



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS CIVIL APPLICATION NO.431 OF 2017**  
**IN THE MATTER OF THE ARBITRATION ACT (ACT NO.4 OF 1995)**  
**THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH) RULES 2012**  
**AND**  
**IN THE MATTER OF AN ARBITRATION BETWEEN**  
**BONFIDE CLEARING & FORWARDING COMPANY LIMITED..APPLICANT**  
**AND**  
**GEOTHERMAL DEVELOPMENT COMPANY LIMITED.....RESPONDENT**  
**IN THE MATTER OF AN APPLICATION TO DETERMINE ISSUES OF LAW, SET ASIDE AND/OR V**  
**ARY INTERIM AWARD NO.1 AND CORRECTION OF INTERIM AWARD NO.1 MADE**  
**AND PUBLISHED ON 22<sup>ND</sup> SEPTEMBER 2017 AND 26<sup>TH</sup> SEPTEMBER 2017**  
**RESPECTIVELY BY COLLINS NAMACHANJA ARBITRATOR**  
**BETWEEN**  
**BONFIDE CLEARING & FORWARDING COMPANY LIMITED.....APPLICANT**  
**VERSUS**  
**GEOTHERMAL DEVELOPMENT COMPANY LIMITED.....RESPONDENT**  
**RULING**

(1) Before this Court is the Preliminary Objection dated **28<sup>th</sup> May 2018**, in which **BONAFIDE CLEARING AND FORWARDING COMPANY LIMITED** (the Applicant herein) raised a Preliminary Objection to the Notice of Preliminary Objection, Grounds of Opposition and Written submissions filed by **GEOTHERMAL DEVELOPMENT COMPANY LIMITED**, (the Respondent herein) in reply to the Applicants Further Written submissions filed on **23<sup>rd</sup> May 2018**.

(2) At the outset I wish to sincerely apologize to the parties for the delay in delivery of this ruling. This was due by the fact that the file was misplaced inside my chambers and was only recently retrieved. Notices were then sent out to the parties to the effect that the Ruling would be delivered in the month of March 2020. However due to the global Covid -19 pandemic and subsequent closure of the Courts, this did not happen. Any inconvenience occasioned to the parties by this delay is regretted.

(3) The Preliminary Objection was canvassed by way of written submissions. The Applicant filed its written submissions on **22<sup>nd</sup> August 2018** while the Respondent filed its submissions on **4<sup>th</sup> October 2018**.

## **BACKGROUND**

(4) The Applicant filed the Originating summons dated **23<sup>rd</sup> October 2017** seeking to set aside/vary the Interim Award No.1 made and published on **22<sup>nd</sup> September 2017** by **Mr. Collins Namachanja** Arbitrator. This Originating Summons was duly served upon the Respondent's Advocate on **24<sup>th</sup> October 2017**. The Respondent filed its Memorandum of Appearance on **30<sup>th</sup> October 2017** but did not file any reply to the Originating summons.

(5) On **6<sup>th</sup> February 2018**, the matter was mentioned in open Court and directions were given that the Originating Summons would be canvassed by way of written submissions. The Claimant and the Respondents were each granted 28 days to file their written submissions.

(6) The claimant filed a further list of documents together with its written submissions on **6<sup>th</sup> March 2018**. The Respondents filed their written submissions on **10<sup>th</sup> April 2018**. On **17<sup>th</sup> April 2018** the Claimant sought and obtained leave to file further Written submissions. The same were filed on **11<sup>th</sup> May 2018**. Parties were due to appear in Court for highlighting of the written submissions on **30<sup>th</sup> May 2018**. However before that date on **23<sup>rd</sup> May 2018**, the Respondent filed in court a notice of Preliminary Objection, Grounds of Opposition and written submissions in reply to the Claimants further written submissions.

(7) The Claimant contends that the documents filed by the Respondent on **23<sup>rd</sup> May 2018** were all filed out of time as the pleadings had effectively been closed on **11<sup>th</sup> May 2018** and that the same were filed without leave of the court. The Claimant then filed the present Notice of Preliminary Objection dated **28<sup>th</sup> May 2018**.

