



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT**

**CIVIL MISC. APPL. NO. 671 OF 2019**

**VISHNU BUILDERS LIMITED.....APPLICANT**

**VERSUS**

**MAOW HOLDING LIMITED.....RESPONDENT**

**MINISTRY OF EDUCATION,**

**STATE DEPARTMENT OF VOCATIONAL & TECHNICAL TRAINING.....GARNISHEE**

**RULING**

1. The application dated 7<sup>th</sup> January, 2020 seeks orders that:

**(1) Spent.**

**(2) That the court issues a Garnishee Order Nisi attaching the debt owed to the Respondent by the Garnishee in the sum of Ksh. 50,000,000/= being the sum awarded by the Arbitral Tribunal together with interest accruing thereon and costs.**

**(3) That the court issues a Garnishee Order Absolute attaching the debt owed to the Respondent by the Garnishee in the sum of Ksh.50,000,000/= being the sum awarded by the Arbitral Tribunal together with interest accruing thereon and costs.**

**(4) That in the alternative, the Garnishee or the Respondent deposits Ksh.50,000,000/= into a joint interest earning account in the names of the Advocates on record for the Applicant and Respondent pending the determination of this matter or further orders of this court.**

**(5) That the costs of this application be borne by the Respondent**

2. The application is premised on the grounds stated therein and is supported by the affidavit sworn by Binji Rabadia, the Applicant's Managing Director. It is stated that there is a final Arbitral Award in favour of the Applicant for Ksh.31,131,562.50 plus interest and costs. That the Respondent has not yet paid the Award in full but has instead filed an application for the setting aside of the same.

3. It is further deposed that the Applicant does not know any assets, properties or office of the Respondent. That the Applicant is however aware that the Respondent is undertaking a contract with the Garnishee for the total sum of Ksh.233,403,417.76 and an outstanding sum of Ksh.132,939,001.24 is yet to be paid. That a certificate has been issued for payment of the sum of Ksh.29,896,811/= under the said contract within 30 days. The Applicant is apprehensive that if the orders sought herein are not granted, it will end up with a paper Judgment/Award. The court was urged to secure the performance of the Arbitral Award under Section 18 (1) (a)(b) and (3) of the Arbitration Act 1995 (as amended in 2009):

Section 18 (1) (a)(b) provides as follows:

**“Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party –**

**(a) Order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in**

connection with such a measure; or

(b) Order any party to provide security in respect of any claim or any amount in dispute; or

Section 18 (3) provides as follows:

**“If a request is made under subsection (2) the High court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of anything which the arbitral tribunal is empowered to order under subsection (1) as it would have in civil proceedings before that Court, but the arbitral proceedings shall continue notwithstanding that a request has been made and is being considered by the High Court.”**

4. The application is opposed. It is averred in the replying affidavit that the application herein dated 17<sup>th</sup> October, 2019 which seeks orders that the Arbitral Award be set aside is still pending. It is stated that the contract between the Respondent and the Garnishee is still pending and is far from being completed. That the money being disbursed to the Respondent is for meeting the costs and expenses for the performance of the contract. That it is not possible to ascertain at this stage if the contract will be profitable or not. That the orders sought will adversely affect the performance of the contract. It is further contended that the Arbitral Award is yet to be recognized as an order of the court and that Section 18 of the Arbitration Act applies when the proceedings are still pending before the Arbitrator.

5. I have considered the application, the response to the same and the submissions made by the respective counsel for the parties. The submissions essentially reiterate the contents of the affidavits.

6. The party named as the Garnishee herein is the Ministry of Education, State Department of Vocational and Technical Training. Section 21(4) & (5) of the Government proceedings Act is applicable.

7. Section 21 (4) provides as follows:

**“Save as foresaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”**

8. Section 21(5) provides as follows:

**“This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.”**

9. Order 29 rule 29 (4)(i) Civil Procedure Rules stipulates:

**“No order for the attachment of debts under Order 23 or for the appointment of a receiver under Order 41 shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the Government.”**

10. Order 23 Civil Procedure Rules which the Applicant has relied on provides for attachment of debt. With the foregoing provisions of the Civil Procedure Rules and the Government Proceedings Act, it is clear that no attachment can issue against the Garnishee herein. The money the subject of the application herein has not yet left the Ministry of Education, State Department of Vocational & Technical Training and can therefore not be attached.

11. The application herein for the setting aside of the Arbitral Award is yet to be heard. The Arbitral Award is yet to be adopted as an order of this court. The money earmarked by the Applicant for attachment is not capable of being attached at this point as it has not yet left the Ministry and neither has any other money or property been pointed out by the Applicant as belonging to the Respondent.

12. The upshot is that the application is hereby dismissed with costs.

**Date, signed and delivered at Nairobi this 19<sup>th</sup> day of Feb., 2020**

**B. THURANIRA JADEN**

**JUDGE**