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……..……..……..……DECREE HOLDER/RESPONDENT

-VERSUS -

PRESBYTERIAN UNIVERSITY OF EAST AFRICA

REGISTERED TRUSTEES……...…...…..….JUDGEMENT DEBTOR/APPLICANT

RULING

1. The application before is by the Judgement-Debtor, **PRESBYTERIAN UNIVERSITY OF EAST AFRICA REGISTERED TRUSTEES.**

2. As an interim measure, they sought a stay of execution, until the substantive application was heard and determined.

3. And the substantive relief sought was an order for the restitution to the Judgement-Debtor, the 3 motor vehicles which had been attached.

4. It is the applicant's position that the process of execution, as carried out at the instance of the respondent, was premature.

5. It is the applicant's further position that by commencing the process of execution, the respondent was in breach of the Arbitral Award.

6. The applicant holds the view that as soon as it had made the payment of the first installment of Kshs. 1,500,000/-, the respondent should have moved back on site to carry out the completion of the construction of **ELSEK II.**

7. However, the respondent insists that the construction of **ELSEK II** was never a precondition for the applicant complying with the terms of the Arbitral Award.

8. The respondent submitted that as soon as the applicant had defaulted in the payment of the installments which had become due, the whole decretal amount became payable.

9. In any event, the respondent believes that the court ought not to grant a stay of execution when the applicant had not lodged any appeal to challenge the terms of the arbitral award.

10. It is common ground that the terms of the arbitral award were consensual. The applicant has not suggested that there is any reason why it could seek to set aside or vary the consent.

11. 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.

12. In the circumstances, the question that needs to be tackled next is the scope of an order for stay of execution, if the court were minded to make such an order. Ordinarily, an order for stay of execution would subsist until the hearing and determination of a pending appeal.

13. In this case, the stay order was to remain in force until the application was heard and determined. That therefore means that that prayer is now spent.

14. However, if the court were to order for the restitution of the vehicles that had already been attached, that may be construed as being an act in furtherance of the orders for stay. Indeed, the restitution of the attached goods is a reversal of the process of execution.

15. The applicant says that such an order was very necessary because the respondent was literally holding the applicant to ransom.

16. By not going back onto the site after being paid the first installment, the respondent is said to have caused the applicant to fail to make the other payments as and when they fell due. The applicant's position was that if the respondent had moved back to the site, and had proceeded to construct **ELSEK II,** that would have enabled the applicant to admit more students to the university; thus enabling the applicant to receive more money from the increased number of students.

17. The increased funding would have been used to help the applicant pay to the respondent some of the installments as they fell due.

18. But because the respondent had not constructed **ELSEK II,** the applicant blames it for its failure to raise money which the applicant could have paid to the respondent.

19. If, as the applicant says, the respondent's inaction is what gave rise to the applicant's inability to remit payments on due dates, the applicant submits that it would be inequitable to allow the respondent to punish the applicant for a situation whose architect was the respondent.

20. The applicant further submitted that for as long as the respondent had not moved back to the site and constructed **ELSEK II,** it would be in breach of the arbitral award, and therefore the respondent ought not to be allowed to proceed with the execution.

21. The response to that submission is that the issue about the respondent moving back to the site and constructing **ELSEK II** was irrelevant, as it did not exempt the applicant from making payments when each of them fell due.

22. The answer, according to the applicant, can be found from the fact that each installment was actually scheduled to coincide with semesters as they fell due at the university. Therefore, the applicant submitted that, by necessary implication, the construction of **ELSEK II** and the subsequent admission of more students at the university, were a clear demonstration of the fact that the university was expected to peg its payments to the work being done by the respondent. That being the case, the applicant added that its cash flow was, *prima facie,* introduced into the award.

23. For that reason, the court was invited to tell the respondent that it cannot be allowed to thwart and impede the actualization of the award, and then proceed to execute the decree.

24. The respondent is said to be impeding the process by:

a. Insisting that the Commission of Higher Education should not carry out an inspection of the university's facilities until after the decretal amount was paid. That insistence is said to stand in the way of the university getting a charter;

b. Refusing to remove a caveat against the title to a piece of land in Mombasa. The parties had allegedly agreed that the said piece of land would be sold, and that the sale proceeds would be used towards paying the decretal amount;

c. The attachment of the university's 3 vehicles, whose operational and administrative value to the applicant was enormous. The said action paralyzed the university's operations.

25. Provided that the respondent continued to impede the applicant's activities in the way set out above, the applicant said that it would find it most difficult to comply with the Arbitral Award.

26. In determining this application the court will derive guidance from the terms of the Arbitral Award.

27. The first significant point of note is that this was a Consent Award.

28. Secondly, none of the parties has challenged the said award. Therefore, the court will interpret its terms in the way the parties incorporated them into the award.

