



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 2630 of 1981

FRANCIS ALEXANDER KIMANTHI MUINDI PLAINTIFFS

VERSUS

MUNICIPAL COUNCIL OF MACHAKOS.....DEFENDANT

RULING

1. Before me are two applications viz;

- i. the one dated 13.5.2009 seeking orders by the Defendant that the Arbitrators do comply with the orders issued on 11.2.2009 and file depositions and all other documents placed before them by the parties during the arbitral process and also seeking enlargement of time within which the Defendant should apply in respect of the award and the time to do so should run from the date of compliance with the orders of 11.2.2009 aforesaid.
- ii. The one dated 28.4.2009 in which the Plaintiff seeks orders that judgment be entered in terms of the Arbitrators award filed on 6.2.2009.

2. The history of the matter is as follows;-

The suit was filed sometime in 1981 and from the torn copy of the Plaintiff on record, certain orders were sought against the Defendant in respect of title no. Machakos/Block 1/293. On 21.10.1993, a consent order was recorded referring the matter to arbitration and on 6.2.2009, Hon Mr. Justice (*retired*) Kasanga Mulwa, Mr. Owino Opiyo and Mr. Norman Murugu the Arbitrators, filed their award and awarded Kshs. 5,504,000.00 to the plaintiff as damages for the Defendant's breach of its obligation to issue a rates clearance certificate to the claimant "***once all rates due had been paid.***"

3. I have read the rival affidavits and submissions and I have also read the record in this matter.

4. Firstly, I note that on 24.3.2009, Norman Murugu, one of the Arbitrators filed depositions and documents produced as evidence before the Arbitral Tribunal and to my mind that is sufficient compliance with Order XLV Rule 10 of the Civil Procedures Rules. However, the Town Clerk, Municipal council of Machakos has taken the view that the Arbitrators have not fully

complied because typed and certified proceedings are missing and ***“some of the documents said to have been produced in the arbitration are missing from the list filed by the Arbitrators.”*** It is unclear what these documents are and for that reason alone I do not find merit in the contention that the Arbitrators have failed to comply with the relevant Rule.

5. Secondly, it is the right of any party to challenge an award that is adverse to it and where time has lapsed, to do so, that party is obligated to explain that delay. In this case, the Defendant states that the failure by the Arbitrators to file depositions within time is the cause of the delay. The Applicant had thirty (30) days under Order XLV Rule 16 of the Civil Procedure Rules to apply for any orders in respect of the award. I agree that the Arbitrators filed the depositions and documents tendered outside the relevant period and therefore the Defendant was necessarily unable to file its application within time. The explanation for delay is reasonable and I accept it.
6. Thirdly, once I have taken the view that the Defendant ought to be granted an opportunity to challenge the award, it means that I cannot at the same time enter judgment in terms of the award as that would amount to an injustice. If the award is set aside, then relevant orders would be made and if not, then judgment would thereby be entered.
7. In the event, I will order as follows:-
 - i. Time is enlarged for further 30 days from the date of this Ruling for the Defendant to apply in respect of the Arbitrators award filed on 6.2.2009.
 - ii. The Plaintiff's Application dated 28.4.2009 shall be kept in abeyance the outcome of the Defendant's Application in respect of the award.
 - iii. Each party shall bear its own costs.
8. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **12th** day of **March 2010**.

H.P.G. WAWERU

JUDGE