(8) The Respondent submitted that the Preliminary Objection dated **28<sup>th</sup> May 2018** had no merit and argued that by the same the claimant appeared intent on frustrating the substantive hearing of its own Notice of Motion. That the said Preliminary Objection is an example of frivolous applications aimed at clogging the court process to the detriment of the oxygen principle espoused in **Section 1A and 1B** of the **Civil Procedure Act Cap 21, Laws of Kenya**.

(9) On the other hand the Respondent submitted that the Applicants Preliminary Objection was merely a misguided adventure aimed at delaying the hearing of the main summons. The Respondent contends that an Originating summons need not be responded to as **Order 37** makes no provision for any response and only provides for a memorandum of appearance.

## **ANALYSIS AND DETERMIANTION**

(10) The Claimant submitted that the Respondents filed their Grounds of Opposition out of time and without leave of the court and submits the same ought to be struck out. The Respondent submitted that the Preliminary Objection had no merit and argued that by the same the claimant appears intent on frustrating the substantive hearing of its own Notice of Motion. It is lamentable that in many instances parties file applications and processes which appear aimed at clogging the court system and exhausting the already stretched capacity of the court.

(11) In **BEATRICE WANJIRU KAMURI –VS- JOHN KIBIRA MUIRURI [2016] eKLR Justice Sila Munyao** observed as follows:-

**“If a party does not file his documents within time, he needs to give reasons as to why his documents need to be admitted, or else there is a risk that the same may be struck out. Though striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the court process and attempting to steal a match on the other party. But that does not mean that parties ought to take for granted what is prescribed in the rules. I do not think that a party who cannot give good reason why he/she has filed his/her documents late ought to go scot-free as if there has been no breach of rules. There ought to be sanctions, in the form of fines or costs meted out upon such party, or else litigants will have no incentive to file their documents within the prescribed period. There is a purpose why the rules prescribe for various time frames within which to file and serve documents and these time frames ought to be given the utmost respect.”** [own emphasis]

(12) The Respondent herein has not advanced any reason why its Grounds of Opposition were filed a full eight (8) months after the applicant filed and served on them the Originating Summons. According to the Respondent an Originating Summons ought to be treated as a Plaint. A Plaint does ordinarily require some form of a response. From **October 2010** when the originating summons was filed to **May 2018** when the Respondent filed its Preliminary Objection and Grounds of Opposition dated **22<sup>nd</sup> May 2018** the Respondent had made no response to the Originating summons. Coming up with a response to the Originating summons eight (8) months after the fact and **after** the Court had already given directions regarding the canvassing of the Originating Summons dated **23<sup>rd</sup> October 2017** is clearly a ploy aimed at delaying the determination of the main application otherwise why would a party wait until the eleventh hour to file a Preliminary Objection.

(13) My finding is that the submissions filed by the Respondent on **23<sup>rd</sup> May 2018** cannot be deemed to be its response to the Originating Summons filed by the Claimant On **17<sup>th</sup> April 2018** the Court gave directions on disposal of the Originating summons. Instead of adhering to those directions the Respondent without seeking leave filed the Notice of Preliminary Objection and Grounds of Opposition dated **22<sup>nd</sup> May 2018**. Pertinently no leave was sought by the Respondent to file the Preliminary Objection and the Grounds of Opposition together with written submissions. Rules of Procedure must be followed. A party cannot just ride roughshod over laid down procedure ignore court directions and expect a pass. I find the Respondents actions to amount to an abuse of court process.

(14) Accordingly I direct that the Respondent Preliminary Objection and Grounds of Opposition dated **22<sup>nd</sup> May 2018** filed in court on **23<sup>rd</sup> May 2018** having been filed without leave of the Court be and are hereby expunged from the court record. Costs to the Claimant.

**Dated in Nairobi this 15<sup>th</sup> day of April 2020.**

.....

**Justice Maureen A. Odero**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

.....

**Justice Maureen A. Odero**