REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 356 OF 2015

ELSEK & ELSEK CONSTRUCTION COMPANY LIMITED..APPLICANT

- VERSUS –

PRESBYTERIAN UNIVERSITY OF EAST AFRICA REGISTERED TRUSTEES......RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 15th March 2019. It is filed by the Presbyterian University of East Africa (herein after PUEA).

BACK GROUND

2. PUEA and ELsek & Elsek Construction Limited (herein after ELsek) entered into contracts by which ELsek was to construct buildings and other structures consisting of classrooms, offices and others on PUEA's property known as L.R. No. 7219/15. This project is known as ELsek 1. Disputes arose on money payable by PUEA to ELsek, on material used and workmanship. These disputes culminated in filing of the case Nairobi HCCC 528 of 2011.

3. PUEA and ELsek entered into other contracts for construction of buildings to house laboratories, dining rooms, student centre and other structures. This development is known as ELsek II. Disputes on this project also arose relating to amount payable by PUEA. That dispute resulted in the filing of the case Nairobi HCCC 482 of 2011.

4. There was yet another case between the parties being Mombasa HCCC 28 of 2015.

5. In the case HCCC 528 of 2011 Justice Ogola by a Ruling delivered on 31st July 2012 ordered and directed the parties to resolve the matter by way of arbitration 'in accordance with their various agreements". Parties appointed Qs Patrick Kisia as a sole arbitrator. While that arbitration had fully been heard and was awaiting parties to present their submissions parties entered into a settlement agreement dated 4th June 2015. By that agreement the parties agreed to settle their pending disputes, court cases and arbitration in terms of that agreement. That agreement was reduced into an arbitral award. Through an application, in this matter, that arbitral award was, by consent of the parties, adopted on 14th October 2015 as a decree of this court.

6. Because the application under consideration in this ruling touches on that decree, I will reproduce it here for better understanding.

> **"REPUBLIC OF KENYA**
>
> **IN THE HIGH COURT OF KENYA AT NAIROBI**
>
> **MILIMANI LAW COURTS (COMMERCIAL DIVISION)**
>
> **MISC NO. 356 OF 2015**
>
> **ELSEK & ELSEK CONSTRUCTION COMPANY ....APPLICANT**
>
> **-VERSUS-**

PRESBYTERIAN UNIVERSITY OF EAST AFRICA

REGISTERED TRUSTEES .... RESPONDENT

DECREE

APPLICATION FOR ORDERS:

1. THAT the application be certified as urgent and be heard ex-parte in the first instance.

2. THAT the Arbitration Award dated 10/6/2015 and the Additional Award dated 3/8/2015 be adopted and enforced as a Decree of this Honourable Court.

3. THAT the costs of this application be provided for

IT IS HEREBY ORDERED BY CONSENT

1. THAT the Award filed herein be and is hereby adopted as Judgment of the Court for enforcement pursuant to section 36 (1) of the Arbitration Act.

2. THAT the claimant shall pay to the Respondent the following amounts in full and final settlement of the disputes, cases and arbitration:

a. Kshs. 30,355,200.00 for the construction and completion of ELSEK II as follows:

i. Kshs. 1,500,000.00 within fourteen (14) days of signing the consent.

ii. Kshs. 28,855,200.00 on or before 30th July, 2015 and:

b. THAT the Claimant shall pay to the Respondent the amount of Kenya Shillings Six Hundred Million (Kshs 600,000,000) only which is negotiated and agreed in full and final settlement of the disputes, cases and arbitration which is in dispute at the above mentioned Courts and will be paid in the following mode and manner:

i. Kshs 200,000,000.00 on or before 30th October, 2015 with Kshs 100,000,000.00 being paid to the Respondent and Kshs 100,000,000.00 to Bermuda Holdings Ltd.

ii. Kshs 100,000,000.00 in three equal instalments during each of the three semesters in 2016, with Kshs 50,000,000.00 being paid to the Respondent and Kshs 50,000,000.00 to Bermuda Holdings Ltd.

iii. Kshs 150,000,000.00 in three equal instalments during each of the three semesters in 2017 with Kshs 75,000,000.00 being paid to the Respondent and Kshs 75,000,000.00 to Bermuda Holdings Ltd.

iv. Kshs 150,000,000.00 in three equal instalments during each of the three semesters in 2018, with Kshs 75,000,000.00 being paid to the Respondent and Kshs 75,000,000.00 to Bermuda Holdings Ltd. The payment to either of the two beneficiaries without payment to both will constitute default.

v. The calendar of semesters for the years 2016, 2017 and 2018 was attached to the consent.

vi. The Respondent will advise the Claimant of the details of the account or accounts to which each instalment shall be remitted at least 5 days before the due date. The details of the account or accounts will be provided by the Respondent to the Claimant by email, by post, by fax or hand delivery. The Claimant will advise the Respondent of any change in their email, postal and the physical address on time.

