper under the circumstances. The period comes to 13 years. Regarding the rate of interest, we settle for an average 12% p.a. on simple rate basis over that period. Using these figures, the interest payable comes to Ksh 2,150,000 x 12 x 13 = Kshs

100

3,354,000.00. This makes the total award Ksh 2,150,000 + 3,354,000 = Kshs 5,504,000.00."

(8) The Plaintiff in his Plaint prayed for damages (as the Defendant concedes) and the Arbitrator's has explained their reasons for awarding interest which in any event would follow the event. The court rate prescribed under section 26 of the Civil procedure Act cannot be deemed to be unjust. Accordingly, and having considered the evidence in conjunction with the Award, I am unable to agree, and with profound respect to learned counsel for the Defendant, that the Arbitrators and the Umpire are guilty of misconduct either on the grounds advanced, which I reject, or otherwise. The application must therefore fail. I also accept that the Award was filed within the period agreed to by the parties in light of the various orders by consent referred to in paragraph 7 of the replying affidavit dated the 12th August 2010.

(9) In the result, the Defendant's Chamber Summons application dated the 31st March 2010 and filed on the 8th April 2010 fails and is hereby dismissed with costs to the Plaintiff.

So ordered.

Dated and delivered at Machakos this **29th** day of **June** , 2011.

P. Kihara Kariuki
Judge.