REPUBLIC OF KENYA

IN THE HIGH COURTOF KENYA AT ELDORET

CIVIL SUIT NO 255 OF 2001 (OS)

ELDORET MUNICIPAL COUNCIL.....APPLICANT

VERSUS

RURAL HOUSING ESTATES LTD.....RESPONDENT

RULING

Eldoret Municipal Council, the plaintiff/applicant (hereinafter called "the applicant") has moved this court under section 17 of the Arbitration Act and under Rules 2 and 11 of the Arbitration Rules 1997. The applicant is praying for an order that there be a stay of any further proceedings in the arbitration between the applicant and the defendant/respondent, being Rural Housing Estates Limited (hereinafter called "the respondent") before Engineer D. J. O. Fitzgerald (hereinafter "the Arbitrator") pending the hearing and determination of this application and thereafter pending the hearing and determination of this suit.

The application is founded on the grounds that the Arbitrator has no jurisdiction to hear this claim; the applicant is challenging the validity of the proceedings on account of limitation, that the proceedings may be rendered nugatory should the Arbitrator proceed with the arbitration before the said issues are determined; and, finally, that the arbitrator is in the process of giving award in the matter.

The application is also supported by the sworn affidavit of M. H. Kimaiyo sworn on the 5th February, 2002.

It is not in dispute that the parties herein entered into the agreement dated 7th September, 1994 which had a provision in its clause 5 that in the event of a dispute between them, the same would be referred to arbitration. Pursuant to that clause, and by an order of the High Court sitting at Nairobi, a dispute which had arisen between the parties was referred to the Arbitrator. Among the issues to be determined was one of limitation. The Arbitrator directed that parties do submit on it in writing, which they did. Thereafter, on the 30th November, 2002, the Arbitrator made a preliminary award. The applicant being aggrieved by that preliminary award has filed a suit by an originating summons for that award to be set aside.

Mr. Gicheru, counsel for the applicant submitted that interim orders of stay are sought in order to obtain protection from this court which protection is not incompatible with an arbitration agreement under section 17 of the Arbitration Act. Counsel stated that the test to be applied in an application of this nature is whether or not the applicant has shown that it may suffer substantial loss; that the suit raises important issues that may be rendered nugatory unless a stay is granted. With respect, I am in concurrence with counsel that these are pertinent matters which in an application such as the present, must be determined by the court.

Counsel said that the arbitration clause was limited to the interpretation and operation of the agreement and did not or contemplate a claim for an award of damages which was lodged with the Arbitrator. He

relied on *Russell Law of Arbitration*, 15th Edition p.40 to state that where reference is made as "meaning and intention" being similar to "interpretation and or operation" of an agreement, it is not open to the Arbitrator to make an award of damages. Again relying on *Bagwasi Nyangau & Omosa Nyakwara* Civil Appeal No. Nairobi 33 of 1984, he submitted that the authority of an arbitrator derives from the reference made to him and once he departs from it he lacks jurisdiction.

Counsel also submitted that the only issue to be determined by the Arbitrator in the instant claim was one of limitation, but he went ahead, to unilaterally resolve that it was not necessary to call witnesses. The Arbitrator thus misconducted himself in so deciding, again in so submitting counsel relied on the judgment of Hancox J. A. (as he then was) in *Bagwasi's* case (supra). It is also the contention of the applicant that at page 7 of the Award, the Arbitrator addressed and determined the issue as to his jurisdiction which was not part of the reference made to him. In Civil Appeal No. Kisumu 139 of 2002 *KCB Ltd. C J J Matere***,** the Court of Appeal held that a Tribunal or Court should only rule upon or address issues properly raised before it. Counsel also challenged the actual decision on limitation, one of the issues in the originating summons filed herein.

On whether or not this suit would be rendered nugatory, counsel submitted that substantial sums of money is involved in the claim and unless further proceedings are stopped and arbitration allowed, execution may issue against the applicant, who is challenging the jurisdiction of the Arbitrator. The decision not to call witnesses may prejudice the applicant's case.

In response to the grounds of opposition and the replying affidavit filed by the Respondent (quite irregularly, but not objected to), counsel observed that section 17(2) of the Act is inapplicable since no stay was prayed for before the Arbitrator nor were the issues of substantial loss or matters being nugatory. Even though the applicant participated in the arbitration, this cannot by itself confer or waive jurisdiction where it is lacking and that the applicant is at liberty to raise it any time. It is the case for the applicant that the issues raised herein are not *res judicata* as they were never considered or decided upon on the merits in H.C.C.C. NO. Nairobi 913 of 1999 (O.S.).

Counsel stated that section 17(7) of the Act empowers the court to decide on an issue as to jurisdiction and since limitation is a matter of jurisdiction, the applicant's suit cannot be an abuse of the process of court.