3. THAT payment of Kshs 1,500,000.00 set out in paragraph 15 (a) (i) above, the Respondent shall move back to the site of ELSEK I within 14 days and carry out any remedial repair works AND simultaneously move back to site of ELSEK II to complete the construction works.

4. THAT it was understood and agreed between the Claimant and the Respondent that payment of Kshs 1,500,00.00 within 14 days of signing the consent, and the payment of Kshs.28,855,200.00 to be made on or before 30th July, 2015 making a total of Kshs 30,355,200.00 constitute the amounts required by the Respondent to enable it construct and build and complete the works of ELSEK II and that repairs and remedial works on ELSEK I shall be carries out by the Respondent free of charge. Work to be done in ELSEK I has to be listed by the Claimant's Vice Chancellor and the Respondent's Representatives before the work start.

5. THAT the three court cases referred to in Recitals 2,4 and 5 of the Settlement Agreement shall be withdrawn by consent of the parties immediately upon signing of the Settlement Agreement in terms of the consent letters signed by the respective advocates of the parties simultaneously with signing of the Settlement Agreement.

6. THAT the terms of the Settlement Agreement shall be filed with the Arbitrator, Qs Patrick Kisia in the ongoing arbitration clearly indicating the terms of settlement including the reference of the dispute on ELSEK II for arbitration before the same arbitrator so that the resultant consent award shall over settlement of both ELSEK I and ELSEK II although only ELSEK I had previously been referred to arbitration. Both the Respondent and the Claimant agreed, and accepted that the Consent Award arising from the Settlement Agreement shall be valid award enforceable through the court as a decree. For the avoidance of doubt any of the parties may present the arbitral award arising out of the Settlement Agreement to the High Court of Kenya for recognition and enforcement. For this purpose both parties agreed that the terms of reference and the jurisdiction of the arbitrator was extended to include the dispute on ELSEK II. It was further agreed that none of the parties may challenge, apply to vary or set aside the Settlement Agreement on any question of law or fact. The right of appeal or challenge was expressly excluded. In so far as the recognition and enforcement is concerned the Settlement Agreement overrides and is independent of the arbitral proceedings.

7. THAT both the Respondent and Claimant agreed that should the Claimant default in payment of the periodic or instalments amounts set out in the Settlement Agreement on the due dates, the Respondent shall be at liberty to enforce the consent Arbitral Award in Court. For the avoidance of doubt, should the Claimant default in payment of any one instalment, the full amount then outstanding shall become forthwith due and payable and the Respondent shall be at liberty to enforce the Consent Award and interest then payable shall be at the rate of 50% p.a. or 4.175 per month.

8. THAT each party shall pay their respective legal costs, court costs and arbitration costs for the cases referred to in the Settlement Agreement.

9. THAT the Settlement Agreement was negotiated and entered into by the Claimant and the Respondent in good faith, without undue pressure, willingly and voluntarily with good will and for the purpose of reconciliation and in full and final settlement of the disputes referred herein, and with intention of restoration of good and amicable relations between them.

10. THAT the Trustees of the Claimant and the directors of the Respondent confirmed and warranted that they had the capacity and authority to sign the Settlement Agreement. None of the parties is bound to make inquiries as to such capacity or authority.

11. THAT this is the final and complete agreement and settlement reached between the parties and it can only be varied, changed or altered by mutual written agreement of both the Respondent and the Claimant.

GIVEN under my hand and the seal of the Court at Nairobi this 14th day of October, 2015.

ISSUED at Nairobi this 22nd day of January, 2016.

DEPUTY REGISTRAR

HIGH COURT OF KENYA

COMMERCIAL AND ADMIRALTY DIVISION

NAIROBI."

