



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 947 OF 1999

IRIS PROPERTIES LTD & ANOTHER.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....DEFENDANT

RULING

This is a Ruling on a preliminary objection by defendant against the plaintiffs application dated 15.1.2002.

The application dated 15.1.2002 is brought under section 36 of the Arbitration Act, 1995 and Rule 9 of the Arbitration Rules 1997. It seeks the following orders:

1. The arbitral award made by Stephen K. Kiplagat on 5th day of November 2001 be recognized as binding and be adopted as a decree of this court
2. A decree for the payment of the sum of shs 35,000,000 to the plaintiffs by the Defendant
3. The defendant to pay to the plaintiff the costs of this suit; the costs of the Arbitration and the Arbitrators fees in terms of Arbitral Award dated 5th November 2001
4. The defendant be ordered to deposit in court the sum of shs 35 million within 30 days of such order to facilitate the opening of a joint interest earning account in the names of Kingara & Co., Advocates and Kenta Moitalel & Co., Advocates as ordered by the Arbitral Award.
5. Costs of this application any further costs and fees arising be paid by the defendant.

The application is filed in an existing suit between the parties. On 2.10.2001, a consent letter dated 1.10.2001 was filed in the existing suit. By the consent letter, the respective Advocates for the parties requested the Deputy Registrar of this court to record orders as follows: "BY CONSENT

1. The matters in dispute herein be and are hereby referred to arbitration.
2. That Mr. Stephen K. Kipkenda is hereby appointed arbitrator.
3. The arbitrator shall at all times carry out his mandate in accordance with the provisions of the Arbitration Act, 1995
4. In the event that any party is dissatisfied with the Arbitrator's award, the dissatisfied party shall

be at liberty to appeal against the award in accordance with the provisions of the Arbitration Act, 1995”

The Deputy Registrar recorded and signed the consent order on 12.10.2001. The copy of Arbitral Award made by Stephen K. Kiplangat on 5.11.2001 is annexed as an exhibit to the application for the enforcement of the Arbitral Award.

Mr. Njagi for the defendant/Respondent contends that the application for enforcement of the Arbitral Award is incompetent as it has been filed in a non-existent suit. It is his submission, that by the consent order, this file was closed and must be deemed to have been closed and that, once the arbitration is done, the Award must be filed and enforced in different proceedings in accordance with the Arbitration Act. Mr. King'ara for the applicant is of the different opinion. His view is that, where a dispute has been referred to arbitration in a pending suit arbitral award has to be filed in the pending suit for enforcement under S. 36 of the Arbitration Act.

He referred to Rule 9 of the Arbitration Rules which provides that applications under S. 36 of the Arbitration Act should be made by summons in chambers and argued that one cannot file a chamber summons unless there is a pending suit. Mr. Kingara further relied on Rule 3(2) of the Arbitration Rule 1997.

The issue raised by Mr. Njagi is a procedural issue which does not affect the validity of the arbitral proceedings or the Arbitral Award made on 5.11.2001

It is clear from the consent letter and the consent order that parties in the suit reached an agreement that the matters in dispute be referred to arbitration and be determined in accordance with the Arbitration Act 1995. The Arbitrator was to carry out his mandate in accordance with provisions of the Arbitration Act, 1995 and any party dissatisfied with the Arbitrators Award could only appeal against the Award in accordance with the provisions of the Arbitration Act.

There is no dispute that the arbitral proceedings were conducted under the provisions of the Arbitration Act and that the Award was made in accordance with that Act. The application to enforce the Award is indeed made under S. 36 of the Arbitration Act and Rule 9 of the Arbitration Rules.

By section 6(2) of the Arbitration Act, the fact that a dispute is pending in court does not preclude parties to the suit from commencing or continuing with arbitral proceedings. The consent letter dated 1.10.2001 is indeed an arbitration Agreement in terms of section 4 of the Arbitration Act. In this case, an order of reference to arbitration under the Arbitration was made after the parties filed an Agreement in court. The order of reference to arbitration under the Arbitration Act had the effect of staying the suit. It is implicit from Rule 8 of the Arbitration Rules, 1997, that the effect of staying the suit and referring dispute to arbitration under s. 6 of the Arbitration Act is to terminate the suit save the question of costs of the suit. If parties in a pending suit reach an agreement that the matters in dispute be referred to arbitration and be determined in accordance with the Arbitration Act, the Arbitral Tribunal under the Arbitration Act supersedes the court in which the dispute is pending.

Further, the arbitral proceedings supercede the suit and the suit becomes spent save the question of costs of the suit. The Arbitral Award has to be enforced in accordance with the Arbitration Act and Rules. This is unlike where the parties in a pending suit have agreed to arbitration under the supervision of the court under order XLV CP Rules; which is not the case here. In that case, the arbitrator is required to cause the award to be filed in court in which the suit is pending (order XLV Rule 10 CP Rules) And, if, the court ultimately sets aside the award, the court supersedes the arbitration and proceeds with the suit (order XLV Rule 15(2) CP Rules).

The Arbitration Rules 1997 stipulate two different procedures for filing an arbitral award made under the Arbitration Act. Firstly, if in the course of arbitral proceedings an application has been filed in the High court to determine matters arising in the arbitral proceedings – specifically under section 12, 15, 16, 17, 18, 28 and 39 of the Arbitration Act, the Arbitral Award has to be filed in the same cause in which

such application was made and determined (Rule 3(2) and 4(3) of the Arbitration Rules 1997) Secondly, if no application was made in the High court during arbitral proceedings, then the award has to be filed in the High Court and be given its own serial number in the Civil Register (Rule 4(3) of the Arbitration Rules)

In either case, an application under S. 36 of the Arbitration Act to enforce the award so filed should be made by summons in Chambers and a filing fees of shs 10,000 should be paid (Rule 9 and 10 pf the Arbitration Rules.

The phrase “in the same cause” in Rule 3(2) and 4(3) of the Arbitration Rules refers to a cause in which an application had been made in the High Court to determine a dispute arising during arbitral proceedings. The phrase does not refer to a pending suit filed before the arbitral proceedings were commenced.

The filing of the Award and the giving of the notice of the filing of the awards precedes any application to enforce the award. The chamber summons under S. 36 to enforce the award is not therefore made in a vacuum. It is filed in the cause in which the award was filed. In the present case, no application was filed in the High court in the course of arbitral proceedings. It follows that the arbitral Award should have been filed as an independent cause with its own serial number in the Civil Register.

The award cannot competently be filed in the original suit. The award has not in any case been filed in accordance with the Arbitration Rules.

The Award is merely appended to the application under S. 36 of the Arbitration Act. The court fees of shs 10,000 payable on filing the award has not been paid. The applicant only paid shs 485 for filing the chamber Summons. The Notice of filing of the Award has not been given to parties in accordance with Rule 5 of the Arbitration Rules. That renders the application incompetent.

For the foregoing reasons, I uphold the preliminary objection with costs and strike out the application dated 15.1.2002 with costs to the respondent

The original awards shall be returned to the applicant’s counsel for filing in accordance with Arbitration Act and Rules.

E. M. Githinji

Judge

12.4.2002

Mr. Kingara for applicant present

Mr. Njagi for Respondent present

12.4.2002 at 2.45

The original Award is released so Mr. Benjamin Munguti – court clerk of

Mr. Kingara in the presence of Mr. Njoroge – court clerk

E. M. Githinji

Judge

