



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E384 OF 2019

C. M. CONSTRUCTION (E. A) LIMITED..... PLAINTIFF

VERSUS

KAMPALA INTERNATIONAL UNIVERSITY.....DEFENDANT

RULING

Background.

1. Sometime in the year 2014, the parties herein entered into an agreement in which the applicant/defendant contracted the respondent/plaintiff to carry out construction work at the applicant's site situate in Kajiado. Sometime in the year 2015, a disagreement arose between the parties that caused the respondent to stop any further work at the site.
2. The respondent then filed a Notice of Motion application dated 30th October 2019, seeking orders for the removal of its equipment and material from the building site and to refer their dispute to arbitration. The respondent's said application was allowed on 28th November 2019 thus precipitating the filing of the application that is the subject of this ruling.

Application

3. Through the application dated 22nd January 2020 and amended on 12th June 2020, the applicant (Kampala International University) seeks the following orders: -

- 1. That this court's orders issued on 28th November 2019 be reviewed, varied and/or set aside upon such terms and conditions as this court may deem just.*
- 2. That the costs of this application be borne by the respondent.*
- 3. That the applicant herein be allowed to commence a suit under this same case number E384 pf 2019 with the applicant being the plaintiff and the respondent being the defendant to recover damages for property stolen.*
- 4. That in the alternative the applicant herein be allowed to commence a suit against the respondent herein touching on the matters arising from the proceedings herein for the recovery of damages for the stolen property.*
- 5. That this court be pleased to grant any further relief that it may deem fit and just.*

4. The application is supported by the affidavit of the applicant's Chairman of Board of Trustees **Mr. Hassan Basajja** and is premised on the grounds that: -

- a) That there was no proper suit before this court as the respondent initiated the suit through a Notice of Motion which is not a prescribed mode for instituting a suit and therefore the proceedings are a nullity.*
- b) That the subject matter of the dispute herein is situate in Kajiado county and is not within the territorial jurisdiction of this honourable court.*
- c) That the subject matter herein falls under the purview of Arbitration and the orders issued exceed the mandate of the court under Section 7 of the Arbitration Act.*

- d) *That the threshold for granting a mandatory injunction at an interlocutory stage was not met.*
- e) *That the purported service of the hearing notices upon the applicant by registered post was irregular.*
- f) *That one of the orders issued by the court referred the matter to arbitration.*
- g) *That the matter cannot be referred to arbitration as the subject matter has been greatly compromised and the conduct of the respondent has resulted in the loss of the right to Arbitrate.*
- h) *That based on the strength of the orders issued by this honourable court the respondent herein stormed applicant's construction site at Kitengela and stole property belonging to the applicant valued at over Two Hundred Million Kenya Shillings (Kshs 200,000.000/=).*
- i) *That the respondent's action amounts to arbitrary deprivation of the applicant's property rights and contravene Article 40 of the Constitution of Kenya 2010.*
- j) *That in the absence of a plaint the applicant herein cannot file a defence or counter-claim for the recovery of the stolen property.*
- k) *That the Civil Procedure Act at Section 7 does not allow the applicant herein to file a separate suit where the subject matter was either directly or substantially an issue in a former suit between the same parties.*
- l) *The equity will not suffer a wrong to be without a remedy.*
- m) *That in the circumstances it is only fair and just that this court be pleased to allow the applicant herein to commence a suit under this same case number E384 of 2019 with the applicant being the plaintiff and the respondent being the defendant to recover damages for the property stolen.*
- n) *That in the alternative the applicant herein be allowed to commence a suit against the respondent herein touching on the matters arising from the proceedings herein for the recovery of damages for the stolen property.*

5. The respondent (C. M. Construction E. A. Limited) opposed the application through the replying affidavit of its Managing Director **Mr. Manji Ravji Vekaria** who avers that by an agreement dated 25th May 2014, the defendant engaged the plaintiff to construct several buildings (seven blocks) at a fixed price of USD 15,015,000/= (approximately Kshs 1,501,500.000/=). He produced a copy of the agreement in the replying affidavit as exhibit marked "MRV1".

6. He states that the plaintiff proceeded diligently with the work for which the defendant would make payments in stages but that sometime in 2015, the defendant defaulted and stopped making the payments that had accumulated arrears of USD 1,550,000/-. He adds that following the default, plaintiff stopped further work on site and decided move some its equipment and materials to other active sites so as to minimize losses but was unlawfully prevented by the defendant's guards who were manning the main gate.

7. He states that plaintiff had no option but to file the instant suit seeking two main prayers as follows; -

i. That the court be and is hereby pleased to compel the defendant, its servants and/or agents or otherwise howsoever by way of a mandatory injunction to allow the plaintiff to remove the following equipment and materials from the site pending the appointment of the arbitrator: -

a) Scaffolding.

b) Unused timber of various sizes.

ii. That the suit be referred to Arbitration in accordance with Clause 25 of the Contract Agreement dated 25th April 2014 between the plaintiff and the defendant.

8. He states that contrary to the averments by the defendant, the suit papers were duly served upon the defendant who failed to attend court when the matter came up for hearing on 11th November 2019 and 28th November 2019. Exhibit "MRV2" are copies of the affidavits of service filed on 8th November 2019 and 22nd November 2019 respectively.

9. He further avers that the equipment and the materials that the plaintiff took from the site belong to the plaintiff as a contractor who is free to move them in and out of the site. He contends that the setting aside or variation of the orders issued on 28th November 2019 will not serve any useful purpose since the dispute has been referred to arbitration and the plaintiff was only interested in taking materials and equipment belong to it.

10. He further states that the plaintiff only took equipment and materials from the site in compliance with the court order which materials were verified by the defendant's security guards who could not have allowed the plaintiff to exit the main gate with the defendant's property.