THE APPLICATION

7. PUEA by the Notice of Motion dated **15th March 2015** seeks the following prayers:

a. THAT execution and or further proceedings in furtherance or execution be stayed pending the hearing of this application.

b. THAT the Order/Decree given by this Honourable Court on 14th October 2015 be reviewed, varied and set aside.

c. THAT if the said order/decree is not reviewed, this honourable court deem it fit to declare that the decree cannot be enforced against the applicant due to the decree holder's default that has impeded the applicant's satisfaction of any debts due to the Decree Holder.

d. THAT this Honourable c*ourt do make such other or alternative orders as would meet the interest of justice.*

8. That application is supported by affidavits sworn by Prof John K. Mungania, the Vice Chancellor of PUEA. The deponed referred to a report, annexed to the affidavit, of a quantity surveyor (QS) namely Emjay consultants. He summarised the findings of QS as follows:

i. The value of the buildings and infrastructure erected by the respondent is Kshs. 63 Million as of now.

ii. There appears to have been no approvals by any of the construction and local Authorities prior to the construction.

iii. The material used had not been certified by Kenya Bureau of Standards and are substandard.

9. On the basis of that report the deponent stated that it was now apparent that Elsek had misled PUEA on the value of the infrastructure and hence that the whole agreement was based on substratum of misrepresentation.

10. PUEA by seeking to review the decree reproduced above argued that a review should be allowed because that decree has an error apparent on the record. The error PUEA pinpointed to, in that decree, was the clause that is:

> **"In so far as the recognition and enforcement is concerned, the Settlement Agreement overrides and is independent of the Arbitral proceedings."**

11.PUEA argued that that clause ousted the provisions for setting aside an arbitral award under the Arbitration Act and also ousted Article 160 of the Constitution of Kenya, by stifling the judicial authority to intervene in relation to rights of parties. In PUEA's view the above clause separated the arbitral proceedings from the settlement Agreement and consequently separated that Agreement from the decree that flowed from the arbitral proceedings. PUEA further argued that because the settlement Agreement superseded or was deemed to override the arbitral proceedings the decree, reproduced above, cannot be pegged on Arbitration Act. That is, that the decree was not from the arbitral award but that it was *sui generis*.

12. I have considered the parties affidavit evidence and submissions on the prayer for review of the decree.

13. Review of decree or order is under Order 45 of the Civil Procedure Rules. That Rule provides:

> **"45 (1) Any person considering himself aggrieved 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 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.**"

14. The jurisprudence of Order 45 of the Civil Procedure Rules (the Rules) is that an application for review should be promptly filed. What is inordinate delay depends on the facts of the particular case. See **Nyamogo & Nyamogo Advocates v Kago (2001) 2EA 173**.

15. In this case the decree, which PUEA seeks to review is of 14th October 2015. PUEA seeks to review that decree by its application dated 15th March 2019. No explanation, whatsoever, was offered by PUEA why it had delayed more than three years in seeking review. There is no doubt that PUEA's application is filed after unreasonable delay from the date of the decree. On that ground alone and because that delay was not explained the application fails.

16. PUEA also sought review on the ground that the decree had an error apparent on the face of the record. The error, it will be recalled as stated above, was that the settlement Agreement ousted the provisions of the Arbitration Act and the Constitution. The court of Appeal in the case **SAMUEL AMUGUNE & 4 OTHERS VS ATTORNEY GENERAL (2018) eKLR** discussed an error apparent on the face of the record and said this:

> "The submission by the appellant is perplexing. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. In **Chandrakhant Joshibhai Patel vs. R [2004] TLR, 218** it was held that an error stated to be apparent on the face of the record:
>
> **"....must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."**

In **Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR,** this Court stated as follows:

> **"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."**

17. What is clear from the record is that PUEA and Elsek entered into a settlement agreement. They did so at the tail end of the arbitral proceedings. They agreed that the said agreement would be reduced into an arbitral award. For PUEA to argue that there was an error in the clause in the agreement which provided that the agreement would override the arbitral proceedings is in my view farfetched. My understanding is that the parties agreed that their settlement agreement would override the proceedings that had taken place before the arbitrator, further the parties agreed that that agreement would be reduced to be the arbitral award and finally the parties agreed that the arbitral award would be adopted by the court and a decree would issue. There is no error that I can see in the clause which ousted the proceedings in arbitration.

