



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1635 OF 1999

ENGINEER CHARCHI GITHINJI T/A

CHARCHI GITHINJI & PARTNERS CONSULTING ENGINEERS
..... **PLAINTIFF**

VERSUS

NATIONAL OIL CORPORATION OF KENYA DEFENDANT

RULING

This is an application under O. XLV Rule 8(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for an order to supercede the arbitration ordered by this court on 17.10.2000 and for the court to proceed to hear the suit between the parties. The application is supported by an affidavit sworn on 27.2.2001 by the plaintiff and is based on two grounds which are:-

- (a) The arbitrator has failed to make his award within the prescribed time; and***
- (b) The arbitrator has failed to file his award as required by law.***

The defendant opposes the application. In an affidavit sworn on its behalf by its Corporation Secretary, Mr. Hosea Kili, the delay in making the award on the part of the arbitrator is acknowledged but several arguments are made as to why the delay should not result in the arbitration being superseded. The first of those arguments, according to Mr. Kili is that there was no time frame within which the award was to be finalised.

Although it is not clear what the defendant means by the word 'finalize' with reference to the arbitral process, at least one crucial fact is clear. The award was to be made within 30 days from the date of appointment i.e. 17.10.2000. My calculations tell me that the award should therefore have been made at the very latest on 16.11.2000. It is I think common ground, the arbitral process had not even begun by that date.

This matter was referred to arbitration under O. XLV of the Civil Procedure Rules. Rule 3(1) thereof provides:-

“3(1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.”

As aforesaid the award was to be made within 30 days from 17.10.2000. In the event it was not made within that time. Rule 8 of the same Order makes provisions for extension of time for making an award in certain circumstances. It provides:-

“8(1) The parties may, by filing an agreement in writing, extend the time for the making of the award, whether or not at the date of the agreement time has expired, and whether or not an award has been made since the expiry of the time allowed.

(2) On application made by a party, arbitrator or umpire on notice, the court may either extend the time for the making of the award, whether or not at the date of the application time has expired, and whether or not an award has been made since the expiry of the time allowed, or make an order superseding the arbitration in which case it shall proceed with the suit.”

There is sufficient evidence to show that both parties in this matter continued to participate in the arbitral process even after the time for making the award as fixed by the court had elapsed. There is also sufficient evidence to show that the award is now ready and that the only matter that is holding its release is non-payment of the portion of the arbitration fees payable by the plaintiff. Because of the plaintiff's participation in the arbitral process even after the time for making the award had expired, coupled with the fact that the matter was mentioned in court on several occasions without any party raising any complaint about time, it was argued by learned counsel for the defendant Mr. Kiplagat, that though there was no formal extension of time, the conduct of the parties suggested that time was in fact extended. Mr. Kimondo, learned counsel for the plaintiff responded by stating that the conduct of the parties cannot constitute an extension of time.

The issue of extension of time was considered by the Court of Appeal in the case of Bagwasi V. Omosa Nyakwara (1982-88) 1 KAR 805 in which Platt Ag J.A. (as he then was) stated:-

“..... under Ord 45 of the Civil Procedure Rules there must be either an agreement or an application to extend time there was no agreement and there was certainly no application. Therefore the award is a nullity.”

As to whether the parties may by conduct waive their right to apply to have the reference superseded on account of the time fixed for making the award having expired the learned judge at page 813 stated:-

“Mr. Kivuitu also canvassed the possibility of the parties waiving their objection He pressed the submission that conduct of the parties may show an agreement to extend the time. In reality these matters are beside the point. Rule 3 of Ord 45 requires a time limit be specified, and r. 8(1) requires the agreement to extend time to be in writing, and not witnessed merely by conduct. It follows that whenever Mr. Osoro was served with the reference, he had to see that he could act under it, and if the time had already expired he had to see that it was enlarged.”

In the instant case the court order was not served upon the arbitrator until after the time fixed for making the award had lapsed. Given that situation, the arbitrator should have taken steps to ensure that time was enlarged before embarking on the arbitration process. Alternatively, he could have procured an agreement in writing to be filed by the parties extending the time for the making of the award. Neither of those two actions having been taken, in commencing the arbitration process outside the time fixed for making the award, the arbitrator acted outside the terms of the reference. He had no powers to act outside the terms of the reference and consequently the award he may now make is clearly a nullity. That conclusion is obviously unfortunate considering the fact that the parties have expended considerable sums of money and time in the arbitral process. However, that is rather unfortunate since there is no agreement in writing by the parties or an application by either of them to enlarge the time for the making of the award; the arbitration process undertaken by the arbitrator must, for the reasons given above, be declared a nullity.

Accordingly, the application is allowed and the arbitration ordered by this court on 17.10.2000 superseded. The defendant will bear the applicant's costs of this application.

Dated at Nairobi this 17th day of April, 2001.

T. MBALUTO

JUDGE