11. In a rejoinder to the respondents replying affidavit, the applicant's deponent **Mr. Basajja** swore a further affidavit dated 29th June 2020

wherein he states that there is ample evidence to show that the respondent took items in excess of what was expressly provided for by the court order of 28th November 2019. He also avers that the items taken by the respondent were not verified by the defendant's security guards as alleged by the respondent.

12. Parties canvassed the application by way of written submissions which I have carefully considered. The question which then arises is whether the applicant has made out a case for the granting of the orders sought.

Review.

13. The applicant seeks orders to review, vary and/or set aside the orders issued on 28th November 2019 on the basis that the threshold set for granting a mandatory injunction, at an interlocutory stage was not met and that it was not properly served with the hearing notices. On its part, the respondent argued that the instant application is an appeal disguised as an application for review, variation and/or setting aside. It was the respondent's case that the applicant was properly served with the hearing notice by way of registered post.

14. Section 80 of the Civil Procedure Act stipulates as follows on review applications: -

"80. Review

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

15. Order 45 Rule 1 of the Civil Procedure Rules(CPR) on the other hand stipulates as follows; -

"Application for review of decree or order.

1. (1) Any person considering himself aggrieved—

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

16. In the present case, I note that the applicant has not demonstrated that it has discovered any new matter that was not within its knowledge or that there is a mistake on the face of the record so as to warrant the issuance of the orders of review.

17. I further note that the orders sought to be reviewed were not extracted and attached to the instant application thus making the application defective. I am guided by the decision in *Suleiman Murunga v Nilestar Holdings Ltd & Another* [2015] eKLR wherein it was held: -

"A plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the defendants sought to be reviewed was not annexed with the result that the defendant's application was defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of Order 45 of the Civil Procedure Rules as relates to review of the decree or order."

18. For the above reasons, I find that the application does not satisfy the conditions for orders or review as set out under Order 45 Rule 1 of the Civil Procedure Rules.

Setting aside.

19. As I have already stated in this ruling, the applicant sought to set aside the impugned orders of 28th November 2019 while arguing that it was not properly served with the hearing notices. I have perused the affidavit of service sworn on 21st November 2019 that was attached to the respondent's replying affidavit as annexure "MRV2" and I note that at paragraph 4 thereof, the process server states as follows: -

"That on the same day I served the Mention Notice upon the Kampala International University by Registered Post after it became clear that their offices are closed and it is not known when the same will be opened. I enclose herewith the forwarding letter dated 15th November 2019, Certificate of Posting dated 15th November 2019, Mention Notice dated 15th November 2019 coming up on 28th November 2019."

20. The applicant did not dispute/deny that the address used by the process server belongs to it or that the subject letter was undelivered and returned to the sender. Order 5 Rule 3 of the Civil Procedure Rules stipulates as follows: -

“Service on a corporation.

3. Subject to any other written law, where the suit is against a corporation the summons may be served —

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation”.

21. Courts have taken the position that the discretion to set aside orders should only be exercised in the most deserving cases and not to assist a party who seeks to delay justice. In the present case, I am not satisfied that the applicant deserves the orders to set aside the impugned orders which were to allow the respondent to take its materials and equipment from the site and to refer the dispute to arbitration.

22. I note that while the applicant claimed that the materials taken from the site were in excess of what belonged to the respondent and was the applicant’s property valued at Kshs 200,000,000. I however note that no material was placed before this court to show that the applicant owned such property.

23. In seeking the review/setting aside the applicant argued that the application dated 30th October 2019 was fatally defective, as it was commenced through a notice of motion and that the orders issued exceed the court’s mandate under Section 7 of the Arbitration Act. It was further argued that the respondent hoodwinked the court into believing that there was a dispute to be determined by an arbitrator. It was the applicant’s case that the respondent did not need to come to court to initiate Arbitration proceedings or to have the matter referred to arbitration.

24. My understanding of the applicant’s above arguments is that it attacks the merits of the ruling of 28th November 2019 on the basis that there were errors in the law and facts. It is trite law that erroneous conclusions of law or facts do not form a ground for review but may be grounds of appeal. (see *Origo & Another v Mungala* [2005] 2 KLR cited in *Jameny Mundaki Asava v Brown Otengo Asava & Another* [2015] eKLR.

25. Having regard to the above cited provisions regarding service and my findings on the issue of proof of ownership of the alleged stolen property, I find that the applicant has not made out a case for the granting of the orders to set aside the impugned orders.

Leave to commence suit.

26. The applicant also sought the leave of this court to commence suit under this same (case number E384 of 2019) against the respondent to recover damages for stolen property. My finding is that, this court, having found that all the disputes between the parties ought to be referred to arbitration, cannot turn around and grant leave for the commencement of a suit before this court under the same case number.

27. As regards the issue of res judicata, I am of the humble view that the same would not arise in respect to the alleged stolen property as it has not been the subject of a similar suit between the same parties that has been conclusively determined by a court of competent jurisdiction. The respondent however submitted that it was not opposed to the court converting the instant case to a main suit so as to enable it file a plait while the defendant files a counter claim. I find this proposition to be contrary to the provisions of the Civil Procedure Act on the institution of suits.

28. In the circumstances of this case, I find that the prayers sought in the amended application dated 12th June 2020 are not merited and I dismiss them with no orders as to costs. The applicant is however at liberty to commence a suit against the respondent herein for recovery of damages for the alleged stolen property.

Dated, signed and delivered via Microsoft Teams at Nairobi this 3rd day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ochwo for the Plaintiff.

Miss Mboya for the Applicant

Court Assistant: Sylvia