18. There is no error in my view when parties agreed that the agreement, which was to be adopted into a decree, was final and complete agreement and settlement between the parties which can only be varied, changed or altered by mutual written agreement of both parties. This after all is one way of resolving dispute which is recognized by Article 159 (1) (c) of the Constitution of Kenya.

19. PUEA also sought review of the decree herein on the basis of other sufficient reason, as provided under Order 45(1) of the Rules. PUEA

argued that the decree provides for calculation of interest at the rate of Ksh 2,340,006 per day which amount Elsek add to the total of the previous day and compounded to make a higher figure the following day. According to PUEA because of that calculation of interest the sum which was Ksh 630 million in **October 2015** has risen to Ksh 1.6 billion in less than two years.

20. It ought to be recalled that parties by their agreement entered into a consent which culminated into the decree in question. Now, PUEA has made previous application in this matter which was the subject of a Ruling by **Justice Ochieng** on **6th June 2016**. That application related to execution of the decree. In that Ruling the learned judge observed:

> **"It is common ground that the terms of the arbitral award were consensual. The applicant (PUEA) has not suggested that there is any reason why it could seek to set aside or vary the consent. In the event, the court is entitled to conclude, as I have done, that the terms of the consent are not being challenged. That therefore means that the said terms will remain undisturbed."**

21. Since, therefore, the settlement agreement and the eventual decree were consensual on what basis can PUEA seek to set aside/review the decree.

22. Clause 5 of the settlement agreement provides:

> **"Both Elsek and PUEA agree and accept the consent award arising from this agreement shall be valid award enforceable through the court as a decree."**

23. In the case often quoted **FLORA N. WASIKE V DESTIMO WAMBOKO (1988) eKLR** the court of appeal made reference to the case **BROOKE BOND LIEBIA V MALLYA (1975) EA 266** as follows:

> **"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding contract between the parties."**

24. That quotation is indeed the jurisprudence on setting aside consents. PUEA has, in my view, not demonstrated any ground which would permit this court to set aside the consent in the settlement agreement. What PUEA seems to seek from this court is to be relieved of the terms, particularly on interest, of that agreement.

25. Prof John Mungania by his affidavit sworn on 2nd April 2019 stated that he had been informed; he did not say by who; that the interest rate in the settlement agreement was not negotiated but was inserted, in the agreement, by Elsek. Now that allegation is very unsatisfactory. It does not reach the standard of proof for fraud, which is what the deponent seems to suggest. It therefore cannot be a basis of setting aside the settlement agreement.

26. The fact that the parties agreed that PUEA would pay Ksh100,000,000/= to another entity called Bermuda holdings Ltd is not a basis to set aside the consent. That is their agreement and this court respects it.

27. PUEA prayed in the alternative that the court do find that Elsek by its default has impeded it. On making that finding PUEA sought the court to then find that the decree cannot be enforced.

28. PUEA set out the default of Elsek by saying that Elsek I had not been completed. On this I am perplexed because by an agreement dated 11th December 2017 parties acknowledge this:

> **"Elsek completed the repairs of phase one (Elsek I) according to the Decree with PUEA for phase one and by the acceptance of the VC of PUEA on the handing over documents dated 30th September, 2015."**

29. With that acknowledgment it is difficult to understand the allegation now made that Elsek I was incomplete. That allegation in the light of the above clause is rejected.

30. Similarly the allegations by PUEA that Elsek has failed to work on Elsek II is not supported by the agreement dated 11 th December 2017 at clause No 10 which provided:

> **"ELSEK also supplied construction materials for phase two on 1st September, 2015 and 8th September, 2015 and materials confirmed to be in possession of PUEA secured premises according to the Decree. ELSEK also for phase two send her workmanship for completion of the said construction but was not supplied with the necessary building permissions and necessary construction approvals by PUEA to continue. Moreover, PUEA did not make payments as per schedule for the work already done for phase one and for investment of phase two making it difficult for ELSEK to continue with the completion of phase two."**

31. It becomes clear from the above discussion that the Notice of Motion dated 15th March 2019 is without merit. It is therefore dismissed with costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **6th day** of **November,** 2019.

MARY KASANGO

JUDGE

<u>Ruling read in open court in the presence of</u>

Sophie .... Court clerk.

.... FOR THE RESPONDENT

....FOR THE APPLICANT