



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 234 OF 2017

PARAGON ELECTRONICS LIMITED.....APPLICANT

VERSUS

OUSAINOU NGUM.....1ST RESPONDENT

KHADIJATOU FRANCES NGUM.....2ND RESPONDENT

RULING

1. This is the notice of motion dated 25th March 2019 brought under Article 50(1) of the Constitution, order 40 rule 4(3) and order 47 rule 8 of the Civil Procedure Rules and all other enabling provisions of the law.
2. It seeks orders:-
 - (a) *Spent.*
 - (b) *Spent.*
 - (c) *The honourable court be pleased to declare that the interim orders given on 6th March 2019 staying the summons have automatically lapsed.*
 - (d) *The honourable court be pleased to set aside the orders given on 6th March 2019.*
 - (e) *The respondents to bear costs of this application of full indemnity basis.*
3. The grounds are on the face of the application and are set out on paragraphs 1 to 12.
4. The affidavit is supported by the affidavit of Clemence Wakio, a representative of the Applicant's company sworn on the 25th March 2019.
5. The application is opposed. There is a replying affidavit sworn by Ousainou Ngum, the 1st respondent herein sworn on the 23rd April 2019. The respondents also filed a notice of preliminary objection dated 5th December 2019.
6. On the 10th July 2019, the court, with the consent of the parties directed that this application be canvassed by way of written submissions.

The applicant's submissions

7. The interim orders given on 6th March 2019 staying the summons have automatically lapsed. The said orders were not served within three (3) days as stipulated by order 40 rule 4(3) of the Civil Procedure Rules. The said orders were obtained exparte.
8. The respondents deliberately suppressed material facts when they appeared exparte, before court and obtained orders of 6th March 2018. They did not disclose to the court that on 5th February 2019, the Applicant wrote to Prof. Albert Mumma and requested him to voluntarily appear before the Arbitral tribunal and give evidence yet to date he has not bothered to respond to the said letter.
9. The orders given on 6th March 2019, were obtained without compliance with the requirements in law for challenging the decision of a Deputy Registrar of this Honourable Court. This is contrary to the requirements of order 47 rule 8 of the Civil Procedure Rules. It prays that

the orders of 6th March 2019 be set aside or declared to have lapsed.

The Respondent's submissions

10. The current status of the arbitration is that the respondents (who are claimants in the Arbitration) have testified, have called their witnesses and closed their case. The applicant herein is yet to testify and call its witnesses. Instead it has chosen to run parallel proceedings before the arbitration and before the court.

11. The applicant has filed several suits and applications in this court with a view to derailing the arbitration proceedings. They are: notice of motion filed by the applicant in ELC Misc 234 of 2017, chamber Summons dated 15th April 2019 filed in ELC 59 of 2019, notice of motion dated 16th September 2019 filed in ELC 215 of 2017, chamber summons dated 24th March 2017 filed in ELC 215 of 2017, notice of motion dated 6th November 2017 filed in ELC Misc 234 of 2017.

12. This application seeks among other orders, a declaration that the orders granted by J E. Obaga on 6th March 2019 which stayed the purported witness summons to Prof. Albert Mumma (Respondent's advocate) have automatically lapsed and should be set aside. The application also seeks to stay the arbitration process. In answer to this the respondents' case, is that the said witness summons to Prof. Albert Mumma to attend arbitration proceedings (where he is also the advocate for the respondents herein) to give evidence as the applicant's witness, was illegal, null and void *abinitio* as the witness summons were not issued pursuant to an application in court. The registrar who purported to issue the said witness summons did not have the requisite powers and jurisdiction under the arbitration Act, and Rules to issue the said summons.

13. The order by Honourable Judge E. O. Obaga was not an experte injunction but order staying the purported witness summons to Prof Albert Mumma.

14. This Honourable Court lacks the requisite jurisdiction pursuant to Section 10 of the Arbitration Act. They have put forward the Case of **Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR**. Neither Article 50(1) of the Constitution nor order 40 Rule 3 and order 47 rule 8 of the Civil Procedure Rules gives the honourable court jurisdiction to intervene in the ongoing arbitration. They have also put forward the case of **Nyugu Agrovet Limited vs Airtel Networks Ltd [2015] eKLR; Kenya Oil Company Ltd & Another vs Kenya Pipeline Company Civil Appeal No. 102 of 2012**. The applicant should not be allowed to break away from an arbitration process that it willingly joined so that it can litigate in court frivolous matters, which are unrelated to the dispute before the Arbitration. This amounts to duplicating the cost and waste of court's time involved, prolonging the time before the arbitration can be concluded. This court has the statutory power to prevent misuse of its procedure to derail the arbitration proceedings. They pray that the application be dismissed for want of jurisdiction and/or for lacking merit.

15. I have considered the notice of motion and the affidavit in support, I have also considered the preliminary objection and the replying affidavit. The issues for determination are:-

(i) *Whether the preliminary objection is merited.*

(ii) *Whether the application dated 25th March 2019 is merited.*

16. The preliminary objection is dated 5th December 2019 and filed in court on the same date. The ground is:-

1. *That the honourable court lacks requisite jurisdiction pursuant to section 10 of the Arbitration Act.*

Section 10 of the Arbitration Act provides that:-

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

17. I agree with the respondent's submissions that none of the quoted provisions, order 40 rule 3, order 47 rule 8 of the Civil Procedure Rules or Article 50(1) of the Constitution can enable this court to give the orders sought in this application. In the case of **Anne Mumbi Hinga vs Victoria Njoki Gathara [2009] eKLR** it was held that:-

“A careful look at all provisions cited in the hearing in the application and invoked by the appellant in the superior court, clearly shows that all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override section 10 the Arbitration Act”.

which states

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

In light of the above the superior court did not have jurisdiction to intervene in any many not specifically provided in the Arbitration Act. The provisions of the Arbitration Act make it clear that it is a complete code except as regards an enforcement of the award/decreed where Arbitration Rules 1997 apply, the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act.....It follows therefore all the provisions invoked do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award on the superior

court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited 1989 KLR 1"

18. I am guided by the above authority in finding that this honourable court lacks jurisdiction to entertain this application. The preliminary objection is therefore found to be merited and it is upheld.

19. I find that the summons to witness dated 27th February 2019 were obtained without an application to court and without prior approval of the Arbitrator as contemplated by Section 10 and 28 of the Arbitration Act. The same are null and void *abinito*. The same are set aside. I therefore find no reason to set aside the orders issued by Honourable Judge Obaga on 6th March 2019.

20. As stated earlier in my ruling dated 17th October 2018, the applicant herein has brought numerous applications with the sole aim of frustrating the arbitration process. This is one of those applications.

21. The upshot of the matter is that I find merit in the preliminary objection and the same is upheld. The application dated 23rd May 2019 lacks merit and the same is dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 4TH day of JUNE 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Applicant

Mr. Obok for the Respondents

Kajuju – Court Assistant