REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 886 of 2009

STIRLING CIVIL ENGINEERING LTD……..…… PLAINTIFF
VERSUS
FESTUS LITIKU…….…...1ST DEFENDANT
TM-AM CONSTRUCTION GROUP……...2ND DEFENDANT

R U L I N G

1. On 7th December 2009 the Plaintiff filed this case against the Defendant and simultaneously filed a Chamber Summons under **Sections 63 and 3A** of the **Civil Procedure Act** and **Order XXXI** of the **Civil Procedure Rules** in which the Plaintiff/Applicant is seeking for inter alia the following orders:

"1. That the First Respondent be restrained from taking any proceedings against the interest of the Applicant until determination of the suit herein.

2. That the First Respondent be restrained from making any award, order, ruling or judgment against the Applicant until the determination of the suit herein,

3. That this Honourable Court do make such orders as it deems appropriate having regard to all the circumstances.

4. That the costs of this application be provided for."

2. This application is supported by the affidavit of Maurice Desouza sworn on 7th December 2009. It is premised on the grounds that the Chairman of the Chartered Institute of Arbitrators appointed an arbitrator to arbitrate on a dispute that does not involve the Plaintiff but involves a company by the name Sterling International Engineering Limited (SICEL) which was a company incorporated in the United Kingdom. It was SICEL which entered into a Joint Venture Agreement with the second Defendant. When the Plaintiff was notified about the arbitration proceedings, it protested and made the objection before the tribunal.

3. That notwithstanding, the 1st Defendant has been proceeding with the arbitration in breach of the rules of natural justice. It is alleged that the 1st Defendant failed to provide the necessary documents to counsel for the Plaintiff. It is further contended that the Plaintiff is a different entity from SICEL who have not been made parties to the proceedings. 1st Defendant who is a sole arbitrator has been proceeding with arbitration as though Mr. Rebero learned counsel for the Plaintiff is also representing SICEL. It is for these reasons that the Applicant seeks for restraining orders so that the issue of jurisdiction regarding the parties to the Joint Venture Agreement can be determined by the High Court.

4. This application was opposed; the 1st Defendant, who was appointed as an arbitrator, filed an affidavit sworn on 16th December 2009. He explained how he was appointed as an arbitrator by the Chairman of the Chartered Institute of Arbitrators. He thereafter informed the parties and requested for a preliminary meeting. He attached minutes of the meetings of 25th March 2009 which was postponed to 14th April 2009 to accommodate the Plaintiff and his lawyer and the minutes of the 11th May 2009 when the Plaintiff was represented by Maurice Desouza and Mr. Rebero. The

minutes capture a heated argument on the issue of jurisdiction of the Tribunal. Eventually an agreement was reached that written submissions on the Plaintiff's objection to jurisdiction be submitted to the Tribunal and, timelines were set. The Plaintiff failed to make their submissions or to appear before the Tribunal and the Tribunal proceeded to make a ruling based on the 2nd Defendant's submissions and documentary evidence adduced.

5. This application was also opposed by the 2nd Defendant; reliance was placed on the replying affidavit sworn by Baldev Bhatti on 15th December 2009. He annexed a certificate of registration that shows **SICEL** was registered as a business name as carrying on business under the name of Sterling International-TM-AM-JV. They also annexed a copy of the Joint Venture Agreement and an agreement dated 1st December 1999 between **SICE**L and the Plaintiff which was in relation to transfer of assets and liabilities of **SICEL**. The transfer of the business was the one operated by **SICEL** in Central America and Africa through the branches, subsidiary and Joint Ventures. The Plaintiff was also supposed to take over the creditors, customers and Joint Ventures from 1st December 1999. There were also communications with the Government of Kenya in which it was indicated that SICEL was taken over by SCEL.

6. In addition to the oral submissions all the parties filed very detailed submissions and, cited authorities in support of their respective positions. The bottom line of the matters raised in this application is whether the Applicant is entitled to the order of injunction to restrain the 1st Defendant, an arbitrator appointed under the Arbitration Act from proceeding with the arbitration. This being an injunction, the principles to guide the court on whether or not to grant the orders of injunction, are well settled in the oft' cited case of **Giella vs Cassman Brown & Co. Limited [1973] EA p. 358**. The Applicant must demonstrate a *prima facie* case with a probability of success. Secondly, irreparable harm which cannot be compensated for in damages would arise and if in doubt the court determines the matter on a balance of probability.

7. The Court of Appeal has further explained what constitutes a *prima facie* case in the case of: **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KRL 125**

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

8. The Plaintiff's principal complaint, as I understand it, is that the 1st Defendant who is a sole arbitrator is proceeding with arbitration proceedings against the Plaintiff who was not a party to the Joint Venture Agreement with the 2nd Defendant. The Plaintiff is also complaining that the real party to the Joint Venture Agreement is SICEL who were not made party to arbitration proceedings. Further the Plaintiff was not furnished with requisite documentation. These are matters that are before an Arbitration Tribunal. Under **Section 7(2)** of the **Arbitration Act No. 4** of 1995

" Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

9. In this case, the Plaintiff declined to forward their submissions to the Arbitration Tribunal on the issue of jurisdiction. The Arbitrator determined the issues and delivered the ruling on 9th November 2009. Thus this court cannot interfere with the proceedings and the findings of the arbitrator which was based on the submissions and documents that were submitted to the Tribunal. The Plaintiff had an opportunity to ventilate their case on the issue of jurisdiction which they squandered by boycotting the proceedings. It is also clearly provided under **Section 17** of the **Arbitration Act** that the Tribunal has the competence to rule on its own jurisdiction.

10. This application is not an appeal against the ruling of the Arbitrator. This is a fresh matter where the Plaintiff is seeking for an injunction based on the matters raised in the Plaint. I do not know how the two matters can be heard simultaneously, that is the one before arbitration and the one in the High Court. The same issues which are before the Arbitrator are also brought to Court as parallel proceedings. Going by the documentation that is on record, the Joint Venture Agreement, the Hive across agreement, the innovation and, assignment, I am not at all persuaded that the Plaintiff has established a *prima facie* case that would enable this court issue an order of injunction to restrain a sole arbitrator from proceeding with the arbitration.

11. All the issues raised by the Plaintiff can adequately be raised before the sole arbitrator who is seized of the matter. If the Plaintiff is dissatisfied with the arbitrator's rulings or findings, the Arbitration Act provides a procedure on how he can apply to the High Court to decide on the matter. The parallel application instituted herein is meant to scuttle the arbitration process. In the upshot this application lacks merit and it is hereby dismissed with costs to the Respondent.

RULING READ AND SIGNED ON THE 1st OCTOBER 2010.

M. K. KOOME
JUDGE