29. Clause 15 provides as follows;

"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 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. The claimant shall pay to the Respondent the amount of Kenya Shillings Six Hundred Million Only (Kshs. 600,000,000.00) which is negotiated and agreed in full and final settlement of the disputes, case 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 installments 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 installments 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.

iv. The payment of 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?.

30. The foregoing is the schedule of payments and also defines what constitutes default.

31. The parties concur that the applicant made the first payment within the agreed time-span. That is the payment of Kshs. 1,500,000/-.

32. However, the applicant admits that it failed to make the next payment, of Kshs. 28,855,200/- within the agreed time. That sum was to have been paid by 30th July 2015.

33. In a literal sense, that constituted a default. But the applicant blames the respondent for it. The reason for that blame is to be found in Clause 16 of the Award, which reads as follows:

> ***"Upon 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 repairs AND simultaneously move back to site of ELSEK II to complete the construction works thereon?.***

34. Although the applicant paid Kshs. 1,500,000/-, I find that the respondent did not meet its part of the bargain fully. The respondent was supposed to move to 2 sites. At **ELSEK I,** the respondent was to carry out remedial repairs, whilst at **ELSEK II** the respondent was to complete the construction works.

35. According to the applicant, it is the respondent's failure to move onto the site of **ELSEK II,** and to complete the construction works at that site, which impeded the applicant's ability to meet its financial obligations to the respondent.

36. There is no doubt, from a reading of the award, that the parties were both aware of the linkage between the construction work, the semesters and the payments due from the applicant.

37. Therefore, although there is no scientific proof that the failure by the respondent to move into **ELSEK II** and to complete construction thereon, that made it difficult for the applicant to make payments timeously, I find that there is some merit in the applicant's arguments on that issue.

38. Why do I say so?

39. A reading of Clause 17 of the award reveals that the respondent had agreed to carry out the repairs and remedial works on **ELSEK** I at no cost to the applicant. That therefore means that the sum of Kshs. 30,355,200/- was to have been paid in respect to work on **ELSEK II.**

40. Pursuant to Clause 20;

> ***"Both the Respondent and the Claimant agreed that should the Claimant default in payment of the periodic or installments amounts set out in the Settlement Agreement on 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 installment, 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 4.17 % per month".***

41. As already seen above, the applicant defaulted, when it did not pay the sum of Kshs. 28,855,200/- by 30th July 2015. In accordance with the award, the default by the applicant was sufficient to trigger the process of the execution of the award.

42. But the respondent cannot deny that it also failed to meet its part of the bargain. Therefore, both parties were in breach of the award.

43. Even though the award did not include a provision for the consequences of any default by the respondent, I hold the view that it would be iniquitous to allow the respondent to escape scot-free from its default, which in all probability, had a direct nexus with the applicant's inability to meet its own obligations.

44. Justice demands that the respondent should bear the consequences of its own default. It failed to move onto the site of **ELSEK II,** and to complete construction thereon.

45. Because the completion of **ELSEK II** may have enabled the applicant to enroll more students into the university; and that could have resulted in the applicant getting more income, which it could have used towards the payments due to the respondent, I order that the terms of the award be deemed to have been mutually varied. The variation will only be in relation to the dates, so that the gap between one installment and the next would remain constant.

46. The starting point is the move by the respondent to the site of **ELSEK II.** That date will trigger the 3 months, at the end of which the applicant must pay Kshs. 200,000,000/-.

47. The reason why I am talking about 3 months is because the applicant was supposed to pay Kshs. 28,855,200/- by 30th July 2015, and thereafter, the sum of Kshs. 200,000,000/- was payable by 30th October 2015. The period between those 2 payments is 3 months.

48. The applicant has already paid, not only the installment of K shs. 1,500,000/-, but also further sums, adding up to more than Kshs. 30,355,200/-.

49. In other words, the applicant has paid for the construction of **ELSEK II.** The respondent ought to move onto the site and complete the construction, as had been agreed between the parties.

50. Meanwhile, I direct the respondent to release to the applicant, the 3 vehicles which had been attached. The vehicles will enable the applicable to run its affairs more economically, and thus, hopefully, be able to raise money needed to pay off the balance of the decretal amount.

51. Finally, in line with the terms of the consent arbitral award, if the applicant should default from the re-scheduled dates for payment, **AND** provided also that the respondent will not have impeded the applicant, the respondent would then be at liberty to execute the award.

52. Each party will bear his own costs of the application because each of them had defaulted on their obligations under the arbitral award.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **6th day** of **June** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mbuthi Gathenji for the Decree Holder/Respondent

Komaara for Judgement Debtor/Applicant

Collins Odhiambo – Court clerk.