Mr. Musangi, counsel for the Respondent argued that section 17 of the Act only contemplates protection of the court as against the other party and not against the arbitrator. The procedure, in the counsel's view, is thus wholly erroneous. He further submitted that the Arbitrator's findings are conclusive in law and so the court is *functus officio* and cannot set aside the interim award or injunct the Arbitrator from proceeding further. Counsel contended that the applicant has no *prima facie* case under section 7 of the Act and distinguished *Russell* (supra) in that the word **"operation"** goes beyond a mere interpretation. According to Mr. Musangi, the proper section is 35 for an application to set aside an award, and not section 17.

He also relied on section 17 (8) to state that the pendency of proceedings in court is no bar and that the Arbitrator may proceed and make a final award. While conceding that jurisdiction cannot be conferred or awarded by consent, he said that the issue of jurisdiction was raised since Mr. Gicheru's argument is that an issue as to limitation is also one of jurisdiction. In the instant case, Mr. Musangi said that the issue as to jurisdiction of the Arbitrator should have been raised not later than the submission of statements but was not. He opined that since the twin issues of limitation and jurisdiction should have been raised at the preliminary meeting but were not, under section 7 of the Civil Procedure Act, they are now *res judicata*. On calling witnesses, counsel submitted that the applicant is still at liberty to call witnesses since the Arbitrator decided he would do so if he deemed it fit.

Mr. Musangi's argument on whether or not the applicant may suffer substantial loss was that its remedy lies in section 35, 36 and 37 of the Act. Finally, on a balance of convenience counsel submitted that the award is ready and the application for injunctive orders relates to the proceedings and not publication of the award. The application is bad in law and be disallowed.

Having thus set out the rival arguments by counsel above in detail and upon going through the voluminous documents relied upon in this application together with the authorities cited by counsel, it is now time to make my findings on issues raised. In doing this, and for avoidance of doubt, I must, from the outset, state and I do hold that the applicants' application is competently before this court under section 17 of the Act. In our present circumstances, it is the appropriate provision under which to file this application. Secondly, and as has been conceded by counsel for the respondent, jurisdiction cannot be conferred or waived by consent of the parties. It cannot be said that it must only be raised at a particular point or time in proceedings. Once a tribunal lacks jurisdiction, any proceedings held before it must be null and void, and so, the issue of jurisdiction is very important and one to be determined first before the Arbitrator may conduct any proceedings or further proceedings. I have perused the preliminary award given by the Arbitrator and in it he was clearly in doubt as to when time did start to run while considering the issue of limitation. The only and best way of reducing that doubt was by calling witnesses. I concur with Mr. Gicheru's argument that it was then not open to the Arbitrator to decide that no witnesses may be called. In the authority cited on this point by Mr. Gicheru, the Arbitrator misconducted himself. Likewise, I am in full agreement with the argument that the Arbitrator's jurisdiction derives from the reference lodged with him. There was no reference lodged for an award of damages and to proceed to give an award in that regard was without jurisdiction. On these two holdings alone, I would conclude that unless the proceedings before the arbitrator are stayed, the suit now pending before this court may be rendered nugatory. At this stage, it is unsafe to go into a great depth in to the issues which also arise in the main suit, which may give an impression that the suit itself has been decided in advance. But it is sufficient to state that the twin issues of jurisdiction and limitation are very important and must first be determined.

It is also conceded by the respondent that the amount in the claim runs into several millions. Such an award if allowed to stand and executed, should it be true that the arbitral tribunal has no jurisdiction, may result into substantial loss and it is the duty of this court that the applicant be protected against the respondent from incurring such a substantial loss until the suit is heard and determined.

Mr. Musangi's argument that the applicant is seeking protection against the Arbitrator is not correct. Had it been so, the Arbitrator would be a party to this suit. He is not and I have even disregarded his sworn affidavit. The protection by this court is sought as against the respondent and that is the correct procedure and it has been adhered to in this application. On whether this court has no jurisdiction and is *functus officio* where an award has been made by an arbitrator. In this he contradicts himself when he also submits that "setting aside of awards is provided for in section 35....." Clearly this court has powers to stay and to set aside arbitral proceedings and awards and has done so severally, be it under section 17 or section 35 of the Act, for good cause. Section 17(8) of the Act does not prohibit this court from staying proceedings and the making of a final award. It states that the Arbitrator "May proceed" which, given its plain measuring means that he may be injuncted.

On the balance of convenience, it is submitted that the award is ready for publication and there is no injunctive orders prayed for against its publication. In my considered view, and I do hold that where the validity of an award is in issue, by reason that it is given without jurisdiction, its publication is in futile exercise and the balance of convenience dictates that no further proceedings be held and by necessary implication, that there be no publication of any award pending the hearing and determination of the suit.

In the result, for the reasons given in the body of this ruling, prayers (b) and (c) in the application dated 5th February, 2002 are hereby granted. Since during the hearing of this application it transpired that the preliminary award is ready, there shall be a stay of its publication until this suit is heard and determined.

It so ordered.

Dated and delivered at Eldoret this 11th day of July , 2002 .

G.E.O TUNYA

JUDGE