



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. E 705 OF 2020**

**GLAMOUR CONSTRUCTION AND CIVIL ENGINEERING COMPANY LIMITED.....APPLICANT**

**-VERSUS-**

**CHINA WU YI KENYA COMPANY LIMITED..... 1<sup>ST</sup> RESPONDENT**

**KENYA RURAL ROADS AUTHORITY (KERRA).....2<sup>ND</sup> RESPONDENT**

**RULING**

1. I am afraid these proceedings are stillborn and the Court cannot grant prayers in the Notice of Motion dated 28<sup>th</sup> April 2020 which are for:-

4. THAT this Honourable Court be pleased to issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to immediately supply the Applicant with all the copies of the documents, relating to the contract dated 1<sup>st</sup> February 2017 between the Applicant and the 1<sup>st</sup> Respondent. The documents are as follows:-

- i. The main contract signed between the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent.
- ii. All instructions and letters issued by the Consultant/Engineer of the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent.
- iii. General and Specific specifications.
- iv. All the Drawings.
- v. All complete Test Request Forms.
- vi. All Surveyors Record Forms.
- vii. All Requests for Actions Forms.
- viii. All measurements and their backups.
- ix. All the certificates presented by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent.

2. The Applicant entered a subcontract agreement with the 1<sup>st</sup> Respondent for some bitumen works in Kericho County in which the 2<sup>nd</sup> Respondent was the employer. A dispute arose and was referred to arbitration before a Tribunal comprising Antony G. Kimani as sole arbitrator. The Applicant states that it bespeaks the documents to enable it prosecute its claim.

3. The Notice of Motion and the affidavit in support did not reveal that the Applicant had already sought similar orders before the Tribunal. It took the 1<sup>st</sup> Respondent to bring this to the attention of the Court. This is not a compliment on the Applicant's candour in this matter.

4. The evidence is that by a reasoned decision dated 3<sup>rd</sup> March 2020, the Tribunal dealt with the issue of production of the documents. That date is important because it is quite clear that in moving this Court about two months later, the Applicant was seeking to obtain orders it had failed to obtain from the Tribunal without first revealing that it had made the unsuccessful attempt.

5. A major hurdle in the way of these proceedings, as pointed out by the 1<sup>st</sup> Respondent, is that they have been brought without the approval of the Arbitral Tribunal as contemplated by the provisions of section 18(2) of the Arbitration Act.

6. The Application itself proclaims that it is brought, inter alia, under the provisions of section 18(2) and (3) of the Act. Section 18 reads:-

“Power of arbitral tribunal

(1) 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

(c) order a claimant to provide security for costs.

(2) The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1).

(3) 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.”

7. As the Applicant has sought intervention of this Court without the prior approval of the Tribunal, then it is in breach of the provisions of section 18(2) and this matter should not go any further. An attempt to again overwork the provisions of article 159 (2) of the Constitution will not do. That article reads:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

8. This permission required by section 18(2) of the Act is not a procedural technicality. It is a matter of substance. To understand the provisions of subsection (2), one must read them in conjunction with subsection (1). Subsection (1) sets the three types of orders the Tribunal can make; an order for interim protection, for security in respect of a claim or amount in dispute or security for costs. Subsection (2) foresees that there will be occasion when the Tribunal or a party may find it necessary to seek the assistance of the Court in implementing any of the powers conferred on it under subsection (1). For instance, an interim measure of protection ordered by the Tribunal may require police intervention in its enforcement. The Tribunal cannot make an order directed at the police but the High Court by dint of the provisions of subsections (2) and (3) can do so for purposes of bringing efficacy into the order of the Tribunal.

9. In the matter before Court, the Tribunal did not perceive that it was powerless to consider and make orders for the production of the documents sought and indeed dealt with the matter substantively. It did not feel it is necessary to seek the assistance of the Court either under the provisions of section 18 or other provisions of the Arbitration Act.

10. The intervention of the High Court in arbitration matters brought under the provisions of the Arbitration Act are circumscribed. Section 10 is clear on this and provides:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

11. This Court is unable to see under which provisions of the Arbitration Act this Court can intervene in the manner sought. An attempt to invoke this Court’s unlimited jurisdiction under Article 165(3) (a) of the Constitution and supervisory jurisdiction under Article 165(6) will simply not work. The Supreme Court has, not so long ago, in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute

of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR reiterated that the High Court's power to intercede in matters under the Arbitration Act is restricted by the provisions of Section 10.

12. The Application of 28<sup>th</sup> April 2020 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 7<sup>th</sup> Day of December 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

**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 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Lakicha for Applicant**

**Ms Avedi for 1<sup>st</sup> Respondent**